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**HEARING ON “DRONE WARS: THE CONSTITUTIONAL
AND COUNTERTERRORISM IMPLICATIONS OF
TARGETED KILLING”**

**TESTIMONY BEFORE THE
UNITED STATES SENATE JUDICIARY SUBCOMMITTEE ON THE
CONSTITUTION, CIVIL RIGHTS, AND HUMAN RIGHTS**

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INTRODUCTION.

I am grateful for the opportunity to address some of the important issues raised the use targeted killing in the War on Terror, before this Subcommittee. I would like to thank Chairman Durbin, Ranking Member Cruz and the other members for their interest in these questions.

Because I was only notified about the invitation to testify late on Thursday, April 18, this statement cannot be as thorough and detailed as it might have been otherwise. I would be happy to augment it in answer to written questions after the hearing, if members of the Subcommittee would find that useful.

In my view, the use of targeted killings by drones is not inherently illegal or immoral. It is a legitimate weapon of war in the struggle against al Qaeda and associated terrorist groups. However, serious constitutional and other problems arise if the US government fails to take proper care to ensure that the use of drones is strictly limited to legitimate terrorist targets. These dangers are likely to be at their most severe in the admittedly rare cases involving American citizens. I would urge the Subcommittee and Congress generally to consider adopting procedural safeguards that would minimize the likelihood of erroneous or illegal drone strikes. One proposal that deserves serious consideration is the establishment of an independent court that would oversee drone strikes in advance.

I. WHY TARGETED KILLING IS NOT INHERENTLY ILLEGAL OR IMMORAL.

The Authorization for the Use of Military Force enacted by Congress on September 14, 2001 authorizes the president to “use all necessary and appropriate force against those nations, organizations, or persons he determines planned, authorized, committed, or aided the terrorist 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.”¹ This is generally understood as creating a legal state of war between the United States and Al Qaeda and its allies. The Supreme Court has recognized this, describing the conflict we are engaged in as “the war with al Qaeda.”² Similarly, President Obama, like President George W. Bush before him, has emphasized that “we are indeed at war with Al Qaeda and its affiliates.”³ Thus, all three branches of government have recognized that a state of war exists, and that therefore the United States is entitled to use all measures normally permitted in warfare against its enemies.

In wartime, the individualized targeting of an enemy commander is surely both legal and moral. During World War II, for example, the United States targeted Japanese Admiral Isoroku Yamamoto, and the British and Czechs successfully targeted German SS General Reinhard Heydrich.⁴ Few if any serious commentators claim that these operations and others like them were either illegal or morally dubious.

If it is permissible to individually target a uniformed enemy officer, such as Admiral Yamamoto in World War II, it is surely legitimate to do the same to the leader of a terrorist organization. Indeed, it would be perverse if terrorist leaders enjoyed greater protection against targeting than uniformed military officers. Unlike the latter, terrorists do not even pretend to obey the laws of war. And they deliberately endanger civilians by choosing not to wear distinctive uniforms. To give terrorists greater protection against targeted killing than that enjoyed by uniformed military personnel would in effect reward and incentivize illegal behavior that endangers innocent civilians by making it harder to distinguish them from combatants.

In some ways, individual targeting of terrorist leaders is actually *more* defensible than mass targeting of their underlings. Leaders usually bear greater moral and legal responsibility for the activities of their groups than do low-level members. And, at least in some cases,

¹ AUMF § 2(a), Pub. L. No.107-40,115 Stat. 224.

² *Hamdan v. Rumsfeld*, 548 U.S. 557, 628 (2006); Cf. *Hamdi v. Rumsfeld*, 542 U.S. 507, 519 (2004) (holding that the AUMF authorizes detention of enemy combatants because such detention is “a fundamental incident of waging war”).

³ President Barack Obama, Statement of May 21, 2009, quoted in Benjamin Wittes, *Drones and the War On Terror: When Can the US Target Alleged American Terrorists Overseas*, Statement before the House Committee on the Judiciary, at 2-3 available at <http://www.lawfareblog.com/wp-content/uploads/2013/02/Wittes-02272013.pdf>

⁴ See DONALD A. DAVIS, *LIGHTNING STRIKE: THE SECRET MISSION TO KILL ADMIRAL YAMAMOTO AND AVENGE PEARL HARBOR*.(2005); CALLUM MACDONALD, *THE KILLING OF REINHARD HEYDRICH: THE SS "BUTCHER OF PRAGUE"* (1998).

individual targeting of leaders is less likely to inflict collateral damage on civilians than conventional attacks on groups.

This analysis does not change if the enemy leader happens to be an American citizen. Surely the targeting of Admiral Yamamoto would not have become illegal or immoral if he had acquired dual US citizenship while living in the United States during the 1920s. As Justice Sandra Day O'Connor noted in her majority opinion for the Supreme Court in *Hamdi v. Rumsfeld*, "[a] citizen, no less than an alien, can be part of or supporting forces hostile to the United States or coalition partners and engaged in an armed conflict against the United States."⁵ Benjamin Wittes of the Brookings Institution correctly points out that "Americans have fought in foreign armies against their country in numerous armed conflicts in the past, and their citizenship has never relieved them of the risks of that belligerency."⁶ Most obviously, nearly all the combatants arrayed against US forces in the Civil War were American citizens. Yet that did not prevent the Union Army from targeting them with lethal force or make it illegal to do so.

Giving American citizens who join terrorist organizations blanket immunity from individual targeting is also problematic because it would increase terrorists' incentives to recruit Americans. Obviously, a terrorist leader who is immune from individually targeted attack can be more effective than one who is not.

There is also no reason to believe that the use of drones for such targeting raises any greater moral or legal problems than the use of conventional weapons such as air strikes, attacks by ground forces, or artillery. Drones can, of course, be used in ways that are illegal, unethical, or unwise. For example, they could be used to deliberately target civilians. But the same is true of virtually every other weapon of war.

Given the existence of a state of war, I believe that the Obama administration was correct to conclude in its recently released White Paper that it is legal for the government to target US citizens who are "senior operational leader[s] of al-Qa'ida or an associated force."⁷

Some critics of the Administration White Paper focus on the possible weaknesses of the memo's three additional requirements for the targeted killing of a US citizen: that "(1) an informed, high-level official of the US government has determined that the targeted individual poses an imminent threat of violent attack against the United States, (2) capture is infeasible and the United States continues to monitor whether capture becomes feasible, and (3) the operation would be conducted in a manner consistent with applicable law of war principles."⁸ Law Professor Gerard Magliocca, for example, argues that "[t]he White Paper says that a citizen is eligible for death-by-drone when 'an informed, high-level, official of the

⁵ *Hamdi*, 542 U.S. at 519 (quotation omitted).

⁶ Wittes, *Drones and the War on Terror* at 6.

⁷ Department of Justice White Paper, *Lawfulness of a Lethal Operation Directed Against a U.S. Citizen Who is a Senior Operational Leader of Al-Qa'ida or An Associated Force* (n.d.), at 1, available at http://msnbcmedia.msn.com/i/msnbc/sections/news/020413_DOJ_White_Paper.pdf ("DOJ White Paper").

⁸ DOJ White Paper at 1.

U.S. government has determined that the targeted individual poses an imminent threat of violent attack against the United States.’ In my opinion, this threshold is too low.”⁹ But the “imminent threat” test applies only to people located outside the United States who are “senior operational leaders of al-Qa’ida or an associated force,” not to just anyone who “an informed...official” believes to be a threat.¹⁰ In other words, the requirements that the target pose an “imminent threat” and cannot be captured are *in addition* to the requirement that he be a senior leader of Al Qaeda or one of its “associated forces.”

Once this key point is recognized, many of the objections to the memo are weakened. Indeed, a senior al Qaeda leader likely qualifies as a legitimate target even if he does not pose an “imminent threat.” It was surely permissible to target Admiral Yamamoto even if the US did not have any proof that he was planning “imminent” military operations against US forces. The fact that he was a top enemy commander in an ongoing war was enough. Here as elsewhere, there is no good reason to give terrorist leaders greater immunity from attack than that enjoyed by uniformed military officers.

Even when the use of targeted killing is both legal and moral, it is not always prudent and wise. In many cases, it might be desirable to refrain from otherwise unproblematic strikes in order to avoid antagonizing civilian populations in the relevant region, or for other strategic reasons. Such considerations are extremely important, but probably best left to those with greater expertise on the relevant issues than I possess. I note them here only to emphasize that I do not claim that the US government should indiscriminately resort to the use of targeted killing in every instance where it might be legally permissible to do so. To the contrary, a prudent government should exercise great caution in ordering such operations.

II. THE TARGETING DILEMMA.

Although the targeting of genuine al Qaeda leaders is legally and morally unproblematic, the administration’s policy of targeted killing still raises serious questions. The key issue is whether we are following rigorous enough procedures to ensure that the people targeted by drone strikes really are members of terrorist organizations at war with the United States.

A. Choosing Targets.

Unfortunately, identifying al Qaeda leaders is a far more difficult task than identifying enemy officers in a conventional war. Precisely because terrorists do not wear uniforms and often do not have a clear command structure, it is easy to make mistakes. And where US citizens are involved, there is the danger that the government will target someone merely because that person is a political enemy of the current administration. Even if officials are acting entirely in good faith, there is still a serious risk that innocent people will be targeted in error.

⁹ Gerard Magliocca, *Legal Justification For Drone Attacks on Citizens*, BALKINIZATION, Feb. 5, 2013, available at <http://balkin.blogspot.com/2013/02/legal-justification-for-drone-attacks.html>.

¹⁰ DOJ White Paper at 1.

The DOJ White Paper does not even consider the question of how we decide whether a potential target really is a terrorist leader or not. But that is the most difficult and dangerous issue that must be considered.

The problem is not an easy one. On the one hand, war cannot wait on elaborate judicial processes. And we usually cannot give a potential target an opportunity to contest his designation in court without tipping him off. On the other hand, it is both dangerous and legally problematic to give the president and his subordinates unconstrained power to designate American citizens as “terrorist leaders” and then target them at will.

A drone strike aimed at American citizen without adequate evidence showing that he or she is a terrorist combatant raises serious constitutional problems. In particular, it is likely to violate the Due Process Clause of the Fifth Amendment, which forbids government deprivation of “life, liberty, or property without due process of law.”¹¹ Legal scholars and jurists have spilled many barrels of ink debating the exact meaning of these words. But at the very least, they surely prevent the executive from unilaterally ordering the death of American citizen without at least some substantial proof that he is an enemy combatant, and perhaps an independent judicial determination thereof.¹² As the Supreme Court has recognized, the Bill of Rights protects American citizens overseas, as well as domestically.¹³ Whether non-citizens are also entitled to the protection of the Due Process Clause when targeted beyond the boundaries of the United States is more disputable. Even though the text of the Amendment extends to all “persons,” some historical evidence suggests that the Due Process Clause was originally understood as not applying to foreigners outside US jurisdiction.¹⁴

The risk of either inadvertent or deliberate targeting of innocent people is heightened by the growing scale of targeted killing over the last several years. According to leading counterterrorism expert Peter Bergen, the Obama Administration conducted 283 drone strikes in Pakistan alone between 2009 and late 2012, more than six times as many as in the years of the George W. Bush administration.¹⁵ These strikes go well beyond targeting “senior” terrorists. Indeed, only 13% of them succeeded in killing a terrorist or “militant” leader.¹⁶ A recent analysis of government documents obtained by McClatchy Newspapers suggests that the vast majority of drone strikes under the Obama administration have been aimed at low-level al Qaeda and Taliban members.¹⁷ During a 12 month period ending in September 2011, McClatchy estimates that drone strikes in Pakistan killed some 482 people, of which only 8 were “senior al Qaida leaders” and 265 were low-level “militants.”¹⁸ Low-

¹¹ U.S. CONST. AMEND. V.

¹² See Michael Ramsey, *Meet the New Boss: Continuity in Presidential War Powers?*, 35 HARVARD JOURNAL OF LAW & PUBLIC POLICY 864, 867-70 (2012).

¹³ See *Reid v. Covert*, 354 U.S. 1, 5-6 (1957) (holding that “we reject the idea that when the United States acts against citizens abroad, it can do so free of the Bill of Rights”).

¹⁴ Ramsey, *Meet the New Boss*, at 867-68.

¹⁵ Peter Bergen, *Drone is Obama’s Weapon of Choice*, CNN.com, Sept. 19, 2012, available at <http://www.cnn.com/2012/09/05/opinion/bergen-obama-drone>.

¹⁶ *Id.*

¹⁷ Jonathan S. Landay, *Obama’s Drone War Kills “Others,” Not Just al Qaida Leaders*, MCCLATCHY NEWSPAPERS, Apr. 9, 2013, available at <http://www.mcclatchydc.com/2013/04/09/188062/obamas-drone-war-kills-others.html>.

¹⁸ *Id.*

level terrorists and their allies are still legitimate targets. But the extension of the targeted killing program to cover such minor figures necessarily heightens the risk of error and abuse.

A related challenge is the extension of targeted killings to cover radical Islamist groups that have few or no ties to al Qaeda or the Taliban. The AUMF only authorizes military action against “those nations, organizations, or persons [the president] determines planned, authorized, committed, or aided the terrorist attacks that occurred on September 11, 2001, or harbored such organizations or persons.”¹⁹ As Harvard Law School Professor and former head of the Office of Legal Counsel Jack Goldsmith points out, the AUMF “is a tenuous foundation for military action against newly threatening Islamist terrorist groups ... that have ever-dimmer links to the rump al-Qaeda organization.”²⁰ The difficulty of determining which groups are closely enough affiliated with al Qaeda to be covered by the AUMF also heightens the danger of error and abuse in target selection.

In this testimony, I do not address the special issues raised by the potential use of targeted killings on American soil. But I agree with Attorney General Eric Holder’s recent statement indicating that the president does not “have the authority to use a weaponized drone to kill an American not engaged in combat on American soil.”²¹

B. Possible Institutional Safeguards.

One partial solution to the problem of target selection would be to require officials to get advance authorization for targeting a United States citizen from a specialized court, similar to the FISA Court, which authorizes intelligence surveillance warrants for spying on suspected foreign agents in the United States. The specialized court could act faster than ordinary courts do and without warning the potential target, yet still serve as a check on unilateral executive power. In the present conflict, there are relatively few terrorist leaders who are American citizens. Given that reality, we might even be able to have more extensive judicial process than exists under FISA.

Professor Amos Guiora of the University of Utah, a leading expert on legal regulation of counterterrorism operations with extensive experience in the Israeli military, has developed a proposal for a FISA-like oversight court that deserves serious consideration by this subcommittee, and Congress more generally.²² The idea of a drone strike oversight court has also been endorsed by former Secretary of Defense Robert Gates, who served in that position in both the Obama and George W. Bush administrations. Gates emphasizes that “some check

¹⁹ AUMF § 2(a), Pub. L. No.107-40,115 Stat. 224.

²⁰ Jack Goldsmith, *US Needs a Rulebook for Secret Warfare*, WASHINGTON POST, Feb. 5, 2013, available at http://www.washingtonpost.com/opinions/us-needs-rules-of-engagement-for-secret-warfare/2013/02/05/449f786e-6a78-11e2-95b3-272d604a10a3_story.html.

²¹ Attorney General Eric Holder, *Letter to Senator Rand Paul*, Mar. 7, 2013, available at <http://www.paul.senate.gov/files/documents/WhiteHouseLetter.pdf>.

²² See Amos Guiora, *Drone Policy: A Proposal Moving Forward*, THE JURIST, Mar. 4, 2013, available at <http://jurist.org/forum/2013/03/amos-guora-drone-policy.php>; See also AMOS GUIORA, LEGITIMATE TARGET: A CRITERIA-BASED APPROACH TO TARGETED KILLING (2013).

on the president's ability to do this has merit as we look to the long-term future," so that the president would not have the unilateral power of "being able to execute" an American citizen.²³

We might even consider developing a system of judicial approval for targeted strikes aimed at non-citizens. The latter process might have to be more streamlined than that for citizens, given the larger number of targets it would have to consider. But it is possible that it could act quickly enough to avoid compromising operations, while simultaneously acting as a check on abusive or reckless targeting. However, the issue of judicial review for strikes against non-citizens is necessarily more difficult than a court that only covers relatively rare cases directed at Americans.

Alternatively, one can envision some kind of more extensive due process within the executive branch itself, as advocated by Neal Katyal of the Georgetown University Law Center.²⁴ But any internal executive process has the flaw that it could always be overridden by the president, and possibly other high-ranking executive branch officials. Moreover, lower-level executive officials might be reluctant to veto drone strikes supported by their superiors, either out of careerist concerns, or because administration officials are naturally likely to share the ideological and policy priorities of the president. An external check on targeting reduces such risks. External review might also enhance the credibility of the target-selection process with informed opinion both in the United States and abroad.

Whether targeting decisions are made with or without judicial oversight, there is also an important question of burdens of proof. How much evidence is enough to justify classifying you or me as a senior Al Qaeda leader? The administration memo does not address that crucial question either.

Obviously, it is unrealistic to hold military operations to the standards of proof normally required in civilian criminal prosecutions. But at the same time, we should be wary of giving the president unfettered power to order the killing of citizens simply based on his assertion that they pose a threat. Amos Guiora suggests that an oversight court should evaluate proposed strikes under a "strict scrutiny standard" that ensures that strikes are only ordered based on intelligence that is "reliable, material and probative."²⁵ It is difficult for me to say whether this standard of proof is the best available option. But the issue is a crucial one that deserves further consideration. Ideally, we need a standard of proof rigorous enough to minimize reckless or abusive use of targeted killing, but not so high as to preclude its legitimate use.

Neither judicial review nor any other oversight system can completely eliminate all errors from the system. Given the limitations of intelligence and the fallibility of human decision-makers, some mistakes are probably inevitable. The only way avoid all error is to ban

²³ Quoted in Amanda Sakuma, *Ex-Pentagon Chief Backs Oversight on Drone Strikes*, MSNBC, Feb. 10, 2013, available at <http://tv.msnbc.com/2013/02/10/ex-pentagon-chief-backs-oversight-on-drone-strikes/>

²⁴ See Neal K. Katyal, *Who Will Mind the Drones?* N.Y. TIMES, Feb. 20, 2013, available at <http://jurist.org/forum/2013/03/amos-guiora-drone-policy.php>http://www.nytimes.com/2013/02/21/opinion/an-executive-branch-drone-court.html?_r=0.

²⁵ Guiora, *Drone Policy*; see also GUIORA, LEGITIMATE TARGET, at chs. 4-5.

targeted killing entirely. But that approach might actually lead to greater loss of innocent life overall, by making it more difficult to combat terrorism and by incentivizing policymakers to use military tactics that often cause greater loss of life than targeted drone strikes.

What we can hope to achieve is an oversight system that greatly diminishes the risk of serious abuse: targeted killings that are undertaken recklessly or - worse still - for the deliberate purpose of eliminating people who do not pose any genuine threat, but are merely attacked because they are critics of the government, or otherwise attracted the wrath of policymakers.

Overall, we should seek to establish procedural safeguards that provide a check on executive discretion without miring the process in prolonged litigation that makes it impossible to conduct operations in “real time.” We cannot achieve anything approaching perfection. But it is reasonable to hope that we can improve on the status quo.

Judicial oversight can help ensure that we are targeting the right individuals. But courts are less likely to be effective in addressing the problem of defining the range of *groups* that we are at war with. Our enemies probably are not limited to individuals formally affiliated with al Qaeda, since that organization has a variety of allies that support it. But the AUMF is not broad enough to cover all radical Islamist groups everywhere, nor is it desirable that we wage war against all of them. Ultimately, only Congress can properly clarify the scope of the conflict we are engaged in.

Like many commentators and legal scholars across the political spectrum, I hope that Congress enacts a framework statute defining the scope of the War on Terror, and regulating the use of targeted killing, including appropriate procedural safeguards. So far, however, it has not chosen to do. It may take a highly visible disaster such as the deliberate or clearly reckless targeting of an obviously innocent person, to stimulate appropriate legislative action. At that point, it may be too late to reverse either the resulting harm to innocent people or the damage to the public image and foreign policy interests of the United States. But I very much hope that such a conjecture is unduly pessimistic.