

Testimony of William C. Banks
before the Subcommittee on National Security and Foreign Affairs,
Committee on Oversight and Government Reform,
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Mr. Chairman, Ranking Member Representative Flake, and Members of the Committee. Thank you for the opportunity to testify concerning the legality of unmanned targeting and the use of drones. I direct the Institute for National Security and Counterterrorism (INSCT) at Syracuse University, where I am the Board of Advisers Distinguished Professor of Law and a professor of public administration in the Maxwell School of Citizenship and Public Affairs. I have been engaged in teaching, writing, and speaking about United States national security and counterterrorism law for more than twenty years.

My prepared testimony provides an overview of the law that applies to the use of drones in targeted killing. In my oral remarks, I will focus on the laws of the United States that govern CIA involvement in unmanned targeting.

Introduction

On the first night of the campaign against al Qa`ida and the Taliban in Afghanistan in October 2001, the United States nearly had a major success. Officials believed that they had pinpointed the location of the supreme leader of the Taliban, Mullah Muhammad Omar. While patrolling the roads near Kabul, an unmanned but armed drone trained its crosshairs on Omar in a convoy of cars fleeing the capitol. Under the terms of an agreement, the CIA controllers did not have the authority to order a strike on the target. Likewise, the local Fifth Fleet commander in

Bahrain lacked the requisite authority. Instead, following the agreement they sought approval from United States Central Command (CENTCOM) in Tampa to launch the Hellfire missile from the Predator drone positioned above Omar.

The Predator followed the convoy to a building where Omar and about 100 guards sought cover. Some delay ensued in securing General Tommy R. Franks' approval. One report indicated that a full-scale fighter-bomber assault was requested, and that General Franks declined to approve the request on the basis of legal advice he received on the spot.¹ Another report suggested that the magnitude of the target prompted General Franks to run the targeting by the White House.² Media reports indicated that President Bush personally approved the strike, although the delay permitted time for Mullah Omar to change his location and thus disrupt the attack.³ F-18s later targeted and destroyed the building, but Omar escaped.⁴ Some speculated that the attack was aborted because of the possibility that others in a crowded house might be killed.

The decision to target specific individuals with lethal force after September 11 was neither unprecedented nor surprising. In appropriate circumstances the United States has engaged in targeted killing at least since a border war with Mexican bandits in 1916.⁵ In a time of war, subjecting individual combatants to lethal force has been a permitted and lawful instrument of waging war successfully. But new elements of the targeted killing policy emerged in recent years, in response to terrorism and its threats against the United States at home and abroad.

The components of the targeted killing policy quickly took on a sharper focus soon after September 11. For the first time, pilotless drone aircraft were equipped both with sophisticated surveillance and targeting technology and with powerful Hellfire missiles capable of inflicting lethal force effectively from a safe distance. After the near miss on Mullah Omar, no verified

intelligence reported seeing, much less targeting, either Omar or Usama bin Laden during the Afghanistan campaign. However, on November 3, 2001, a missile-carrying Predator drone killed Mohammed Atef, al Qa`ida's chief of military operations, in a raid near Kabul.⁶ Then, in early May 2002 the CIA tried but failed to kill an Afghan factional leader, Gulbuddin Hekmatyar, an Islamic fundamentalist who had vowed to topple the government of Hamid Karzai and to attack U.S. forces.⁷

The calculus for targeted killing changed dramatically on November 3, 2002, when a drone fired a Hellfire missile and killed a senior al Qa`ida leader and five low-level operatives traveling by car in a remote part of the Yemeni desert.⁸ In the first use of an armed Predator outside Afghanistan or, indeed, the first military action in the war against terrorism outside Afghanistan, Qaed Salim Sinan al-Harethi was killed. Al Harethi was described as the senior al Qa`ida official in Yemen, one of the top ten to twelve al Qa`ida operatives in the world, and a suspect in the October 2000 suicide bombing of the U.S. destroyer Cole, where 17 American Navy personnel were killed. U.S. intelligence and law enforcement officials had been tracking his movements for months before the attack. Along with al Harethi, killed in the Predator strike were five other al Qa`ida operatives, including an American citizen of Yemeni descent, Kamal Derwish, who grew up in the Buffalo suburb of Tonawanda and who, according to FBI intelligence, recruited American Muslims to attend al Qa`ida training camps.

Now, after years of fighting in Iraq and Afghanistan, the focus of attention for lethal targeting has shifted to Waziristan and neighboring border areas in Pakistan. Last August 5, Baitallah Mehsud was killed when two Hellfire missiles were fired from a Predator drone piloted by someone at CIA headquarters in Virginia. Mehsud was the commander of the Pakistan Taliban. He had terrorized the Pakistani government for years, kidnapped Pakistani soldiers,

deployed suicide bombers into the streets of Pakistan, masterminded the assassination of Prime Minister Benazir Bhutto, and was implicated in attacks on U.S. forces in Afghanistan. The missiles struck while Mehsud was lying on the roof of his father-in-law's house, apparently while receiving an intravenous drip for his diabetes or a kidney condition. His wife and uncle were killed, along with his in-laws and eight others, including Mehsud's bodyguards. To many, news of Mehsud's death underscored an important victory against terrorists. To some others, his death was murder. It was significant that Mehsud was in Pakistan, not Afghanistan, and that the trigger was pulled by the CIA, not the U.S. military. Was Mehsud a combatant involved in an armed conflict with the United States in Pakistan? Alternately, was he a civilian who was taking a direct part in hostilities during an armed conflict? If there was no armed conflict in Pakistan when Mehsud was targeted, did the United States nonetheless possess the U.S. and/or international legal authority to target Mehsud with lethal force?

Overview of the Law that Applies to the use of Drones in Targeted Killing

During his campaign, President Obama promised to pursue terrorists around the world, including in their refuges in Pakistan. In 2009, President Obama ordered more drone strikes than President Bush ordered in two terms as President. In the first months of 2010, the pace quickened, as more than a dozen strikes were carried out in the first six weeks of the year, killing up to ninety suspected militants. The administration's legal position was outlined by State Department Legal Adviser Harold Koh in a March 24 speech. Koh offered a vigorous defense of the use of force against terrorists, including the targeting of persons "such as high-level al Qaeda leaders who are planning attacks."⁹ Koh indicated that each strike is analyzed beforehand based on "considerations specific to each case, including those related to the imminence of the threat, the sovereignty of the states involved, [and] the willingness and ability of those states to suppress

the threat the target poses.”¹⁰ Koh indicated that the operations conform to “all applicable law,”¹¹ and are conducted consistent with the principles of distinction and proportionality. Just what constitutes “all applicable law” in the use of drones in targeted killing?

Regardless of the policy efficacy of the drone strikes, it is never sufficient under the rule of law that a government policy is wise. It must also be supported by law, not just an absence of law violations, but positive legal authority. Indeed, where the subject is intentional, premeditated killing by the government, the need for clearly understood legal authority is paramount. After all, legal authority is what distinguishes murder from lawful policy.

Under the Constitution, the President may order targeted killing in defense of the United States in war. The President’s authority as Commander in Chief to “repel sudden attacks”¹² has traditionally had a real time dimension, or a sort of imminence requirement, by analogy to the doctrine of self-defense at international law. Yet a terrorist attack is usually over before it can be repelled in real time, and when the attack is a suicide attack, it is impracticable to strike back. In addition, the United States has learned to expect terrorists to pursue a course of continuing attacks against us. As such, over time a domestic law anticipatory self-defense custom has emerged that permits the President to use deadly force against a positively identified terrorist if he has exhausted other means of apprehending him.¹³ Congress surely has the legal authority to regulate the use of force in this setting, and it has done so.

The National Security Act of 1947 authorized the CIA to “perform such other functions and duties related to intelligence affecting the national security as the President or National Security Council may direct.”¹⁴ Although the original grant of authority in 1947 likely did not contemplate targeted killing, the 1947 Act was designed as dynamic authority to be shaped by practice and necessity, and by the 1970s, the practice came to include targeted killing. After the

Church Committee learned of and disapproved assassination plots of the CIA or its agents in the mid-1970s, President Ford issued an executive order prohibiting CIA involvement in assassination (but notably not restricting targeted killing) and Congress enacted intelligence oversight legislation that, as amended, continues to require reporting to Congress by the President of significant anticipated intelligence operations.

In the weeks after September 11, President Bush signed an intelligence finding giving the CIA broad authority to pursue terrorism around the world.¹⁵ A finding contains the factual and policy predicates for the intelligence activities authorized in any significant operation, and the document must be personally approved by the President. By statute, a finding must accompany any covert operation approved by the President, including those that permit targeted killing. (The military use operations orders, and are thus neither given authority nor restricted by the findings.) In the classified finding, the President delegated targeting and operational authority to senior civilian and military officials. Revised findings, including any prepared by President Obama, along with their precise approval mechanisms, remain classified. The authority given in these presidential findings is surely the most sweeping and most lethal since the founding of the CIA. In part, the findings contemplate a high and unprecedented degree of cooperation between the CIA and Special Forces, as well as other military units.

Terrorists were first singled out by name in a 1995 Executive Order by President Clinton that introduced a category of “specially designated terrorists” on a list maintained by the Secretary of State and the Treasury Office of Foreign Assets Control.¹⁶ In fact, the CIA has been authorized since 1998 to use covert means to disrupt and preempt terrorist operations planned by Usama bin Laden. The Clinton administration directive was affirmed by President Bush before September 11 and was based on evidence linking al Qa`ida to the August 1998 bombings of U.S.

embassies in Africa. The directive stopped short of authorizing targeted killing, but did authorize lethal force for self-defense.

The 2001 finding was apparently modified in 2006 by President Bush to broaden the class of potential targets beyond UBL and his close circle, and also extends the boundaries beyond Afghanistan.¹⁷ In permitting explicitly the targeting of an individual with lethal force, the finding also more narrowly focuses the potential to inflict violence. Because the Yemen strike was authorized by the President in an intelligence finding, at first blush, the relevant law is the law of intelligence. Since the Hughes-Ryan Amendment of 1974,¹⁸ Congress has authorized CIA covert operations if findings are prepared and delivered to select members of Congress before the operation described, or in a “timely fashion” thereafter. So long as the intelligence committees are kept “fully and currently informed,” the intelligence laws permit the President broad discretion to utilize the nation’s intelligence agencies to carry out national security operations, implicitly including targeted killing.¹⁹ Such an operation would follow intelligence law as an “operation in foreign countries, other than activities intended solely for obtaining necessary intelligence,”²⁰ and thus presumably would be conducted pursuant to statutory authority.

To some it seemed that the 2001 finding ran counter to the long-standing ban on political assassination. Enshrined in an executive order first by President Gerald Ford and unchanged since President Reagan’s iteration in 1981, the directive forbids political assassination but does not define the term.²¹ Just what does distinguish lawful targeted killing from unlawful political assassination? The answer turns upon which legal framework applies. During war, whether authorized by Congress or fought defensively by the President on the basis of his authority, targeted killing of individual combatants is lawful, although killing by treacherous means—through the use of deceit or trickery—is not. In peacetime, any extra-judicial killing by a

government agent is lawful only if taken in self-defense or in defense of others. But what rules apply when the United States is engaged in a nontraditional war on terrorism, or war against al Qaeda? The evolving customary law of anticipatory self-defense and intelligence legislation regulating the activities of the CIA supply adequate, albeit not well articulated or understood legal authority for the drone strikes.

In addition to the President's constitutional authorities as commander in chief and his authorities over intelligence activities authorized by statute, the President's finding may also be supported by Congress's September 14, 2001 Authorization for the Use of Military Force (AUMF) giving the President the authority to use "all necessary and appropriate force" against "persons he determines planned, authorized, committed, or aided the terrorist attacks" of September 11. The sweeping authority granted in the resolution is not time-limited; nor does it have a geographic constraint. Nor is his discretion on choice of target narrowed in any way, so long as the target is connected to September 11 and al Qaeda.²² In my view, Congress should revisit the AUMF, now nearly nine years after enactment, and provide a more fine-grained authorization for the use of military force against terrorists. Criteria should be supplied for the use of force in self-defense, including targeted killings, within and outside what are regarded as traditional battlefields. Congress should debate the criteria for triggering the use of lethal force against suspected terrorists. Is functional membership in al Qaeda or a related group sufficient? Must the target be taking a direct part in hostilities, or is providing financial or logistical support to terrorists enough to permit targeting with lethal force? To what extent should the consent of a sovereign state be required before military force is used against terrorists who seek refuge in that state?

Under what conditions could a U.S. citizen be subject to a Predator attack, ordered by the CIA or the military? Before September 11, the government's authority to kill a citizen outside the judicial process was generally restricted to situations where the American is threatening directly the lives of other Americans or their allies.²³ Still, the President's intelligence finding does not make any exception for Americans. The authority to target U.S. citizens is thus implicit, not explicit. In addition, if the AUMF authorizes strikes against al Qaeda operatives, there may be authority to use lethal force against the radical American-citizen cleric Anwar al-Awaki, who is apparently hiding in Yemen, and who has shifted from encouraging attacks on the United States to directly participating in them.

The defensive use of force—targeted at a known al Qaeda leader, for example—also has firm legal roots in customary international law. In making operational decisions like the one made to strike with the Predator in Afghanistan, Yemen, or Pakistan, the international and U.S. law concerning self-defense permits targeting al Qaeda combatants, although carrying out the strike in a terrorist sanctuary (Pakistan or Yemen, for example) rather than on a traditional battlefield complicates the international legal issues.

On the one hand, President Bush asserted forcefully that the September 11 attacks were acts of war directed at the United States, giving it the legal right to repel the horrific attacks. Secretary of Defense Donald Rumsfeld opined, “it is certainly within the president's power to direct that, in our self-defense, we take this battle to the terrorists and that means to the leadership and command and control capabilities of terrorist networks.”²⁴ Whether waged against us by a state or a non-state terrorist organization, war is defined by what it does, not by the identity of the perpetrator. Still, the law of armed conflict has not yet evolved to account

adequately for the twilight zone between conventional war and conventional peace, when nations are subject to the continuing threat of terrorist attack.

On the other hand, within this twilight zone of threat from terrorist attacks it is not clear exactly what distinguishes a combatant and, thus, a proper target, from a civilian who may not be targeted. Nor is it known what evidence will suffice that someone who does not wear a uniform and who does not fight for a sovereign state is sufficiently implicated in terrorist activities so as to warrant targeting with lethal force. Clearly someone who is positively identified as an al Qaeda operative is an enemy combatant, one who may be targeted with lethal force.

Under international humanitarian law, during an armed conflict the selection of individuals for targeted lethal force is lawful if the targets are combatant forces of another nation, a guerilla force, or a terrorist or other organization whose actions pose a threat to the security of the United States. The United States is surely engaged in an armed conflict in Afghanistan, but the absence of sustained fighting over a significant period of time in Yemen means that there is no armed conflict going on there. Pakistan is a closer case. Until sometime in 2009, and the combined campaign of the Pakistani military and the stepped up use of drone attacks by the Obama administration, the conditions in the border region of Pakistan did not likely rise to the level of an armed conflict under the laws of war. By now, however, the conditions on the ground there have changed so dramatically that the laws of armed conflict may apply in Pakistan, in relation to the United States and its use of military force against al Qaeda or Taliban insurgents.

Conclusion

Contemporary laws have not kept up with changes in the dynamics of military conflicts. Nowhere is the weakness of the legal regime more glaring than in its treatment of targeted killing. The relevant spheres of authority overlap – the laws of the United States (constitutional,

statutory, executive, and customary), international laws (treaty-based and customary), and international humanitarian law (a subset of international law that applies during “armed conflicts”). The relationship of the spheres of authority to one another, and their application as binding law is fraught with dispute and contentiousness. In part, the lack of consensus on the legal rules reflects the changing nature of asymmetric warfare. The United States now finds itself engaged in military conflicts with non-state groups, and such conflicts were not the subject of the extensive international framework for warfare negotiated after the World Wars.

These new battlefields require adaptations of old laws, domestic and international laws. My testimony has shown how the legal authority to permit and regulate targeted killing may be found within the existing legal corpus. Admittedly, however, the foundational authorities are not well formed, and there has been little deliberative attention to modernizing the law to reflect the modern battlefield. Congress would do all of us an important favor by devoting attention to articulating policy and legal criteria for the use of force against non-state terrorists.

¹ See Seymour Hersh, “King’s Ransom,” *The New Yorker* (October 10, 2001). Available at http://www.newyorker.com/fact/content/articles/011022fa_FACT1.

² Michael R. Gordon and Tim Weiner, “A Nation Challenged: The Strategy,” *New York Times* (October 16, 2001), A1.

³ Eric Schmitt, “U.S. Would Use Drones to Attack Iraqi Targets,” *New York Times* (November 6, 2002), A16.

⁴ Gordon and Weiner, “A Nation Challenged”

⁵ See William C. Banks and Peter Raven-Hansen, “Targeted Killing and Assassination: The U.S. Legal Framework,” 37 *U. Richmond L. Rev.* 667, 688 (2003).

⁶ James Risen, “A Nation Challenged: The Terror Network,” *New York Times* (December 13, 2001) at A1.

⁷ Thom Shanker and Carlotta Gall, “U.S. Attack on Warlord Aims to Help Interim Leader,” *New York Times* (May 9, 2002). Available at <http://query.nytimes.com/search/article-page.html?res=9D04E2D91330F93AA35756C0A9649C8B63>.

⁸ John J. Lumpkin, “*Al-Qaida Suspects Die in U.S. Missile Strike*,” Associated Press (November 5, 2002). Available at <http://www.timesunion.com/AspStories/story.asp?storyID=68947>.

⁹ “The Obama Administration and International Law,” Keynote Speech at the Annual Meeting of the American Society of International Law, Harold Hongju Koh, Legal Adviser, United States Department of State, March 24, 2010, <http://www.state.gov/s/l/releases/remarks/139119.htm>

¹⁰ *Ibid.*

¹¹ *Ibid.*

¹² 2 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, at 318 (Max Farrand ed., rev. ed. 1937).

¹³ Banks and Raven-Hansen, 37 Richmond L. Rev. at 677-681.

¹⁴ Pub. L. No. 80-253, §102(d)(5), codified as amended at 50 U.S.C. §403-4a(d)(4).

¹⁵ James Risen and David Johnston, “Bush Has Widened Authority of C.I.A. to Kill Terrorists,” *New York Times*, (December 15, 2002), available at <http://www.nytimes.com/2002/12/15/international>.

¹⁶ Gellman, “CIA Weighs ‘Targeted Killing’ Missions,” *Washington Post* (October 28, 2001), A01. Available at <http://www.washingtonpost.com/wp-dyn/articles/A63203-2001Oct27.html>

¹⁷ David Johnston and David E. Sanger, “Fatal Strike in Yemen Was Based on Rules Set Out by Bush,” *New York Times* (November 6, 2002), A16.

¹⁸ “No funds appropriated under the authority of this or any other Act may be expended by or on behalf of the Central Intelligence Agency for operations in foreign countries, other than activities intended solely for obtaining necessary intelligence, unless and until the President finds that each such operation is important to the national security of the United States and reports, in a timely fashion, a description and scope of such operation to the appropriate committees of the Congress” Pub. L. No. 93-559, §32, 88 Stat. 1804 (1974). The amendment was a component of reforms in intelligence operations law designed to make U.S. covert operations decisions directly accountable to the decision makers. See Stephen Dycus, William C. Banks, and Peter Raven-Hansen, *National Security Law* 456-459 (4th ed. 2006).

¹⁹ Banks and Raven-Hansen, “Targeted Killing and Assassination,” 713.

²⁰ Pub. L. No. 93-559, §32, 88 Stat. 1804 (1974).

²¹ Gellman, “CIA Weighs ‘Targeted Killing’ Missions.”

²² Banks and Raven-Hansen, “Targeted Killing and Assassination,” text at n.482.

²³ John J. Lumpkin, "U.S. Can Target American Al-Qaida Agents," Associated Press (December 3, 2002). Available at <http://story.news.yahoo.com>.

²⁴ Ibid.