

# **The Constitutional and Counterterrorism Implications of Targeted Killing**

## **Testimony Before the Senate Judiciary Subcommittee on the Constitution, Civil Rights, and Human Rights**

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Statement for the Record Submitted By

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Chairman Durbin, Ranking Member Cruz, members and staff of the subcommittee, thank you for giving me the opportunity to testify today about the constitutional and counterterrorism implications of U.S. drone wars and targeted killing policy. I appreciate your commitment to fostering a rigorous and transparent dialogue on this tough issue.

I am currently a Professor of Law at Georgetown University Law Center, where I teach courses on international law, constitutional law and national security issues. I am also a Bernard L. Schwartz Senior Fellow at the New America Foundation, and I write a weekly column for *Foreign Policy* magazine. From April 2009 to July 2011, during a public service leave of absence from Georgetown, I had the privilege of serving as Counselor to the Undersecretary of Defense for Policy at the Department of Defense. This testimony reflects my personal views only, however.

Mr. Chairman, the mere mention of drones tends to arouse strong emotional reactions on both sides of the political spectrum, and last week's tragic events in Boston have raised the temperature still further. Some demonize drones, denouncing them for causing civilian deaths or enabling long-distance, "video game-like" killing, even as they ignore the fact that the same (or worse) could equally be said of many other weapons delivery systems. Others glorify drones, viewing them as a low- or no-cost way to "take out terrorists" wherever they may be found, with little regard for broader questions of strategy or the rule of law.

I believe it is important to take a closer look both at what is and what *isn't* new and noteworthy about drone technologies and the activities they enable. Ultimately, "drones" *as such* present us with few new issues—but the manner in which the United States has been using drone strikes raises serious questions about their strategic efficacy and unintended consequences. Just as troubling -- particularly with regard to this subcommittee's mandate -- the legal theories used by the Obama Administration to justify many US drone strikes risk undermining the rule of law.

It does not have to be this way, however. I believe that the President and Congress can and should take action to place US targeted killing policy on firmer legal ground, and at the end of this testimony I will offer some suggestions for how this might be accomplished.

In the first part of this testimony, I will first address some of the most common but *unfounded* criticisms of US drone strikes. In the second section, I will discuss some of the perceived *advantages* of drones, focusing on the ways in which drone technologies lower the cost of using lethal force across borders. In the third section, I will highlight some of the strategic costs of current US drone policy. In the fourth section, I will first discuss the concept of the rule of law and the legal framework in which US drone strikes occur, then look specifically at the law of armed conflict and finally at the international law of self-defense, highlighting the ways in which existing legal frameworks offer only ambiguous guidance with regard to the legality of US targeted killings. In the fifth section, I will briefly address the question of what precedent US targeted killing policy is setting for other nations. In the sixth and final section, I will turn to the question of reform. While it is beyond the scope of this testimony to fully examine the many possible routes to improving oversight and accountability, I will briefly highlight a number of possible ways for Congress to ensure that US targeted killing policy does not undermine rule of law norms.

## 1. What's *not* wrong with drones

Many of the most frequently heard criticisms of drones and drone warfare do not hold up well under serious scrutiny – or, at any rate, there's nothing uniquely different or worse about drones, compared to other military technologies. Consider the most common anti-drone arguments.

First, critics often assert that US drone strikes are morally wrong because they kill innocent civilians. This is undoubtedly both true and tragic -- but it is not really an argument against drone strikes as such. *War* kills innocent civilians, period. But the best available evidence suggests that US drone strikes kill civilians at no higher a rate, and almost certainly at a lower rate, than most other common means of warfare.

Much of the time, the use of drones actually permits far greater precision in targeting than most traditional manned aircraft. Today's unmanned aerial vehicles (UAVs) can carry very small bombs that do less widespread damage, and UAVs have no human pilot whose fatigue might limit flight time. Their low profile and relative fuel efficiency combines with this to permit them to spend more time on target than any manned aircraft. Equipped with imaging technologies that enable operators even thousands of miles away to see details as fine as individual faces, modern drone technologies allow their operators to distinguish between civilians and combatants far *more* effectively than most other weapons systems.

That does not mean civilians never get killed in drone strikes. Inevitably, they do, although the covert nature of most US strikes and the contested environment in which they occur

makes it impossible to get precise data on civilian deaths. This lack of transparency inevitably fuels rumors and misinformation. However, several credible organizations have sought to track and analyze deaths due to US drone strikes. The British Bureau of Investigative Journalism analyzed reports by "government, military and intelligence officials, and by credible media, academic and other sources," for instance, and came up with a range, suggesting that the 344 known drone strikes in Pakistan between 2004 and 2012 killed between 2,562 and 3,325 people, of whom between 474 and 881 were likely civilians.<sup>1</sup> (The numbers for Yemen and Somalia are more difficult to obtain.) The New America Foundation, with which I am affiliated, came up with slightly lower numbers, estimating that US drone strikes killed somewhere between 1,873 and 3,171 people overall in Pakistan, of whom between 282 and 459 were civilians.<sup>2</sup>

Whether drones strikes cause "a lot" or "relatively few" civilian casualties depends what we regard as the right point of comparison. Should we compare the civilian deaths caused by drone strikes to the civilian deaths caused by large-scale armed conflicts? One study by the International Committee for the Red Cross found that on average, 10 civilians died for every combatant killed during the armed conflicts of the 20<sup>th</sup> century.<sup>3</sup> For the Iraq War, estimates vary widely; different studies place the ratio of civilian deaths to combatant deaths anywhere between 10 to 1 and 2 to 1.<sup>4</sup>

The most meaningful point of comparison for drones is probably manned aircraft. It's extraordinarily difficult to get solid numbers here, but one analysis published in the *Small Wars Journal* suggested that in 2007 the ratio of civilian to combatant deaths due to coalition air attacks in Afghanistan may have been as high as 15 to 1.<sup>5</sup> More recent UN figures suggest a far lower rate, with as few as one civilian killed for every ten airstrikes in Afghanistan.<sup>6</sup> But drone strikes have also gotten far less lethal for civilians in the last few years: the New America Foundation concludes that only three to nine civilians were killed during 72 U.S. drone strikes in Pakistan in 2011, and the 2012 numbers were also low.<sup>7</sup> In part, this is due to technological advances over the last decade, but it's also due to far more stringent rules for when drones can release weapons.

Few details are known about the precise targeting procedures followed by either US armed forces or the Central Intelligence Agency with regard to drone strikes. The Obama Administration is reportedly finalizing a targeted killing "playbook,"<sup>8</sup> outlining in great detail the procedures and substantive criteria to be applied. I believe an unclassified version of this should be made public, as it may help to diminish concerns reckless or negligent targeting

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<sup>1</sup> See <http://www.thebureauinvestigates.com/category/projects/drones/>

<sup>2</sup> <http://counterterrorism.newamerica.net/drones>

<sup>3</sup> See [http://www.nytimes.com/2010/10/23/world/middleeast/23casualties.html?\\_r=3](http://www.nytimes.com/2010/10/23/world/middleeast/23casualties.html?_r=3) ; [www.icrc.org/eng/assets/files/other/irrc-872-wenger-mason.pdf](http://www.icrc.org/eng/assets/files/other/irrc-872-wenger-mason.pdf)

<sup>4</sup> See [http://en.wikipedia.org/wiki/Casualties\\_of\\_the\\_Iraq\\_War](http://en.wikipedia.org/wiki/Casualties_of_the_Iraq_War)

<sup>5</sup> See <http://smallwarsjournal.com/jrnl/art/close-air-support-and-civilian-casualties-in-afghanistan>

<sup>6</sup> See <http://www.navytimes.com/article/20130219/NEWS/302190304/U-N-Afghan-civilian-deaths-in-airstrikes-down>;  
<http://unama.unmissions.org/Default.aspx?tabid=12254&ctl=Details&mid=15756&ItemID=36445&language=en-US>

<sup>7</sup> See <http://counterterrorism.newamerica.net/drones>

<sup>8</sup> See [http://articles.washingtonpost.com/2012-10-24/world/35499428\\_1\\_drone-strikes-brennan-obama-administration](http://articles.washingtonpost.com/2012-10-24/world/35499428_1_drone-strikes-brennan-obama-administration);  
<http://www.usnews.com/debate-club/has-obama-gone-too-far-with-his-drone-policies/brennan-and-obamas-drone-playbook-must-be-debated-publicly>

decisions. Even in the absence of specific details, however, I believe we can have confidence in the commitment of both military and intelligence personnel to avoiding civilian casualties to the greatest extent possible. The Obama Administration has stated that it regards both the military and the CIA as bound by the law of war when force is used for the purpose of targeted killing.<sup>9</sup> (I will discuss the applicable law of war principles in section IV of this statement). What is more, the military is bound by the Uniform Code of Military Justice.

Concern about civilian casualties is appropriate, and our targeting decisions, however thoughtfully made, are only as good as our intelligence—and only as wise as our overall strategy. Nevertheless, there is no evidence supporting the view that drone strikes cause disproportionate civilian casualties relative to other commonly used means or methods of warfare. On the contrary, the evidence suggests that if the number of civilian casualties is our metric, drone strikes do a better job of discriminating between civilians and combatants than close air support or other tactics that receive less attention.

Critics of US drone policy also decry the fact that drones enable US personnel to kill from a safe distance, which seems to be viewed as somehow “unsavory.” But long-distance killing” is neither something to automatically condemn nor something unique to drone technologies. Military commanders naturally seek ways to kill enemies without risking the lives of our own troops – and if drone technologies enable us to reduce the danger to our own personnel, all things being equal this is surely a good thing, not a bad thing. No one would argue that we should strip troops of body armor just to level the playing field.

It is also important to consider drone strikes in the context of the evolution of warfare. After all, drones are hardly the only technology that has facilitated killing from a distance. In this sense, drones don't present any "new" issues not already presented by aerial bombing -- or by guns or bows and arrows, for that matter. The crossbow and later the long bow were considered immoral in their day. In 1139, the Second Lateran Council of Pope Innocent II is said to have "prohibit[ed] under anathema that murderous art of crossbowmen and archers, which is hateful to God."<sup>10</sup> In the early 1600s, Cervantes took a similar view of artillery, which he called a "devilish invention" allowing "a base cowardly hand to take the life of the bravest gentleman," with bullets coming –like drones-- “nobody knows how or from whence.”<sup>11</sup>

Other critics have decried what they called "the PlayStation mentality" created by drone technologies. I cannot see, however, that drones any more "video game-like" than, say, having cameras in the noses of cruise missiles. Regardless, there's little evidence that drone technologies "reduce" their operators' awareness of human suffering. If anything, drone operators may be far more keenly aware of the suffering they help inflict than any sniper or bomber pilot could be, precisely because the technology enables such clear visual monitoring. Increasingly, there is evidence that drone pilots, just like combat troops, can suffer from post-traumatic stress disorder.

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<sup>9</sup> See [http://msnbcmedia.msn.com/i/msnbc/sections/news/020413\\_DOJ\\_White\\_Paper.pdf](http://msnbcmedia.msn.com/i/msnbc/sections/news/020413_DOJ_White_Paper.pdf)

<sup>10</sup> See <http://www.ewtn.com/library/COUNCILS/LATERAN2.HTM>

<sup>11</sup> See JFC Fuller, *Armament and History: The Influence of Armament on History from the Dawn of Classical Warfare to the End of the Second World War*, 1998, at [\l "v=onepage&q=cervantes%20artillery%20base%20devilish&f=false">http://books.google.com/books?id=hECRavhisUIC&pg=PA91&lpg=PA91&dq=cervantes+artillery+base+devilish&source=bl&ots=ZIFDFmgJuh&sig=2E4IVzuBqOREKoVokbnfUpRG3fs&hl=en" \l "v=onepage&q=cervantes%20artillery%20base%20devilish&f=false](http://books.google.com/books?id=hECRavhisUIC&pg=PA91&lpg=PA91&dq=cervantes+artillery+base+devilish&source=bl&ots=ZIFDFmgJuh&sig=2E4IVzuBqOREKoVokbnfUpRG3fs&hl=en)

A recent Air Force study found that 29 percent of drone pilots suffered from "burnout," with 17 percent "clinically distressed."<sup>12</sup>

## 2. The perceived advantages of drone strikes

For every critic who demonizes drones while ignoring their similarities to other less-demonized technologies, there are as many others who seem to regard drones as a near-panacea – an almost magical new technology that will allow us to economically stave off foreign threats from the comfort and safety of home – or even, perhaps, find some new “fix” to the thorny problems posed by “homegrown” attacks such as those on the Boston Marathon.

But the advantages of drones are as overstated and misunderstood as the problems they pose—and in some ways, their very perceived advantages cause new problems. Drone technologies temptingly lower or disguise the costs of lethal force, but their availability can blind us to the potentially dangerous longer-term costs and consequences of our strategic choices.

Armed drones lower the perceived costs of using lethal force in at least three ways. First, drones reduce the dollar cost of using lethal force inside foreign countries.<sup>13</sup> Most drones are economical compared with the available alternatives.<sup>14</sup> Manned aircraft, for instance, are quite expensive:<sup>15</sup> Lockheed Martin's F-22 fighter jets cost about \$150 million each; F-35s are \$90 million; and F-16s are \$55 million. But the 2011 price of a Reaper drone was approximately \$28.4 million, while Predator drones cost only about \$5 million to make.<sup>16</sup> As with so many things, putting a dollar figure on drones is difficult; it depends what costs are counted, and what time frame is used. Nevertheless, drones continue to be *perceived* as cheaper by government decision-makers.

Second, relying on drone strikes rather than alternative means reduces the domestic political costs of using lethal force. Sending manned aircraft or special operations forces after a suspected terrorist places the lives of U.S. personnel at risk, and full-scale invasions and occupations endanger even more American lives. In contrast, using armed drones eliminates all short-term risks to the lives of U.S. personnel involved in the operations.

Third, by reducing accidental civilian casualties,<sup>17</sup> precision drone technologies reduce the perceived moral and reputational costs of using lethal force. The US government is extraordinarily concerned about avoiding unnecessary civilian casualties, and rightly so. There are moral and legal reasons for this concern, and there are also pragmatic reasons: civilian

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<sup>12</sup> See <http://www.npr.org/2011/12/19/143926857/report-high-levels-of-burnout-in-u-s-drone-pilots>

<sup>13</sup> See [https://www.deloitte.com/assets/Dcom-](https://www.deloitte.com/assets/Dcom-Australia/Local%20Assets/Documents/Industries/Government%20Services/Public%20Sector/Deloitte_DefenseUAV_DI_CaseStudy_2Apr2012.pdf)

[Australia/Local%20Assets/Documents/Industries/Government%20Services/Public%20Sector/Deloitte\\_DefenseUAV\\_DI\\_CaseStudy\\_2Apr2012.pdf](https://www.deloitte.com/assets/Dcom-Australia/Local%20Assets/Documents/Industries/Government%20Services/Public%20Sector/Deloitte_DefenseUAV_DI_CaseStudy_2Apr2012.pdf)

<sup>14</sup> See <http://www.economist.com/node/14299496>

<sup>15</sup> See <http://fpc.state.gov/documents/organization/180677.pdf>

<sup>16</sup> See <http://www.nationaldefensemagazine.org/archive/2012/February/Pages/AirForceF-35s,DronesMaySquareOffinBudgetBattle.aspx>

<sup>17</sup> See <http://www.nytimes.com/2012/07/15/sunday-review/the-moral-case-for-drones.html>

casualties cause pain and resentment within local populations and host-country governments and alienate the international community.

It is of course not a bad thing to possess military technologies that are cost little, protect American lives and enable us to minimize civilian casualties. When new technologies appear to reduce the costs of using lethal force, however, the threshold for deciding to use lethal force correspondingly drops, and officials will be tempted to use lethal force with greater frequency and less wisdom.

Over the last decade, we have seen US drone strikes evolve from a tool used in extremely limited circumstances to go after specifically identified high-ranking al Qaeda officials to a tool relied on in an increasing number of countries to go after an eternally lengthening list of putative bad actors, with increasingly tenuous links to grave or imminent threats to the United States. Some of these suspected terrorists have been identified by name and specifically targeted, while others are increasingly targeted on the basis of suspicious behavior patterns.

Increasingly, drones strikes have targeted militants who are lower and lower down the terrorist food chain,<sup>18</sup> rather than terrorist masterminds.<sup>19</sup> Although drone strikes are believed to have killed more than 3,000 people since 2004,<sup>20</sup> analysis by the New America Foundation and more recently by a the McClatchy newspapers suggests that only a small fraction of the dead appear to have been so-called "high-value targets."<sup>21</sup> What's more, drone strikes have spread ever further from "hot" battlefields, migrating from Pakistan to Yemen to Somalia (and perhaps to Mali<sup>22</sup> and the Philippines as well).<sup>23</sup>

This increasing use of drone strikes to go after individuals with more and more tenuous links to Al Qaeda and the 9/11 attacks pushes the furthest boundaries of Congress' 2011 Authorization for use of Military Force. The AUMF authorized the President to "[U]se all necessary and appropriate force against those nations, organizations, or persons he determines planned, authorized, committed, or aided the attacks that occurred on September 11, 2001, or harbored such organizations or persons, in order to prevent any future acts of international terrorism against the United States by such nations, organizations, or persons."

The AUMF's language appears to restrict the use of force both with regard to who can be targeted (those with some culpability for the 9/11 attacks) and with regard to the purpose for which force is used (to prevent future attacks against the U.S.). As drone strikes expand beyond Al Qaeda targets (to go after, for instance, suspected members of Somalia's al Shabaab), it grows increasingly difficult to justify such strikes under the AUMF. Do we believe al Shabaab was in any way culpable for the 9/11 attacks? Do we believe al Shabaab, an organization with primarily local and regional ambitions, has the desire or capability to engage in acts of international terrorism against the United States?

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<sup>18</sup> See [http://articles.cnn.com/2012-09-05/opinion/opinion\\_bergen-obama-drone\\_1\\_drone-strikes-drone-attacks-drone-program](http://articles.cnn.com/2012-09-05/opinion/opinion_bergen-obama-drone_1_drone-strikes-drone-attacks-drone-program)

<sup>19</sup> See <http://www.washingtonpost.com/wp-dyn/content/article/2011/02/20/AR2011022002975.html>

<sup>20</sup> See <http://counterterrorism.newamerica.net/drones>

<sup>21</sup> See <http://www.washingtonpost.com/wp-dyn/content/article/2011/02/20/AR2011022002975.html>

<sup>22</sup> See [http://www.longwarjournal.org/threat-matrix/archives/2012/06/did\\_the\\_us\\_launch\\_a\\_drone\\_stri.php](http://www.longwarjournal.org/threat-matrix/archives/2012/06/did_the_us_launch_a_drone_stri.php)

<sup>23</sup> See <http://www.brookings.edu/research/opinions/2012/03/05-drones-philippines-ahmed>

### 3. The true costs of current US drone policy

When we come to rely excessively on drone strikes as a counterterrorism tool, this has potential costs of its own. Drones strikes enable a "short-term fix" approach to counterterrorism, one that relies excessively on eliminating specific individuals deemed to be a threat, without much discussion of whether this strategy is likely to produce long-term security gains.

Most counter-terrorism experts agree that in the long-term, terrorist organizations are rarely defeated militarily. Instead, terrorist groups fade away when they lose the support of the populations within which they work. They die out when their ideological underpinnings come undone – when new recruits stop appearing—when the communities in which they work stop providing active or passive forms of assistance—when local leaders speak out against them and residents report their activities and identities to the authorities.

A comprehensive counterterrorist strategy recognizes this, and therefore relies heavily on activities intended to undermine terrorist credibility within populations, as well as on activities designed to disrupt terrorist communications and financing. Much of the time, these are the traditional tools of intelligence and law enforcement. Kinetic force undeniably has a role to play in counterterrorism in certain circumstances, but it is rarely a magic bullet.

In addition, overreliance on kinetic tools at the expense of other approaches can be dangerous. Drone strikes -- lawful or not, justifiable or not – can have the unintended consequence of increasing both regional instability and anti-American sentiment. Drone strikes sow fear among the "guilty" and the innocent alike,<sup>24</sup> and the use of drones in Pakistan and Yemen has increasingly been met with both popular and diplomatic protests. Indeed, drone strikes are increasingly causing dismay and concern within the US population.

As the Obama administration increases its reliance on drone strikes as the counterterrorism tool of choice, it is hard not to wonder whether we have begun to trade tactical gains for strategic losses. What impact will US drone strikes ultimately have on the stability of Pakistan, Yemen, or Somalia?<sup>25</sup> To what degree -- especially as we reach further and further down the terrorist food chain, killing small fish who may be motivated less by ideology than economic desperation -- are we actually creating new grievances within the local population – or even within diaspora populations here in the United States?<sup>26</sup> As Defense Secretary Donald Rumsfeld asked during the Iraq war, are we creating terrorists faster than we kill them?<sup>27</sup>

At the moment, there is little evidence that US drone policy – or individual drone strikes—result from a comprehensive assessment of strategic costs and benefits, as opposed to a shortsighted determination to strike targets of opportunity, regardless of long-term impact. As a

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<sup>24</sup> See <http://www.economist.com/node/21561927>

<sup>25</sup> See <http://www.guardian.co.uk/world/2012/jun/05/al-qaida-drone-attacks-too-broad>

<sup>26</sup> See [http://www.washingtonpost.com/world/middle\\_east/in-yemen-us-airstrikes-breed-anger-and-sympathy-for-al-qaeda/2012/05/29/gJQAUmKI0U\\_story.html](http://www.washingtonpost.com/world/middle_east/in-yemen-us-airstrikes-breed-anger-and-sympathy-for-al-qaeda/2012/05/29/gJQAUmKI0U_story.html)

<sup>27</sup> See <http://www.usatoday.com/news/washington/executive/rumsfeld-memo.htm>

military acquaintance of mine memorably put it, drone strikes remain “a tactic in search of a strategy.”

#### 4. Drones and the rule of law

Mr. Chairman, I would like to turn now to the legal framework applicable to US drone strikes. Both the United States and the international community have long had rules governing armed conflicts and the use of force in national self-defense. These rules apply whether the lethal force at issue involves knives, handguns, grenades or weaponized drones. When drone technologies are used in traditional armed conflicts—on “hot battlefields” such as those in Afghanistan, Iraq or Libya, for instance – they pose no new legal issues. As Administration officials have stated, their use is subject to the same requirements as the use of other lawful means and methods of warfare.<sup>28</sup>

But if drones used in traditional armed conflicts or traditional self-defense situations present no “new” legal issues, some of the activities and policies *enabled and facilitated* by drone technologies pose significant challenges to existing legal frameworks.

As I have discussed above, the availability of perceived low cost of drone technologies makes it far easier for the US to “expand the battlefield,” striking targets in places where it would be too dangerous or too politically controversial to send troops. Specifically, drone technologies enable the United States to strike targets deep inside foreign states, and do so quickly, efficiently and deniably. As a result, drones have become the tool of choice for so-called “targeted killing” – the deliberate targeting of an individual or group of individuals, whether known by name or targeted based on patterns of activity, inside the borders of a foreign country. It is when drones are used in targeted killings outside of traditional or “hot” battlefields that their use challenges existing legal frameworks.

Law is almost always out of date: we make legal rules based on existing conditions and technologies, perhaps with a small nod in the direction of predicted future changes. As societies and technologies change, law increasingly becomes an exercise in jamming square pegs into round holes. Eventually, that process begins to do damage to existing law: it gets stretched out of shape, or broken. Right now, I would argue, US drone policy is on the verge of doing significant damage to the rule of law.

##### A. The Rule of Law

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<sup>28</sup> See [http://msnbcmedia.msn.com/i/msnbc/sections/news/020413\\_DOJ\\_White\\_Paper.pdf](http://msnbcmedia.msn.com/i/msnbc/sections/news/020413_DOJ_White_Paper.pdf); Harold H. Koh, Keynote Address at the Annual Meeting of the American Society of International Law, Washington, DC (Mar. 25, 2010), Eric Holder, Address at Northwestern University School of Law, Chicago, IL (Mar. 5, 2011), <http://www.justice.gov/iso/opa/ag/speeches/2012/ag-speech-1203051.html>.<http://www.state.gov/s/l/releases/remarks/139119.htm>.; John O. Brennan, Address at Program on Law and Security, Harvard Law School, Cambridge, MA: Strengthening our Security by Adhering to our Values and Laws (Sep. 16, 2011), <http://www.whitehouse.gov/the-press-office/2011/09/16/remarks-john-o-brennan-strengthening-our-security-adhering-our-values-an>; John O. Brennan, Address at Woodrow Wilson International Center for Scholars, Washington, DC: The Ethics and Efficacy of the President’s Counterterrorism Strategy (Apr. 30, 2012), <http://www.wilsoncenter.org/event/the-ethics-and-ethics-us-counterterrorism-strategy>.

At root, the idea of “rule of law” is fairly simple, and well understood by Americans familiar with the foundational documents that established our nation, such as the Declaration of Independence, the Constitution and the Bill of Rights. The rule of law requires that governments follow transparent, clearly defined and universally applicable laws and procedures. The goal of the rule of law is to ensure predictability and stability, and to prevent the arbitrary exercise of power. In a society committed to the rule of law, the government cannot fine you, lock you up, or kill you on a whim -- it can restrict your liberty or take your property or life only in accordance with pre-established processes and rules that reflect basic notions of justice, humanity and fairness.

Precisely what constitutes a fair process is debatable, but most would agree that at a minimum, fairness requires that individuals have reasonable notice of what constitutes the applicable law, reasonable notice that they are suspected of violating the law, a reasonable opportunity to rebut any allegations against them, and a reasonable opportunity to have the outcome of any procedures or actions against them reviewed by some objective person or body. These core values are enshrined both in the US Constitution and in international human rights law instruments such as the International Covenant on Civil and Political Rights, to which the United States is a party.

In ordinary circumstances, this bundle of universally acknowledged rights (together with international law principles of sovereignty) means it is clearly unlawful for one state to target and kill an individual inside the borders of another state. Recall, for instance, the 1976 killing of Chilean dissident Orlando Letelier in Washington DC. When Chilean government intelligence operatives planted a car bomb in the car used by Letelier, killing him and a US citizen accompanying him, the United States government called this an act of murder—an unlawful political assassination.

## B. Targeted Killing and the Law of Armed Conflict

Of course, sometimes the “ordinary” legal rules do not apply. In war, the willful killing of human beings is permitted, whether the means of killing is a gun, a bomb, or a long-distance drone strike. The law of armed conflict permits a wide range of behaviors that would be unlawful in the absence of an armed conflict. Generally speaking, the intentional destruction of private property and severe restrictions on individual liberties are impermissible in peacetime, but acceptable in wartime, for instance. Even actions that a combatant knows will cause civilian deaths are lawful when consistent with the principles of necessity, humanity, proportionality,<sup>29</sup> and distinction.<sup>30</sup>

It is worth briefly explaining these principles. The principle of necessity requires parties to a conflict to limit their actions to those that are indispensable for securing the complete submission of the enemy as soon as possible (and that are otherwise permitted by international law). The principle of humanity forbids parties to a conflict to inflict gratuitous violence or

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<sup>29</sup> See generally the US Army’s Operational Law Handbook, 2012, at [http://www.loc.gov/rr/frd/Military\\_Law/pdf/operational-law-handbook\\_2012.pdf](http://www.loc.gov/rr/frd/Military_Law/pdf/operational-law-handbook_2012.pdf) ; [http://www.icrc.org/customary-ihl/eng/docs/v1\\_cha\\_chapter4\\_rule14](http://www.icrc.org/customary-ihl/eng/docs/v1_cha_chapter4_rule14)

<sup>30</sup> See generally the US Army’s Operational Law Handbook, 2012, at [http://www.loc.gov/rr/frd/Military\\_Law/pdf/operational-law-handbook\\_2012.pdf](http://www.loc.gov/rr/frd/Military_Law/pdf/operational-law-handbook_2012.pdf) ; [http://www.icrc.org/customary-ihl/eng/docs/v2\\_rul\\_rule1](http://www.icrc.org/customary-ihl/eng/docs/v2_rul_rule1)

employ methods calculated to cause unnecessary suffering. The principle of proportionality requires parties to ensure that the anticipated loss of life or property incidental to an attack is not excessive in relation to the concrete and direct military advantage expected to be gained. Finally, the principle of discrimination or distinction requires that parties to a conflict direct their actions only against combatants and military objectives, and take appropriate steps to distinguish between combatants and non-combatants.<sup>31</sup>

This is a radical oversimplification of a very complex body of law.<sup>32</sup> But as with the rule of law, the basic idea is pretty simple. When there is no war -- when ordinary, peacetime law applies -- agents of the state aren't supposed to lock people up, take their property or kill them, unless they have jumped through a whole lot of legal hoops first. When there is an armed conflict, however, everything changes. War is not a legal free-for-all<sup>33</sup> -- torture, rape are always crimes under the law of war, as is killing that is willful, wanton and not justified by military necessity<sup>34</sup> -- but there are far fewer constraints on state behavior.

Technically, the law of war is referred to using the Latin term "*lex specialis*" -- special law. It is applicable in—and *only* in -- special circumstances (in this case, armed conflict), and in those special circumstances, it supersedes "ordinary law," or "*lex generalis*," the "general law" that prevails in peacetime. We have one set of laws for "normal" situations, and another, more flexible set of laws for "extraordinary" situations, such as armed conflicts.

None of this poses any inherent problem for the rule of law. Having one body of rules that tightly restricts the use of force and another body of rules that is far more permissive does not fundamentally undermine the rule of law, as long as we have a reasonable degree of consensus on what circumstances trigger the "special" law, and as long as the "special law" doesn't end up undermining the general law.

To put it a little differently, war, with its very different rules, does not challenge ordinary law as long as war is the exception, not the norm -- as long as we can all agree on what constitutes a war -- as long as we can tell when the war begins and ends -- and as long as we all know how to tell the difference between a combatant and a civilian, and between places where there's war and places where there's no war.

Let me return now to the question of drones and targeted killings. When all these distinctions I just mentioned are clear, the use of drones in targeted killings does not necessarily present any great or novel problem. In Libya, for instance, a state of armed conflict clearly existed inside the borders of Libya between Libyan government forces and NATO states. In that context, the use of drones to strike Libyan military targets is no more controversial than the use of manned aircraft.

That is because our core rule of law concerns have mostly been satisfied: we know there

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<sup>31</sup> See generally the US Army's Operational Law Handbook, 2012, at [http://www.loc.gov/rr/frd/Military\\_Law/pdf/operational-law-handbook\\_2012.pdf](http://www.loc.gov/rr/frd/Military_Law/pdf/operational-law-handbook_2012.pdf)

<sup>32</sup> See <http://ihl.ihlresearch.org/index.cfm?fuseaction=page.viewpage&pageid=2083>

<sup>33</sup> See <http://www.law.cornell.edu/uscode/text/18/2441>

<sup>34</sup> See <http://www1.umn.edu/humanrts/instree/iccelementsofcrimes.html>

is an armed conflict, in part because all parties to it agree that there is an armed conflict, in part because observers (such as international journalists) can easily verify the presence of uniformed military personnel engaged in using force, and in part because the violence is, from an objective perspective, widespread and sustained: it is not a mere skirmish or riot or criminal law enforcement situation that got out of control. We know *who* the “enemy” is: Libyan government forces. We know *where* the conflict is and is not: the conflict was in Libya, but not in neighboring Algeria or Egypt. We know *when* the conflict began, we know who authorized the use of force (the UN Security Council) and, just as crucially, we know whom to hold *accountable* in the event of error or abuse (the various governments involved).<sup>35</sup>

Once you take targeted killings outside hot battlefields, it’s a different story. The Obama Administration is currently using drones to strike terror suspects in Pakistan, Somalia, Yemen, and –perhaps–Mali and the Philippines as well. Defenders of the administration’s increasing reliance on drone strikes in such places assert that the US is in an armed conflict with “al Qaeda and its associates,” and on that basis, they assert that the law of war is applicable -- in any place and at any time -- with regard to any person the administration deems a combatant.

The trouble is, no one outside a very small group within the US executive branch has any ability to evaluate who is and who isn’t a combatant. The war against al Qaeda and its associates is not like World War II, or Libya, or even Afghanistan: it is an open-ended conflict with an inchoate, undefined adversary (who exactly are al Qaeda’s “associates”?). What is more, targeting decisions in this nebulous “war” are based largely on classified intelligence reporting. As a result, Administration assertions about who is a combatant and what constitutes a threat are entirely non-falsifiable, because they’re based wholly on undisclosed evidence. Add to this still another problem: most of these strikes are considered covert action, so although the US sometimes takes public credit for the deaths of alleged terrorist leaders, most of the time, the US will not even officially acknowledge targeted killings.

This leaves all the key rule-of-law questions related to the ongoing war against al Qaeda and its “associates” unanswered.<sup>36</sup> Based on what criteria might someone be considered a combatant or directly participating in hostilities? What constitutes “hostilities” in the context of an armed conflict against a non-state actor, and what does it mean to participate in them? And just where is the war? Does the war (and thus the law of war) somehow “travel” with combatants? Does the US have a “right” to target enemy combatants anywhere on earth, or does it depend on the consent of the state at issue? Who in the United States government is authorized to make such determinations, and what is the precise chain of command for such decisions?

I think the rule of law problem here is obvious: when “armed conflict” becomes a term flexible enough to be applied both to World War II and to the relations between the United States and “associates” of al Qaeda such as Somalia’s al Shabaab, the concept of armed conflict is not very useful anymore. And when we lack clarity and consensus on how to recognize “armed conflict,” we no longer have a clear or principled basis for deciding how to categorize US

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<sup>35</sup> In my previous scholarly work, I have written extensively about the challenges posed by geographically dispersed terrorist organizations to traditional legal categories. See, e.g., Rosa Brooks, *War Everywhere: Rights, National Security Law, And The Law Of Armed Conflict In The Age Of Terror*, 153 U. Pa. L. Rev. 675 (2004).

<sup>36</sup> See <http://www.hrw.org/news/2011/12/19/q-us-targeted-killings-and-international-law>

targeted killings. Are they, as the US government argues, legal under the laws of war? Or are they, as some human rights groups have argued, unlawful murder?

### C. Targeted Killing and the International Law of Self-Defense

When faced with criticisms of the law of war framework as a justification for targeted killing, Obama Administration representatives often shift tack, arguing that international law rules on national self-defense provide an alternative or additional legal justification for US targeted killings. Here, the argument is that if a person located in a foreign state poses an "imminent threat of violent attack" against the United States, the US can lawfully use force in self-defense, provided that the defensive force used is otherwise consistent with law of war principles.

Like law of war-based arguments, this general principle is superficially uncontroversial: if someone overseas is about to launch a nuclear weapon at New York City, no one can doubt that the United States has a perfect right (and the president has a constitutional duty) to use force if needed to prevent that attack, regardless of the attacker's nationality.

But once again, the devil is in the details. To start with, what constitutes an "imminent" threat? Traditionally, both international law and domestic criminal law understand that term narrowly:<sup>37</sup> to be "imminent," a threat cannot be distant or speculative.<sup>38</sup> But much like the Bush Administration before it, the Obama Administration has put forward an interpretation of the word "imminent" that bears little relation to traditional legal concepts.

According to a leaked 2011 Justice Department white paper<sup>39</sup>—the most detailed legal justification that has yet become public-- the requirement of imminence "does not require the United States to have clear evidence that a specific attack on U.S. persons and interests will take place in the immediate future." This seems, in itself, like a substantial departure from accepted international law definitions of imminence.

But the White Paper goes even further, stating that "certain members of al Qaeda are continually plotting attacks...and would engage in such attacks regularly [if] they were able to do so, [and] the US government may not be aware of all... plots as they are developing and thus cannot be confident that none is about to occur." For this reason, it concludes, anyone deemed to be an operational leader of al Qaeda or its "associated forces" presents, by definition, an imminent threat even in the *absence* of any evidence whatsoever relating to immediate or future attack plans. In effect, the concept of "imminent threat" (part of the international law relating to self-defense) becomes conflated with identity or status (a familiar part of the law of armed

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<sup>37</sup> The most restrictive traditional formulation of the term imminent in international law can be seen in the famous 1837 Exchange of letters between US Secretary of State Daniel Webster and Lord Ashburton, Foreign Secretary of Great Britain, relating to the case of the SS *Caroline*, explaining "imminent attack" as one that is "instant, overwhelming, leaving no choice of means, and no moment for deliberation." More recent approaches have been somewhat more flexible. See, e.g., United Nations Secretary-General's High-level Panel on Threats, Challenges and Change: "A More Secure World: Our Shared Responsibility," at <http://www.un.org/secureworld/>

<sup>38</sup> See <http://opiniojuris.org/2012/03/07/why-preventive-self-defense-violates-the-un-charter/>

<sup>39</sup> See [http://msnbcmedia.msn.com/i/msnbc/sections/news/020413\\_DOJ\\_White\\_Paper.pdf](http://msnbcmedia.msn.com/i/msnbc/sections/news/020413_DOJ_White_Paper.pdf)

conflict).

That concept of imminence has been called Orwellian, and although that is an overused epithet, in this context it seems fairly appropriate. According to the Obama Administration, “imminent” no longer means “immediate,” and in fact the very *absence* of clear evidence indicating specific present or future attack plans becomes, paradoxically, the basis for assuming that attack may *perpetually* be “imminent.”

The 2011 Justice Department White Paper notes that the use of force in self-defense must comply with general law of war principles of necessity, proportionality, humanity, and distinction. The White Paper offers no guidance on the specific criteria for determining when an individual is a combatant (or a civilian participating directly in hostilities), however. It also offers no guidance on how to determine if a use of force is necessary or proportionate.

From a traditional international law perspective, this necessity and proportionality inquiry relates both to imminence and to the gravity of the threat itself, but so far there has been no public Administration statement as to how the administration interprets these requirements. Is *any* threat of "violent attack" sufficient to justify killing someone in a foreign country, including a U.S. citizen? Is *every* potential suicide bomber targetable, or does it depend on the gravity of the threat? Are we justified in drone strikes against targets who might, if they get a chance at some unspecified future point, place an IED that might, if successful, kill one person? Ten people? Twenty? 2,000? How grave a threat must there be to justify the use of lethal force against an American citizen abroad -- or against non-citizens, for that matter?

As I have noted, it is impossible for outsiders to fully evaluate US drone strikes, since so much vital information remains classified. In most cases, we know little about the identities; activities or future plans of those targeted. Nevertheless, given the increased frequency of US targeted killings in recent years, it seems reasonable to wonder whether the Administration conducts a rigorous necessity or proportionality analysis in all cases.

So far, the leaked 2011 Justice Department White Paper represents the most detailed legal analysis of targeted killings available to the public. It is worth noting, incidentally, that this White Paper addresses only the question of whether and when it is lawful for the US government to target US citizens abroad. We do not know what legal standards the Administration believes apply to the targeting of non-citizens. It seems reasonable to assume, however, that the standards applicable to non-citizens are less exacting than those the Administration views as applicable to citizens.

Defenders of administration targeted killing policy acknowledge that the criteria for determining how to answer these many questions have not been made public, but insist that this should not be cause for concern. The Administration has reportedly developed a detailed “playbook” outlining the targeting criteria and procedures,<sup>40</sup> and insiders insist that executive branch officials go through an elaborate process in which they carefully consider every possible

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<sup>40</sup> See <http://www.uta.edu/faculty/story/2311/Misc/2013,4,1,DronesTargetedKillingWhoCanWeKill.pdf>;

issue before determining that a drone strike is lawful.<sup>41</sup>

No doubt they do, but this is somewhat cold comfort. Formal processes tend to further normalize once-exceptional activities -- and "trust us" is a rather shaky foundation for the rule of law. Indeed, the whole point of the rule of law is that individual lives and freedom should *not* depend solely on the good faith and benevolence of government officials.

As with law of war arguments, stating that US targeted killings are clearly legal under traditional self-defense principles requires some significant cognitive dissonance. Law exists to restrain untrammelled power. It is no doubt possible to make a plausible legal argument justifying each and every U.S. drone strike -- but this merely suggests that we are working with a legal framework that has begun to outlive its usefulness.

The real question isn't whether U.S. drone strikes are "legal." The real question is this: Do we really want to live in a world in which the U.S. government's justification for killing is so malleable?

## 5. Setting Troubling International Precedents

Here is an additional reason to worry about the U.S. overreliance on drone strikes: Other states will follow America's example, and the results are not likely to be pretty. Consider once again the Letelier murder, which was an international scandal in 1976: If the Letelier assassination took place today, the Chilean authorities would presumably insist on their national right to engage in "targeted killings" of individuals deemed to pose imminent threats to Chilean national security -- and they would justify such killings using precisely the same legal theories the US currently uses to justify targeted killings in Yemen or Somalia. We should assume that governments around the world—including those with less than stellar human rights records, such as Russia and China—are taking notice.

Right now, the United States has a decided technological advantage when it comes to armed drones, but that will not last long. We should use this window to advance a robust legal and normative framework that will help protect against abuses by those states whose leaders can rarely be trusted. Unfortunately, we are doing the exact opposite: Instead of articulating norms about transparency and accountability, the United States is effectively handing China, Russia, and every other repressive state a playbook for how to foment instability and --literally-- get away with murder.

Take the issue of sovereignty. Sovereignty has long been a core concept of the Westphalian international legal order.<sup>42</sup> In the international arena, all sovereign states are formally considered equal and possessed of the right to control their own internal affairs free of

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<sup>41</sup> See <http://www.state.gov/s/l/releases/remarks/139119.htm>, <http://www.justice.gov/iso/opa/ag/speeches/2012/ag-speech-1203051.html>, <http://www.nytimes.com/2012/05/29/world/obamas-leadership-in-war-on-al-qaeda.html?pagewanted=all>

<sup>42</sup> See <http://www.towson.edu/polsci/irencyc/sovrein.htm>

interference from other states. That's what we call the principle of non-intervention -- and it means, among other things, that it is generally prohibited for one state to use force inside the borders of another sovereign state. There are some well-established exceptions, but they are few in number. A state can lawfully use force inside another sovereign state with that state's invitation or consent, or when force is authorized by the U.N. Security Council, pursuant to the U.N. Charter,<sup>43</sup> or in self-defense "in the event of an armed attack."

The 2011 Justice Department White Paper asserts that targeted killings carried out by the United States don't violate another state's sovereignty as long as that state either consents or is "unwilling or unable to suppress the threat posed by the individual being targeted." That sounds superficially plausible, but since the United States views itself as the sole arbiter of whether a state is "unwilling or unable" to suppress that threat, the logic is in fact circular.

It goes like this: The United States -- using its own malleable definition of "imminent" -- decides that Person X, residing in sovereign State Y, poses a threat to the United States and requires killing. Once the United States decides that Person X can be targeted, the principle of sovereignty presents no barriers, because either 1) State Y will *consent* to the U.S. use of force inside its borders, in which case the use of force presents no sovereignty problems or 2) State Y will *not* consent to the U.S. use of force inside its borders, in which case, by definition, the United States will deem State Y to be "unwilling or unable to suppress the threat" posed by Person X and the use of force again presents no problem.

This is a legal theory that more or less eviscerates traditional notions of sovereignty, and has the potential to significantly destabilize the already shaky collective security regime created by the U.N. Charter.<sup>44</sup> If the US is the sole arbiter of whether and when it can use force inside the borders of another state, any other state strong enough to get away with it is likely to claim similar prerogatives. And, of course, if the US executive branch is the sole arbiter of what constitutes an imminent threat and who constitutes a targetable enemy combatant in an ill-defined war, why shouldn't other states make identical arguments—and use them to justify the killing of dissidents, rivals, or unwanted minorities?

## 6. Towards solutions: ensuring that US targeted killing policy does not undermine the rule of law.

I have suggested in this testimony that while the law of war and the international law of self-defense *may* provide justification for US targeted killing policy, it is, in practice, difficult to say for sure. This is because decisions about who is a combatant, what threats are imminent and so on are inherently fact specific. Since US targeted killings take place under a cloak of secrecy, it is impossible for outsiders to evaluate the facts or apply the law to specific facts.

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<sup>43</sup> See <http://www.un.org/en/documents/charter/chapter7.shtml>

<sup>44</sup> See generally Rosa Brooks, *Be Careful What You Wish For: Changing Doctrines, Changing Technologies, and the Lower Cost of War*, 106 Am. Soc'y Int'l L. Proc. 106 (2012) and *The Strange Convergence of Sovereignty-Limiting Doctrines in Human Rights and National Security Law Discourses*, Georgetown J. Int'l Affairs, Issue 13-2, 2012.

I have also suggested that we face a problem that is deeper still: we are attempting to apply old law to novel situations. As I noted earlier, the law of war evolved in response to traditional armed conflicts, and cannot be easily applied to relations between states and geographically diffuse non-state terrorist organizations. When we try to apply the law of war to modern terrorist threats, we encounter numerous translation problems. Most disturbingly, it becomes nearly impossible to make a principled decision about when the law of war is applicable in the first place, and when it is not.

As I noted earlier, law is almost always out of date: legal rules are made based on the conditions and technologies existing at the time, and as societies and technologies change, law increasingly becomes an exercise in jamming square pegs into round holes. Up to a point, this works, but eventually, that process begins to do damage to existing law: it gets stretched out of shape, or broken. At that point, we need to update our laws and practices before too much damage is done.

This is a daunting project, and I do not have any simple solutions to offer. In a sense, the struggle to adapt old legal frameworks and institutions to radically new situations will be the work of generations. But the complexity of the problem should not be an excuse for ignoring it. In that spirit, I will suggest several potential means to improve on the existing state of affairs and enhance oversight, transparency and accountability. Congress can implement some of these recommendations, while others would require Administration acquiescence. Fully evaluating the pros and cons of potential reforms is beyond the scope of this testimony, but I hope that this will be the subject of future hearings.

1. Congress should encourage Administration transparency and public debate by continuing to hold hearings on targeted killing policy, its relationship to (and impact on) broader US counterterrorism, national security and foreign policy goals, and appropriate mechanisms for improving oversight, accountability and conformity to US rule of law values. Congress should also consider hearings on the longer-term challenge of adapting the law of war and law of self-defense to 21<sup>st</sup> century threats.
2. Congress should also encourage Administration transparency through the imposition of reporting requirements. Congress could require that the executive branch provide thorough reports on any uses of force not expressly authorized by Congress and/or outside specified regions, and require that such reports contain both classified sections and unclassified sections in which the Administration provides a legal and policy analysis of any use of force in self-defense or other uses of force outside traditional battlefields.
3. Congress should consider repealing the 2001 AUMF. The Obama administration's domestic legal justification for most drone strikes relies on the AUMF, which it interprets to authorize the use of force not only against those individuals and organizations with some real connection to the 9/11 attacks, but also against all "associates" of al Qaeda. This flexible interpretation of the AUMF creates few constraints, and has lowered the threshold for using force. Repealing the AUMF would not deprive the President of the ability to use force if necessary to prevent or respond to a serious armed attack: the president would retain his existing discretionary power, as chief executive and

commander in chief, to protect the nation in emergencies. Repealing the 2001 AUMF would, however, likely reduce the frequency with which the president resorts to targeted killings.

4. The Constitution gives Congress the power to “define and punish offenses against the law of nations.” Without tying the president’s hands, Congress can pass a resolution clarifying that the international law of self-defense requires a rigorous imminence, necessity and proportionality analysis, and that the use of cross-border military force should be reserved for situations in which there is concrete evidence of grave threats to the United States or our allies that cannot be addressed through other means.
5. Congress and/or the Executive branch should create a non-partisan blue ribbon commission made up of senior experts on international law, national security, human rights, foreign policy and counterterrorism. Commission members should have or receive the necessary clearances to review intelligence reports and conduct a thorough policy review of past and current targeted killing policy, evaluating the risk of setting international precedents, the impact of US targeted killing policy on allies, and the impact on broader US counterterrorism goals.

In the absence of a judicial review mechanism, such a commission might also be tasked with reviewing particular strikes to determine whether any errors or abuses have taken place. The commission should release a public, unclassified report as well as a classified report made available to executive branch and congressional officials, and the report should contain detailed recommendations, including, if applicable, recommendations for changes in law and policy and recommendations for further action of any sort, including, potentially, compensation for civilians harmed by US drone strikes. The unclassified report should contain as few redactions as possible.

6. Congress should urge the President to publicly acknowledge all targeted killings outside traditional battlefield within a reasonable time period, identifying those who were targeted, laying out (with the minimal number of appropriate redactions) the legal and factual basis for the decision to target, and identifying, to the best of available knowledge, death, property damage and injury resulting from the strike(s).
7. Congress should urge the President to release unclassified versions of all legal memoranda relating to targeted killing policy. In particular, US citizens have a right to understand the government’s views on the legality of targeting US citizens; there is no conceivable justification for failing to make this information public.
8. Congress should urge the president to also provide the public with information about the process through which targeting decisions outside traditional battlefields are made, the chain of command for such decisions, and internal procedures designed to prevent civilian casualties. Most military operational and legal manuals are publicly available, and this issue should be no different. If reports of a targeted killing “playbook” are accurate, an unclassified version should be released to the public.

9. Congress should urge the administration should convene, through appropriate diplomatic and track II channels, an international dialogue on norms governing the use of drone technologies and targeted killings. The goal should be to develop consensus and a code of conduct on the legal principles applicable to targeted killing outside a state's territory, including those relating to sovereignty, proportionality and distinction, and on appropriate procedural safeguards to prevent and redress error and abuse.
10. Congress should consider creating a judicial mechanism, perhaps similar to the existing Foreign Intelligence Surveillance Court, to authorize and review the legality of targeted killings outside of traditional battlefields. While the Administration may argue that such targeting decisions present non-justiciable political questions because of the President's commander-in-chief authority, the use of military force outside of traditional battlefields and against geographically dispersed non-state actors straddles the lines between war and law enforcement. While the President must clearly be granted substantial discretion in the context of armed conflicts, the *applicability* of the law of armed conflict to a particular situation requires that the law be interpreted and applied to a particular factual situation, and this is squarely the type of inquiry the judiciary is best suited to making.

It is also worth noting that the *practical* concerns militating against justiciability in the context of traditional wartime situations do not exist to the same degree here. On traditional battlefields, imposing due process or judicial review requirements on targeting decisions would be unduly burdensome, as many targeting decisions must be made in situations of extreme urgency. In the context of targeted killings outside traditional battlefields, this is rarely the case. While the window of opportunity in which to strike a given target may be brief and urgent, decisions about whether an individual may lawfully be targeted are generally made well in advance.

A judicial mechanism designed to ensure that US targeted killing policy complies with US law and the law of armed conflict might take any of several forms. Most controversially, a court might be tasked with the *ex ante* determination of whether a particular individual could lawfully be targeted.

This approach is likely to be strenuously resisted by the Administration on separation of powers grounds, and it also raises potential issues about whether the Constitution's case and controversy requirement could be satisfied, insofar as proceedings before such a judicial body would, of necessity, be *in camera* and *ex parte*.<sup>45</sup> This is also true for the existing FISA court, however, and its procedures have generally been upheld on Fourth Amendment grounds. It would seem odd to permit *ex parte* proceedings in an effort to ensure judicial approval for surveillance, but reject such proceedings as insufficiently protective of individual rights when an individual has been selected for lethal targeting rather than mere search and seizure.

I believe it would be possible to design an *ex ante* judicial mechanism that would pass constitutional and practical muster. It would be complex and controversial, however, and there is an alternative approach that might offer many of the same benefits with far fewer

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<sup>45</sup> See <http://www.lawfareblog.com/2013/02/why-a-drone-court-wont-work/>

of the difficulties. This alternative approach would be to develop a judicial mechanism that conducts a post hoc review of targeted killings, perhaps through a statute creating a cause of action for damages for those claiming wrongful injury or death as a result of unlawful targeted killing operations. This would add additional incentives for executive branch officials to abide by the law, without placing the judiciary in the troubling role of authorizing or rejecting the use of military force in advance. While proceedings might need to be conducted at least partially *in camera*, judicial decisions in these cases could be released in redacted form.

It is not possible for this testimony to fully address the many permutations of potential judicial review mechanisms for targeted killing, but I hope this is an issue that will generate further discussion and inquiry in this sub-committee. To that end, it is worth noting that the notion of judicial review of targeted killing is one that has been validated by the courts of one of our closest allies, Israel.

The Israeli Supreme Court addressed the issue of targeted killing in a 2006 decision, and roundly rejected the view that targeted killing presents a non-justiciable issue.<sup>46</sup> The court insisted that the legality of each targeted killing decision must be individually considered in light of domestic and international legal requirements. It determined that while the conflict between Israel and Palestinian terrorist organizations was an international armed conflict, individual terrorist suspects were civilians who become targetable by virtue (and only by virtue) of their direct participation in hostilities, a concept the court analyzed in detail. The court also noted that international law requires independent investigations when civilians are targeted because of their suspected participation in hostilities. While specific judicial review mechanisms in the US might reasonably be expected to vary from those in place in Israel, the Israeli experience strongly suggests that there is no inherent reason judicial review of targeted killings could not occur.

## Conclusion

Mr. Chairman, Senator Cruz and members and staff of the subcommittee, we need to start talking honestly about drones, the activities they enable and the strategic and legal frameworks in which these activities take place. Drone critics need to end their irrational insistence on viewing drones as somehow inherently “immoral.” But drone strike boosters also need to engage in a more honest conversation, and grapple with the argument that although drone strikes appear to offer cheap and low-risk “quick fix” approach to counterterrorism, they may well be doing the US as much harm as good.

In particular, we need to address the rule of law implications of US targeted killing policy. Every individual detained, targeted, and killed by the U.S. government may well deserve his fate. But when a government claims for itself the unreviewable power to kill anyone,

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<sup>46</sup> See [http://elyon1.court.gov.il/Files\\_ENG/02/690/007/a34/02007690.a34.HTM](http://elyon1.court.gov.il/Files_ENG/02/690/007/a34/02007690.a34.HTM)

anywhere on earth, at any time, based on secret criteria and secret information discussed in a secret process by largely unnamed individuals, it undermines the rule of law.

One can argue, as the Obama Administration does, that current US drone policy is entirely lawful, and perhaps this is so, if we're willing to take virtually everything about the strikes on faith, and don't mind jamming square pegs into round holes. But "legality" is not the same as morality or common sense. Current US drone policy offers no safeguards against abuse or error, and sets a dangerous precedent that other states are sure to exploit.

Thank you once again for affording me this opportunity to testify. There is nothing preordained about how we use new technologies, but by lowering the perceived costs of using lethal force, drone technologies enable a particularly invidious sort of mission creep. When covert killings are the rare exception, they do not pose a fundamental challenge to the legal, moral, and political framework in which we live. But when covert killings become a routine and ubiquitous tool of U.S. foreign policy, we cannot afford to let them remain in the legal and moral shadows.

We need an honest conversation about how to bring targeted killings under a rule of law umbrella, by creating more transparent rules and more robust checks and balances. I am grateful to all of you for helping to foster such an honest conversation.