

**“Targeted Killing” and the Rule of Law:
The Legal and Human Costs of 20 Years of US Drone Strikes**

**Senate Committee on the Judiciary
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Testimony of Ambassador Nathan A. Sales

Chairman Durbin, Ranking Member Grassley, and Members of the Committee, it is a pleasure to appear before you today to discuss this important topic.

My name is Nathan Sales. I am the founder and principal of Fillmore Global Strategies LLC, a consultancy that provides legal and strategic advisory services on matters at the intersection of law, policy, and diplomacy. I am also a member of the advisory board of the Vandenberg Coalition; a nonresident senior fellow at the Atlantic Council; and a senior advisor at the Soufan Group.

From 2017 to 2021, I served at the U.S. Department of State as Ambassador-at-Large and Coordinator for Counterterrorism. I also was acting Under Secretary of State for Civilian Security, Democracy, and Human Rights, as well as Special Presidential Envoy to the Global Coalition to Defeat ISIS. Before my service at the State Department, I was a tenured law professor, teaching and writing in the fields of national security law, counterterrorism law, and constitutional law, among others. Previously, I served at the U.S. Department of Homeland Security as Deputy Assistant Secretary for Policy, and at the U.S. Department of Justice as Senior Counsel in the Office of Legal Policy.

Today I will testify that drones are an important component of an integrated counterterrorism strategy that includes both military and civilian elements; that, compared to the alternatives, drone strikes can help minimize harm to civilians, which is essential for legal, moral, and strategic reasons; and that transparency and accountability are critical in the aftermath of errant strikes.

I. An Important Counterterrorism Tool

Drones play an important role as part of an integrated counterterrorism strategy. Properly used, drone strikes allow the United States to remove terrorist leaders and other high-value targets from the battlefield with maximum precision and minimal risk to U.S. troops. To be sure, drone strikes are not a silver bullet capable of solving the problem of international terrorism on their own. Rather, they are one tool that must be used judiciously alongside a number of civilian-sector counterterrorism capabilities. A comprehensive counterterrorism strategy should also include: (1) criminal prosecution of suspected terrorists in civilian courts, particularly when enabled by evidence collected from the battlefield; (2) the use of terrorism designations and economic sanctions to cut off the flow of money to terrorist groups; (3) effective customs and border security screening to prevent terrorists from entering our country; and (4) countering violent extremism (CVE) initiatives to help counteract terrorist radicalization and recruitment.

Terrorists themselves recognize the effectiveness of drones. In letters seized during the 2011 raid on Osama bin Laden’s compound in Abbottabad, Pakistan, al Qaeda’s then-leader instructed his subordinates to stay indoors “except on a cloudy overcast day” to avoid being spotted, and another top al Qaeda figure lamented that the group’s leadership had been “suffering from the spy planes problem and the spy war, especially in the tribal area [of Pakistan].”¹

In particular, drone strikes can degrade terrorist organizations by eliminating their leadership. Of course, terrorist groups will replace their leaders with new ones, but these successors may not be as charismatic or effective; Ayman al-Zawahiri is no Osama bin Laden. In addition, decapitation strikes can be deeply demoralizing for a terrorist group’s rank-and-file members, demonstrating that, if leaders can be taken off the battlefield, they could be next. Drone strikes also can disrupt attack planning as terrorists go to ground to avoid becoming targets themselves; it’s harder for them to play offense if they have to play defense. Alternatively, strikes can illuminate terrorist networks as operatives chatter among themselves, creating opportunities for intelligence collection or follow-on strikes.

Not only can drone strikes degrade terrorist organizations, they also lower the risk of injury and death to U.S. military personnel. Some counterterrorism operations that otherwise might have required the use of ground forces can instead be carried out remotely by drones. With fewer troops required to deploy to and operate in combat zones, drones enable military planners to achieve their objectives without putting large numbers of American soldiers in harm’s way.

In addition to saving American lives, drones save taxpayer dollars. Drones can be cheaper than other legacy platforms used for counterterrorism missions. For instance, in the Fiscal Year 2021 Defense Department budget request, drones constituted \$1.8 billion of the Department’s aircraft acquisition investment – an amount equal to less than one percent of the total investment budget.² Deploying troops to the theatres where these drones will operate likely would cost considerably more. Indeed, the U.S. government spent \$22 billion in the late 2000s just to acquire 15,000 Mine Resistant Ambush Protected (MRAP) vehicles to protect our troops in Iraq and Afghanistan from improvised explosive devices (IEDs).³

Moreover, because drones are precision weapons, they can reduce the risk of unintended loss of civilian life when compared to alternative kinetic tools. Few military platforms are as precise and discriminating as drones. Other options that might be used to achieve a given

¹ Catherine Putz, *Reading Bin Laden’s Letters: Paranoia and the “Spy Planes Problem”*, The Diplomat, Mar. 2, 2016, <https://thediplomat.com/2016/03/reading-bin-ladens-letters-paranoia-and-the-spy-planes-problem/>.

² Office of the Under Secretary of Defense (Comptroller)/Chief Financial Officer, *Fiscal Year 2021 Budget Request: Program Acquisition Cost by Weapon System*, accessed Feb. 6, 2022, https://comptroller.defense.gov/Portals/45/Documents/defbudget/fy2021/fy2021_Weapons.pdf.

³ Government Accountability Office, *Rapid Acquisition of Mine Resistant Ambush Protected Vehicles* at 1-1, July 15, 2018, <https://www.govinfo.gov/content/pkg/GAOREPORTS-GAO-08-884R/html/GAOREPORTS-GAO-08-884R.htm>.

counterterrorism objective – such as manned fixed-wing aircraft or conventional ground units – can involve less precision, potentially resulting in greater risk to nearby civilians.⁴

Drones can preserve civilian lives well beyond the strike zone. Indeed, drone strikes have been a vital tool in thwarting terrorist plots against innocent civilians, as seen in the U.S. response to ISIS violence in northern Iraq. In August 2014, the Defense Department reported having carried out 25 strikes to slow ISIS’s advance on Erbil and to provide an exit route for Yazidis who were fleeing a genocidal ISIS onslaught.⁵ This use of drones likely was responsible for saving thousands of innocent civilian lives.⁶

II. Drone Strikes and the Protection of Civilians

It is of the utmost importance that U.S. drone operations prevent harm to civilians, for legal, moral, and strategic reasons. Multiple presidential administrations have affirmed that drone strikes must operate within accepted domestic and international legal norms, including the laws of war. This framework includes the requirement that, as a default rule, a drone strike may not take place unless there is “near certainty” that civilians will not be harmed. The Obama administration adopted this “near certainty” standard in a 2013 Presidential Policy Guidance (“PPG”)⁷; according to partially declassified documents released in response to a FOIA request, the Trump administration maintained this standard in its Principles, Standards, and Procedures for U.S. Direct Action Against Terrorist Targets (“PSP”).⁸

To begin with the legal standards, the law of armed conflict (“LOAC”) includes the principles of “distinction” and “proportionality.” “Distinction” requires combatants to distinguish between combatants and civilians and to target only the former. Under the distinction principle, it is unlawful for combatants to deliberately target civilians. “Proportionality” requires combatants to avoid causing *incidental* harm to civilians that is excessive in relation to the military advantage to be gained. Under the distinction principle, combatants must take certain steps to minimize civilian casualties.

Indeed, the “near certainty” standard for drone strikes appears to offer even more protection to civilians than what is required by the LOAC. The proportionality principle is not a strict prohibition on causing incidental harm to civilians; it requires that any such incidental harms must be calibrated to the military advantage to be gained. By contrast, the near certainty standard

⁴ Lynn E. Davis, et. al, *Armed and Dangerous? UAVs and U.S. Security* (Santa Monica, CA: RAND Corporation, 2014), https://www.rand.org/pubs/research_reports/RR449.html.

⁵ *Department of Defense Press Briefing by Rear Adm. Kirby in the Pentagon Briefing Room*, Aug. 14, 2014, <https://www.defense.gov/News/Transcripts/Transcript/Article/606912>.

⁶ Jenna Krajeski & Alex Baze, *The Daring Plan to Save a Religious Minority from ISIS*, *The New Yorker*, Feb. 19, 2018, <https://www.newyorker.com/magazine/2018/02/26/the-daring-plan-to-save-a-religious-minority-from-isis>.

⁷ *Procedures for Approving Direct Action Against Terrorist Targets Located Outside the United States and Areas of Active Hostilities*, May 22, 2013, available at https://www.justice.gov/oip/foia-library/procedures_for_approving_direct_action_against_terrorist_targets/download.

⁸ *Principles, Standards, and Procedures for U.S. Direct Action Against Terrorist Targets*, available at https://www.aclu.org/sites/default/files/field_document/2021-4-30_psp_foia_final.pdf.

establishes a default rule that a drone strike may not take place if it would result in any civilian casualties. Some drone strikes that might be permissible under the proportionality principle might nevertheless be ruled out by the more demanding near certainty standard.

As for the morality of avoiding civilian casualties, protecting innocent human life is a fundamental American value. This is who we are as Americans. We fight hard, but we fight fair. We play by the rules, and one of the most important rules of all is to avoid inflicting the horrors of war on innocent bystanders.

Finally, minimizing the loss of civilian life is important for strategic reasons. If drone strikes or other military operations repeatedly cause harm to civilians, that can turn local populations against the United States. Civilian casualties can fuel terrorist radicalization and recruitment, potentially resulting in the creation of more terrorists. Civilian casualties can also strain the United States' relationships with important partner governments, causing them to lose public support and thereby risking instability in countries and regions that are vital to U.S. national security and foreign policy interests. It is also important to emphasize that the United States benefits from its observance of these principles. By minimizing civilian casualties – by strictly complying with the LOAC and the near certainty standard – the power of the United States' example can induce other countries to follow suit, thereby helping to encourage the protection of American civilians in the event of armed conflict.

In short, drones can be understood as a mechanism by which the United States operationalizes its obligations under the LOAC and its policy choices to minimize civilian harms: Drone strikes can be carried out with a high degree of precision and target discrimination, they can obviate the need for alternative military measures that carry a higher risk of collateral damage, and the heightened near certainty standard offers even greater protection to civilians than the baseline LOAC requirements.

III. The Need for Transparency and Accountability

Drone strikes can be an effective tool to degrade terrorist threats, reduce risks to our troops, and protect innocent civilians. It is in the United States' interest to use this tool responsibly by upholding rigorous legal and policy standards to protect our military personnel and civilian lives throughout the world.

Of course, sometimes the United States makes mistakes, as we saw in heartbreaking fashion in the erroneous August 29, 2021 drone strike in Kabul that killed ten innocent civilians, including seven children,⁹ and in the important series of *New York Times* articles about civilians who lost their lives in the campaign against ISIS in Iraq and Syria from 2014 onward.¹⁰ When

⁹ Christoph Koettl, *Newly Declassified Video Shows U.S. Killing of 10 Civilians in Drone Strike*, *New York Times*, Jan. 19, 2022, <https://www.nytimes.com/2022/01/19/us/politics/afghanistan-drone-strike-video.html>.

¹⁰ See, e.g., Dave Philipps, Eric Schmitt & Mark Mazzetti, *Civilian Deaths Mounted as Secret Unit Pounded ISIS*, *New York Times*, Dec. 12, 2021, <https://www.nytimes.com/2021/12/12/us/civilian-deaths-war-isis.html?referringSource=articleShare>; Azmat Khan, *Hidden Pentagon Records Reveal Patterns of Failure in Deadly Airstrikes*, *New York Times*, Dec. 18, 2021, <https://www.nytimes.com/interactive/2021/12/18/us/airstrikes-pentagon-records-civilian-deaths.html>.

mistakes are made, and civilians inadvertently are killed, the United States must live up to the highest standards of transparency and accountability. If someone broke the law or violated the proper procedures in the course of an errant drone strike, that person should be disciplined appropriately and otherwise held to account. More broadly, policymakers should be prepared to adjust the standards and procedures that govern drone strikes if those rules prove to be ineffective at preventing civilian casualties; one would expect such adjustments to be narrowly tailored to specific problems that have been uncovered rather than wholesale revisions of direct action authorities. (For that matter, policymakers also should be prepared to adjust the rules for drone strikes if they prove so constraining as to prevent the military from eliminating terrorist threats or if they expose our troops to unnecessary risks.) At the same time, it also must be acknowledged that in many cases the alternatives to drone strikes – from doing nothing at all to deploying ground forces instead – could involve greater risk to our troops and to local civilians alike, and could be less effective at removing terrorist threats from the battlefield.

Mr. Chairman, Mr. Ranking Member, and Members of the Committee, thank you again for the opportunity to be here today. I would be happy to answer any questions you might have.