

CONSTITUTIONAL AND COUNTER TERRORISM IMPLICATIONS OF TARGETED KILLING

General (ret) James E. Cartwright

Testimony to the Senate Judiciary Subcommittee on the
Constitution, Civil Rights, and Human Rights

24 March 2013

Introduction

Senator Durbin, Senator Cruz and other distinguished members. It's an honor and a pleasure to present testimony before this committee. Thank you for inviting me. Much of my testimony will be based on my 40 years of military experience and work I am currently supporting with various universities, think tanks and studies. My time in government is dated, retiring in 2011.

The Threat

In today's world we are dealing with individuals and groups that have the potential to exercise lethal operations, which in the past were only available to nation states. These terrorist groups have access through our networked environment to intellectual capital, resources and communication venues enabling them to cause great harm. They find sanctuary in sympathetic populations, ungoverned spaces, and have the potential to move quietly, often undetected, across the globe. Our ability to discover, disrupt, and deny their operations has improved as nations cooperate, exchange information and develop technologies to deny them of the resources, mobility and target access. Yet they adapt and persist with no current predictions, I am aware of, that see this threat diminishing any time soon. Today's hearing focuses on one of our counter terrorism tactics and the technology that supports it, targeted killing and the use of armed drones.

Targeted Killing

The methods of locating these groups and individuals, who have a past or current behavior that identify them as a threat, is difficult. Our intelligence services have significantly improved their tradecraft in this counter terrorism arena, but it is a daunting, time consuming task. The authorities, policies, laws, accountability chains, and means that have served us in the past are challenged by willingness of governments to support operations against these groups. Their concerns over collateral damage, violations of sovereignty, their role in authorizing operations, and the perception that the threat may not be relevant to the host nation, add to the challenges. In addition, determining who in the population is actually participating in planning, support and operations is often

difficult. As a result, the scale of operations and extended presence in an area can take on the character of military operations, absent the declaration of an area of hostility.

Armed Drones

Advances in high band-width satellite communications, sensing technologies - particularly full motion video - combined with existing aircraft technology has allowed armed drones to emerge as the platform of choice in this counter terror mission space. In military operations, these drones are highly capable and sought after by ground forces. They cost roughly \$4-5M versus a modern fighter's \$150M. They persist on station for 15-20 hours without refueling, versus 1-2 hours for fighter attack aircraft. They consume 100 gallons of fuel per flight versus 1,000-3,000 gallons for an unrefueled fighter attack aircraft. Their optics provides full motion imagery at far greater distances and altitudes than the human eye, and the crews are not distracted or disabled by the constant duties of flight. Their sensor information can be distributed to fixed and mobile users in real time. For a Marine, this means getting up in the morning, getting a patrol assignment, monitoring the target area in real time, while conducting mission planning, followed by travel to the target area, execution of the mission, return to base and debriefing. They can rerun the entire mission for accurate debriefings and mission effectiveness and accountability. During all that, they have an armed escort that can see over hills, and around corners, in the palm of their hand. Not hard to see why military operations are significantly improved by this technology.

Drones offer many advantages over other conventional forces in counter terrorism missions. Basing can be located far from the area of interest without sacrificing time on station. They have far greater mobility than a similar ground or naval capability. Their elevated sensors are generally more effective in locating and pursuing a threat. They can persist in an area for extended periods of time awaiting emergence or a clear opportunity. They can quickly adapt to fixed and mobile targets. These and many other attributes of armed drones make them the leading choice in counter terrorism operations.

DOD – Oversight & Accountability

The use of armed platforms and drone technology has been a part of DOD policies and law for many years. Remoting the crew to bases, where they have access to greater information tools, over-sight mechanisms and accountability, have improved the application of force when required. The ability to control and employ drones in conjunction with or by mobile users has had the same positive attributes. Authority to train, equip, and support, rests with the military departments and Services. Operations are conducted by Combatant Commanders through the National Command Authority exercised by the President and the Secretary of Defense. The preparation, movement, and operations, along with the definition of what forces, what capabilities, what actions and objectives, are stipulated in writing. There is a clear line of authority and accountability. Congress provides oversight as appropriate in all of these areas.

Considerations for Oversight & Accountability for Drone Technologies

Legitimate questions remain about the use, authorities, and oversight of armed drone activities outside an area of declared hostility. While I believe, based on my experience, all parties involved in this activity have acted in the best interests of the country, as with other new technologies, adaptation of policy and law tends to lag implementation of the capability. We should now ask; are the use, authority and oversight protocols actually providing us with the safeguards we want? Are the current metrics telling the full story of operational effectiveness? Do these same metrics serve to warn us when operations are no longer contributing to the desired end-state?

I have spent time supporting reviews of drone use outside an area of declared hostility, with think tanks, NGOs, and law schools. One of the more thoughtful and useable products I have seen is the work done by Columbia Law School, Center for Civilians in Conflict. They conducted a human rights clinic last year that provided a menu of review actions that would serve to focus on what in our use, authorities and oversight protocols is working and what may require revision or new measures. I also believe, based on my experience, that this list of actions has, in large measure, been accomplished. Because of the sensitive nature of these counter terror operations the extent to which review results have been made public or shared across government is likely uneven. I provide the following recommended actions from the clinic, for the committee's consideration.

To the Administration

» Establish a special interagency task force to evaluate covert drone operations and make recommendations to the President with regard to the following issues:

- The extent of civilian casualties from drone strikes and the larger impact on civilian communities, including destruction of homes and displacement, and retaliatory violence by local groups;
- The sufficiency of civilian protection mechanisms employed by the CIA and JSOC, including civilian casualty mitigation processes;
- The adequacy of civilian protection standards for the identification of targets, including the reliability of “signatures,” and the sufficiency of intelligence sources and analysis where there is limited US ground presence;
- The capabilities and limitations of drone technology for reducing and accurately assessing civilian harm, and the adequacy of current technology testing and personnel training;
- The existence and sufficiency of post-strike assessments and investigations of who is killed, including assessing the appropriateness of the behaviors associated with signature strikes;

- The existence and sufficiency of processes for recognizing harm and making amends to civilian victims of drone strikes, their families, and communities;
- The strategic value and humanitarian impact of covert drone strikes compared to other counter terrorism approaches;
- For joint CIA-JSOC operations, the adequacy of oversight mechanisms, the delineation of responsibilities between the organizations, and the adequacy of agency accountability for civilian protection and harm response.

The task force should be composed of representatives from relevant agencies and departments including the Director of National Intelligence, the State Department, the Department of Justice, the National Security Agency, the Department of Defense, and the Central Intelligence Agency. A declassified version of the task force's findings should be made publicly available.

- » Continue to engage with civil society regarding legal standards for targeting operations.
- » Identify the international law-related justifications and standards that apply to covert drone strike operations in different countries, including the legal standards for who may be targeted.
- » Encourage the Department of Defense and the CIA to establish or implement processes for declassifying information about targeting operations once they are completed.

To the CIA

- » Acknowledge that the CIA has a role in drone strikes outside of Afghanistan; establish a process for declassifying information about CIA targeting operations once they are completed, and officially provide information on the impact of the program on civilians, including to the relevant US Congress committees and members.
- » Publicly describe the agency's civilian protection mechanisms, including its civilian casualty mitigation processes and post-strike investigatory procedures.
- » Engage with civil society regarding legal standards for targeting operations; confirm whether the agency regards itself as bound by international law, including under which specific legal framework it is operating the drones program (human rights law, international humanitarian law, etc.), and publicly describe the agency's legal standards for who may be targeted.
- » Disclose steps the agency takes to train personnel involved in drone operations, including lawyers, on applicable laws and related civilian protection and harm response tactics and procedures. www.civiliansinconflict.org

To the Department of Defense, SOCOM and Joint Special Operations Command (JSOC)

» Acknowledge that JSOC has a role in drone strikes outside of Afghanistan; in accordance with existing Department of Defense processes for declassifying information on operations, declassify information on drone targeting operations once they are completed; and officially provide information on the impact of operations on civilians, as is done by the military in traditional combat theaters.

» Publicly describe the agency's civilian protection mechanisms, including its civilian casualty mitigation processes and post-strike investigatory procedures.

» Clarify whether directives, rules, and manuals in relation to civilian protection and use of force compliance that are a matter of Department of Defense-wide policy also apply to JSOC operations, including operations conducted under the CIA statutory authority.

To Congress

» Exercise oversight powers to the fullest extent possible in reviewing and evaluating the following issues:

- The extent of civilian casualties from covert drone strikes and the larger impact on civilian communities, including destruction of homes and displacement, and retaliatory violence by local groups;
- The sufficiency of civilian protection mechanisms employed by the CIA and JSOC, including civilian casualty mitigation processes;
- The adequacy of standards for the identification of targets, including the reliability of "signatures," and the sufficiency of intelligence sources and analysis where there is limited US ground presence;
- The capabilities and limitations of drone technology for reducing civilian harm, and the adequacy of current technology testing and personnel training;
- The existence and sufficiency of post-strike assessments and investigations that determine who is killed, including the characterization of military-age males as presumptively non-civilian;
- The existence and sufficiency of processes for recognizing harm and making amends to civilian victims of covert drone strikes, their families, and communities;
- The strategic value and humanitarian impact of covert drone strikes compared to alternative approaches to counterterrorism;

- For joint CIA-JSOC operations, the adequacy of oversight mechanisms; the delineation of responsibilities between the organizations, and the adequacy of agency accountability for civilian protection and harm response.
 - » Seek information about the impact of covert drone strikes from sources outside of government, including journalists, regional experts, and civil society.
 - » Exercise effective oversight of joint CIA-JSOC operations, e.g., by formally requiring that joint operations be reported to both intelligence oversight committees, and the Senate and House Armed Services Committees.
 - » Inform public debate about the involvement of the CIA and JSOC in drone strikes, effectiveness of the strikes in counterterrorism operations (including in the long-term), and civilian impact, e.g., through an open congressional hearing.

The full report is available at:

<http://web.law.columbia.edu/sites/default/files/microsites/human-rights-institute/files/The%20Civilian%20Impact%20of%20Drones.pdf>