



Rosa Brooks

Rosa Brooks is a Bernard L. Schwartz senior fellow at the New America Foundation, a tenured law professor at the Georgetown University Law Center, and a weekly columnist on national security issues for *Foreign Policy*.

From 2009-2011, Brooks served as Counselor to Undersecretary of Defense for Policy Michèle Flournoy. During her time at the Defense Department, Brooks founded DoD's Office for Rule of Law and International Humanitarian Policy and led a major overhaul of the Defense Department's strategic communication and information operations efforts. In July 2011, she received the Secretary of Defense Medal for Outstanding Public Service

From 2005-2009, Brooks wrote a syndicated weekly opinion column for the *Los Angeles Times*. From 2006-2007, Brooks served as Special Counsel to the President of the Open Society Foundation, and from 2001-2006 she was an associate professor of law at the University of Virginia School of Law. From 1999-2001, she was a senior advisor at the U.S. Department of State.

Brooks has also served as a consultant for Human Rights Watch, a term member of the Council on Foreign Relations and a fellow at the Carr Center for Human Rights Policy at Harvard's Kennedy School of Government. She has served on the board of the National Security Network, the World Economic Forum's Global Agenda Council on Fragile States, the board of Amnesty International USA, the executive council of the American Society of International Law, the steering committee of the White Oak Foreign Policy Leaders Project, the advisory committee of Human Rights Watch's Children's Rights Division, and numerous other ad hoc non-profit advisory committees. She has taught at Yale Law School, where she ran the Orville H. Schell Center for International Human Rights Law, and at Harvard University.

Her book, "Can Might Make Rights? The Rule of Law After Military Interventions," (with Jane Stromseth and David Wippman) was published in 2006 by Cambridge University Press, and she has written numerous scholarly articles on international law, failed states, post-conflict reconstruction, human rights, terrorism and the law of war. Her byline has appeared in dozens of publications, from *Harper's Magazine* to the *Washington Post*.

Brooks is a graduate of Harvard University, the University of Oxford (where she was a Marshall Scholar) and Yale Law School.

The Law of Armed Conflict, the Use of Military Force, and the 2001 Authorization for Use of Military Force

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Statement for the Record Submitted the Senate Committee on Armed Services

By

Rosa Brooks

Professor of Law, Georgetown University Law Center
Bernard L. Schwartz Senior Fellow, New America Foundation

Chairman Levin, Ranking Member Inhofe and members and staff of the Committee on Armed Services, thank you for giving me the opportunity to testify today on the law of armed conflict, the use of military force, and the 2001 Authorization for Use of Military Force (AUMF). These are extraordinarily important issues, and I appreciate your commitment to taking a fresh look at them.

I am a law professor at Georgetown University, 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, almost twelve years have gone by since the passage of the AUMF on September 14, 2001. The war in Afghanistan – the longest war in U.S. history-- has begun to wind down. But at the same time, a far more shadowy war has quietly accelerated.

I am referring to what many have called the “drone war”: the increased use of military force by the United States outside of traditional, territorially bounded battlefields,¹ carried out primarily, though not exclusively,² by missile strikes from remotely piloted aerial vehicles.³ In recent years this shadowy war has spread ever further from “hot” battlefields, migrating from

¹ I will use the term “hot battlefields” interchangeably with “traditional battlefields,” “traditional territorially bounded battlefields” or “active theaters of combat.” The intent is not to assert that there is a clear legal distinction between these concepts (that, after all, is part of what is at issue today), but rather to distinguish descriptively between bounded geographical locations in which the existence of an armed conflict is legally uncontroversial and universally acknowledged -- such as Afghanistan, or Iraq prior the the withdrawal of U.S. troops – and situations in which the existence of an armed conflict and/or the applicability of the law of armed conflict is precisely what is controversial.

² While drone strikes have garnered the most media attention, most of the analysis in this testimony applies equally to strikes carried out by manned aircraft and to strikes or raids that involve “boots on the ground,” such as those carried out by Special Operations Forces.

³ These have variously been termed “drones,” “unmanned aerial vehicles,” and “remotely piloted vehicles.” I will generally use the term “drone” as shorthand.

Afghanistan and Iraq to Yemen, Pakistan and Somalia, and perhaps to Mali and the Philippines as well.⁴

As you know, most information about U.S. drone strikes and other U.S. uses of military force outside “hot battlefields” remains classified. As a result, virtually all of what is publicly known has had to be pieced together from leaked U.S. government documents, court filings, NGO and media investigations and occasional statements from government officials of foreign states. Everything in this testimony is therefore subject to the caveat that I can only comment on publicly available information, which is inevitably partial and (in some cases potentially misleading).

Subject to that caveat, however, it appears that U.S. drones strikes, which began as a tool used in extremely limited circumstances to target specifically identified high-ranking al Qaeda officials, have become a tool relied on to go after an ever-lengthening list of bad actors, many of whom appear to have only tenuous links to al Qaeda and the 9/11 attacks, and many of whom arguably pose no imminent threat to the United States. Some of these suspected terrorists have been identified by name and specifically targeted, while others have reportedly been targeted solely on the basis of behavior patterns deemed suspect by U.S. officials.⁵

We also appear increasingly to be targeting militants who are lower and lower down the terrorist food chain,⁶ rather than high-ranking terrorist planners and operatives.⁷ Although drone strikes are thought to have killed well over 3,000 people since 2004,⁸ analysis by the New America Foundation and more recently by the McClatchy newspapers suggests that only a small fraction of the dead appear to have been so-called “high-value targets.”⁹

The increasing use of weaponized drones to target individuals who only tenuous links to Al Qaeda and the 9/11 attacks raises critical legal and policy questions, particularly when such drone strikes occur outside of traditional battlefields. Most pertinently for today’s hearing, such strikes raise significant domestic legal questions about whether current U.S. targeted killing policy is fully in conformity with Congress’ 2001 Authorization for use of Military Force.

In my view, current U.S. targeted killing policy has grown increasingly difficult to justify under the 2001 AUMF. As I will discuss, however, I believe it is neither necessary nor wise to expand the AUMF to give the president broad additional authorities to use force. Expanding the AUMF would effectively cede to the executive branch powers our Constitution entrusts to Congress. This would undermine the separation of powers scheme so vital to sustaining our constitutional democracy, and could easily lead to an irresponsible and unconstrained executive branch expansion of what has already been termed “the forever war.”¹⁰

⁴ See http://www.longwarjournal.org/threat-matrix/archives/2012/06/did_the_us_launch_a_drone_stri.php and <http://www.brookings.edu/research/opinions/2012/03/05-drones-philippines-ahmed>

⁵ So called “signature strikes.”

⁶ See http://articles.cnn.com/2012-09-05/opinion/opinion_bergen-obama-drone_1_drone-strikes-drone-attacks-drone-program

⁷ See <http://www.washingtonpost.com/wp-dyn/content/article/2011/02/20/AR2011022002975.html>

⁸ See <http://counterterrorism.newamerica.net/drones>

⁹ See <http://counterterrorism.newamerica.net/drones>; <http://www.mcclatchydc.com/2013/04/09/188062/obamas-drone-war-kills-others.html#.UZFXncq9QI>; and <http://www.washingtonpost.com/wp-dyn/content/article/2011/02/20/AR2011022002975.html>

¹⁰ <http://opiniojuris.org/wp-content/uploads/2013-5-7-corrected-koh-oxford-union-speech-as-delivered.pdf>

Expanding the AUMF is also wholly unnecessary. Even without any AUMF, the president already has both the constitutional power and the right under international law to use military force to defend the United States from an imminent attack, regardless of whether the threat emanates from al Qaeda or from some new and unrelated terrorist organization.

If Congress chooses to revise the AUMF, it would be far more appropriate to add geographic and temporal limitations-- or clarify Congress' assumptions about the nature of the force authorized-- than to expand it. The 2001 AUMF created a domestic legal framework that assumes an indefinitely continuing state of armed conflict and gives the president advance authorization to use force more or less as he chooses, without regard to geography and without regard to the gravity or imminence of any threats posed to the United States. But as the threat posed by Al Qaeda dissipates and U.S. troops begin to withdraw from Afghanistan, it is appropriate for the U.S. to transition to a domestic legal framework in which there is a heightened threshold for the use of military force.

Congressional authorization for the president to use military force should be reserved for situations in which there is a sustained and intense threat to the United States. If this president or any future president identifies a specific new threat of that nature, he can and should provide Congress with detailed information about the threat, and request that Congress authorize the use of military force in a manner tailored to address the specific threat posed by a specific state or organization.

In the event that the president becomes aware of a threat so imminent and grave that it is not feasible for him to seek Congressional authorization prior to using military force, he can rely on his inherent constitutional powers to take appropriate action – by force if needed-- until the threat has been dissipated or until Congress can act. There is simply no need for Congress to preemptively authorize the president to use military force indefinitely against inchoate threats that have not yet emerged.

Mr. Chairman, the United States is usually credited with the first modern codification of the rules of armed conflict. In 1863, President Abraham Lincoln signed General Order #100, "Instructions for the Government of Armies of the United States in the Field" – better known as the Lieber Code – outlining the core rules of armed conflict with which he expected the Union Army to comply. In Article 29, the Lieber Code makes a bold declaration: "Peace is [the] normal condition; war is the exception. The ultimate object of all modern war is a renewed state of peace."¹¹

This rings as true today as in 1863, when the U.S. faced a truly existential threat. And it invites us to ask a broad policy question in addition to a legal question: do we *want* to live in a world of perpetual, open-ended war? And if not, how do we begin to turn the page on the 9/11 era? What Congressional action will ensure that we retain the ability to protect ourselves when

¹¹ http://avalon.law.yale.edu/19th_century/lieber.asp

necessary, while at the same time ensuring that peace, rather than war, once again becomes our norm?

Difficult as this question is, I am certain of one thing: an expanded AUMF will do nothing to prevent a “forever war.” On the contrary, it would likely lead only to thoughtless further expansion of our current shadowy drone war -- and this, I believe, would both undermine the rule of law and represent an act of supreme strategic folly.

Moving well beyond the issue of the AUMF, U.S. drone strikes outside traditional battlefields also raise significant questions about U.S. compliance with international law principles, and even about what international legal framework is the appropriate framework for evaluating current U.S. targeted killing policy. Is it the international law of armed conflict? The international law concerning the right of states to use force in self-defense? International human rights law? Some combination of all these, or a different framework depending on the factual circumstances unique to each situation? Even more broadly, current U.S. policy raises grave questions about what it means to respect the rule of law when the law itself appears to be ambiguous or indeterminate.

I recently testified at a hearing on “The Constitutional and Counterterrorism Implications of Targeted Killing” held by the Senate Judiciary Committee’s Subcommittee on the Constitution, Civil Rights and Human Rights. In my written statement submitted for the record for that April 23 hearing (see Appendix), I addressed a number of broader issues that I believe are also of interest to the Committee on Armed Services.

Specifically, my April 23 testimony discussed what I view as some of the most common but *unfounded* criticisms of U.S. drone strikes, and identified some advantages of using drones as weapons delivery systems. I argued that drones present no new legal issues *as such*, but drone technologies lower the perceived costs of using lethal force across borders; as a result, they have facilitated a steady expansion of the use of force beyond traditional battlefields, which will likely have long-term strategic costs for the United States.

My April 23 testimony also addressed the significant rule of law challenges posed by current U.S. targeted killing policy. I discussed the international legal framework in which U.S. drone strikes occur, focusing specifically on the law of armed conflict and the international law of self-defense, and arguing that existing international law frameworks offer only ambiguous guidance with regard to the legality of U.S. targeted killings. This creates a grave rule of law problem: when the legal framework for assessing U.S. targeted killings is uncertain and contested, the “legality” of such killings becomes effectively indeterminate. My April 23 testimony also addressed the question of what precedent U.S. targeted killing policy risks setting for other less scrupulous nations, and concluded by highlighting a number of possible ways for Congress to ensure that U.S. targeted killing policy does not continue to undermine vital rule of law norms.

Rather than restate these arguments in this testimony prepared for the Committee on Armed Services, I will focus today solely on questions relating to the 2001 AUMF. However, I am including as an appendix to today’s written testimony the statement I submitted on April 23

to the Judiciary Committee's Subcommittee on the Constitution, Civil Rights, and Human Rights, and I respectfully request that you consider it part of the record for today's hearing as well.

The 2001 Authorization for use of Military Force

Mr. Chairman, our Constitution gives Congress vital powers relating to the use of military force. To Congress is given the power to declare war and the power to raise, support and make rules regulating the armed forces and to make rules concerning "captures on land and water." To Congress is also given the constitutional power to call forth "the militia to execute the laws of the Union, suppress insurrections and repel invasions," as well as the power to "define and punish... offenses against the law of nations." The Constitutional grant of these powers to Congress is essential to our scheme of separation of powers, and Congress has rightly been vigilant against executive usurpation of its constitutional prerogatives.

The original AUMF was passed on September 14, 2001. It gives the president Congressional blessing to

"[U]se 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."¹²

Mr. Chairman and Senator Inhofe, as you and your colleagues on this committee undoubtedly recall, the Bush Administration initially proposed a broader, more open-ended AUMF, one that would authorize the use of force to "deter and pre-empt any future acts of terrorism or aggression against the United States."¹³ But even in those frightening days right after the 9/11 attacks—even as bodies continued to be pulled from the rubble of the Pentagon and the Twin Towers—Congress refused to give the executive branch what would have amounted to an unnecessary and open-ended declaration of permanent war against an inchoate, undefined enemy.

Congressional power once ceded to the executive branch tends never to be regained, and in 2001, Congress rightly wished to ensure that its authorization to use force would not end up eviscerating its vital role in the constitutional scheme. As a result, the language of the 2001 AUMF was drafted with great care. The 2001 AUMF is *forward looking*, insofar as its language

¹² Pub. L. No. 107-40, § 2(a), 115 Stat. 224, 224 (codified at 50 U.S.C. § 1541 note).

¹³ See 147 CONG. REC. S9950-51 (daily ed., Oct. 1, 2001) (statement of Sen. Byrd) (providing the text of the Administration's initial proposal); see also *id.* at S9949 ("[T]he use of force authority granted to the president extends only to the perpetrators of the September 11 attack. It was not the intent of Congress to give the president unbridled authority . . . to wage war against terrorism writ large without the advice and consent of Congress. That intent was made clear when Senators modified the text of the resolution proposed by the White House to limit the grant of authority to the September 11 attack.").

is focused on prevention rather than retaliation; but it is also *backward looking*, insofar as force is explicitly authorized only against those with responsibility for the 9/11 attacks.

The 2001 AUMF does not authorize the U.S. of military force against *every* terrorist or anti-U.S. extremist the world contains. Instead, it focuses squarely on those “nations, organizations, or persons who specifically “planned, authorized, committed, or aided” the 9/11 attacks, as well as those who “harbored” such organizations or persons.

The AUMF also does not authorize force for the open-ended purpose of preventing any and all future acts of terrorism. Instead, it authorizes force for a limited and defined purpose: “to prevent any future acts of international terrorism *against the United States* by *such* nations, organizations or persons.” (emphasis added). This language, on its face, does *not* authorize the use of force for the purpose of preventing terrorist acts *not* directed against U.S. territory or U.S. persons, and it also does *not* authorize the use of force for the purpose of preventing terrorist attacks by nations, organizations or persons who with no culpability for 9/11. Furthermore, as the U.S. Supreme Court has several times emphasized, the AUMF must be construed as authorizing force only to the degree that it is also consistent with the international laws of war. This in turn means that any use of force under the AUMF must be consistent with longstanding law of war principles relating to necessity, proportionality, humanity and distinction.¹⁴

For much of the last dozen years, the AUMF provided adequate domestic legal authority both for the conflict in Afghanistan and for most U.S. drone strikes outside hot battlefields, since most of the individuals targeted in early U.S. strikes were reportedly senior Taliban or Al Qaeda operatives. Early U.S. drone strikes could of course still be criticized on other grounds—as strategically foolish, or as lacking in transparency and protections against abuse¹⁵ -- but strictly from the perspective of domestic authorizing legislation, most of the early U.S. drones strikes appeared comfortably within the scope of the congressionally-granted authority to use force. I believe that this has changed in the last few years.

The 9/11 attacks have receded into the past, the war in Iraq -- which had its own independent AUMF¹⁶ -- is over, the war in Afghanistan is winding down, and Al Qaeda no longer poses the urgent, intense and sustained threat it posed in September 2001. As former Secretary of Defense Leon Panetta said in November 2012, the “core” of Al Qaeda has been “decimated.”¹⁷ In his March 2013 testimony before the Senate Select Committee on Intelligence, Director of National intelligence James Clapper similarly observed that “core” Al Qaeda has been “degraded...to a point that the group is probably unable to carry out complex, large-scale attacks in the West.”

This does not, of course, mean that the world no longer contains any terrorists or anti-U.S. extremists. The world is unfortunately replete with people who resent the United States or

¹⁴ See *Hamdan v. Rumsfeld*, 548 U.S. 557, 594–95 (2006); *Hamdi v. Rumsfeld*, 542 U.S. 507, 519–21 (2004) (plurality opinion).

¹⁵ See, e.g., Rosa Brooks, *Take Two Drones and Call me in the Morning*, *Foreign Policy*, Sept. 12, 2012. Available at http://www.foreignpolicy.com/articles/2012/09/12/take_two_drones_and_call_me_in_the_morning

¹⁶ http://en.wikipedia.org/wiki/Iraq_Resolution

¹⁷ Hon. Leon Panetta, Sec’y of Def., “The Fight Against Al Qaeda: Today and Tomorrow,” Speech Before the Center for a New American Security (Nov. 20, 2012), *available at* <http://www.cfr.org/defense-strategy/panettas-speech-al-qaeda-november-2012/p29547>.

oppose U.S. policies. Some subset of those people self-identify with the distorted brand of Islam favored by Al Qaeda and the Taliban, and a further subset may be willing to use violence to further their ends.¹⁸

Not all these people and organization pose serious or urgent threats to the United States, however. I am not privy to classified military or intelligence evaluations of the capabilities of foreign terrorist organizations, but publicly available information suggests that while extremists and terrorists abound, few have both the intent and the ability to plan and implement actual attacks against the United States.

Indeed, in his March 2013 testimony SSCI testimony, DNI James Clapper did not highlight any organization known to have both the current intent and the current capacity to carry out attacks against the United States. He noted, for instance, that Al Qaeda in the Arabian Peninsula (AQAP) continues to view attacks on U.S. soil as “part of [its] transnational strategy,” but he also suggested that AQAP has regional and internal priorities that its leaders may view as taking precedence over U.S. operations, given its limited number of “individuals who can manage, train, and deploy operatives for U.S. operations.”¹⁹ DNI Clapper suggested that other known international terrorist organizations are primarily local or regional in their interests and reach. Al Qaeda in Iraq’s “goals inside Iraq will almost certainly take precedence over U.S. plotting,” while “Somalia-based al-Shabaab will remain focused on local and regional challenges.” Clapper offered similar assessments of Syria’s al Nusra Front, Al Qaeda in the Islamic Maghreb (AQIM), Nigeria’s Boko Haram and Pakistan’s Lashkar-e-Tayibba.

Nevertheless, the publicly available evidence suggests that the United States continues to use military force outside hot battlefields not only against the remnants of “core” al Qaeda and the Taliban, but also against known or suspected members of other organizations-- including Somalia’s al Shabaab -- as well as against individuals identified by U.S. intelligence only as “militants,” “foreign fighters” and “unknown extremists.”²⁰

Insofar as such groups and individuals were unconnected to the 9/11 attacks and are not planning or carrying out terrorist attacks against the United States, the use of force against these groups and individuals-- at least outside of traditional battlefields -- does not appear to be authorized by the 2001 AUMF.

The Obama administration has countered this argument by asserting that insofar as Congress intended the AUMF to be the functional equivalent of a declaration of war, the AUMF must be read to include the implied law of war-based authority to target groups that are “associates” of Al Qaeda or the Taliban.

However, it is not clear that Congress intended to authorize the use of force *outside* of traditional territorial battlefields against mere “associates” of those responsible for the 9/11 attacks. It is also not clear how the executive branch defines “associates” of al Qaeda, and the

¹⁸ Arguably, post-9/11 U.S. counterterrorism policy has increased, rather than decreased, the number of people in this category.

¹⁹ <http://www.intelligence.senate.gov/130312/clapper.pdf>

²⁰ <http://www.mcclatchydc.com/2013/04/09/188062/obamas-drone-war-kills-others.html#.UZF-Xncq9QI>

Obama Administration has not offered any public explanation of which groups it considers to be “associates” of Al Qaeda or the Taliban.

The international law of war unquestionably permits parties to a conflict to target “co-belligerents” of the enemy. On a traditional battlefield—such as within the territorial confines of Afghanistan—it would clearly be permissible for the U.S. to target individuals and groups that are fighting alongside the Taliban or Al Qaeda.²¹ It is less clear that this is the case outside “hot battlefields.” In this murkier context, it is far harder to determine what would constitute “co-belligerency” with Al Qaeda, and executive branch officials have provided no clear criteria, nor even a simple list of those it regards as “associates” under a co-belligerency theory.

As a result, there is a real danger that the Administration’s assertion that the AUMF authorizes the use of force against AQ “associates” even outside of traditional battlefields could become a backdoor way of expanding the AUMF far beyond Congress’ intent.

As noted earlier, in 2001 Congress refused to acquiesce in Bush Administration proposals to that the AUMF authorize force to “deter and pre-empt any future acts of terrorism or aggression,” and instead opted for language that was far more specific and limiting. If Congress now accepts Obama Administration claims that force can be used against a broad category of persons and organizations determined (based on unknown criteria) to be AQ “associates,” this would effectively turn the AUMF into precisely the open-ended authorization to use force that Congress chose to avoid in 2001.

Congress bears some responsibility for enabling the executive branch to assert such virtually unlimited authority to use force, however. In the 2006 and 2009 Military Commissions Acts, for instance, Congress gave military commissions jurisdiction over individuals who are “part of forces *associated* with Al Qaeda or the Taliban,” along with “those who purposefully and materially support such forces in hostilities against U.S. Coalition partners.”²²

This allowed the Bush Administration and later the Obama Administration to argue that if Congress considers it appropriate for U.S. military commissions to have *jurisdiction* over AQ and Taliban associates—including over those “associates” who were detained in geographical locations far from traditional battlefields-- Congress *must* believe the executive branch has the authority to *detain* such associates found far from traditional battlefields, and the authority to detain must stem from the authority to use force. Indeed, by 2009 the Obama Administration was arguing in court that at least when it comes to detention, the AUMF implicitly authorizes the president “to detain persons who were part of, or substantially *supported*, Taliban or al-Qaida forces or *associated forces* that are engaged in hostilities against the United States *or its coalition partners*.”²³ (My emphasis).

²¹ Indeed, the AUMF notwithstanding, the U.S. would be justified under international self-defense principles in using force against persons or organizations posing an imminent threat to U.S. personnel, subject to the principles of necessity and proportionality.

²² See, e.g., Military Commissions Act of 2006 (2006 MCA), Pub. L. No. 109-366, 120 Stat. 2600 (codified in part at 28 U.S.C. § 2241)

²³ <http://www.justice.gov/opa/documents/memo-re-det-auth.pdf>

But note how far this has shifted from the original language of the AUMF: at least with regard to detention, the administration's focus is no longer merely on those who were directly complicit in the 9/11 attacks, but on a far broader category of individuals. This broadened understanding of executive *detention* authority was later given the congressional nod in the 2012 NDAA, which used virtually identical language.²⁴

The key subsequent move in the executive branch's gradual expansion of the scope of the 2001 AUMF was the conflation of detention authority with the authority to target using lethal force. Logically, as the Supreme Court noted in 2004,²⁵ a party to a conflict must have the power to lawfully detain all persons it has the lawful power to kill. The greater power must include the lesser: if it would be lawful to shoot an enemy combatant, it must be lawful to capture and hold him instead. Working backward from this principle, the Obama Administration appears to have reasoned that if it is lawful to detain an individual, it is equally lawful to use force against him.

This does not follow: while the existence of the greater power implies the existence of the lesser power, Congressional authorization of the lesser power (detention) should not be construed – in the absence of express, unambiguous manifestations of Congressional intent-- to include Congressional authorization of the greater power (the use of military force to target and kill “associates” of Al Qaeda). However, Congress' failure to clarify its intent with regard to the AUMF has enabled the executive to read Congressional silence as approval.

Notwithstanding executive branch efforts to shoehorn the vague category of “associates” into the AUMF, few would dispute that as the “drone war” expands, it has become more and more difficult to view all current Obama administration uses of force as congruent with the limited authorities granted by Congress on September 14, 2011. In February 2012, then-Pentagon General Counsel Jeh Johnson insisted that the 2001 AUMF remains the domestic legal “bedrock” of the military's drone strikes,²⁶ and Administration representatives have repeatedly affirmed this view. But as a recent Hoover Institution white paper authored by former Obama official Bobby Chesney, former Bush officials Jack Goldsmith and Matt Waxman and the Brookings Institution's Ben Wittes concludes, “in a growing number of circumstances, drawing the requisite connection to the AUMF requires an increasingly complex daisy chain of associations—a task that is likely to be very difficult... in some cases, and downright impossible in others.”²⁷

John Bellinger, former State Department Legal Advisor under President Bush, is equally blunt: the AUMF is “getting a little long in the tooth.” Like it or not, the language of the AUMF is still clearly “tied to the use of force against the people who planned, committed, and or aided

²⁴ See FY2012 NDAA § 1021(b)(2), 125 Stat. at 1562 (authorizing detention of “A person who was a part of or substantially supported al-Qaeda, the Taliban, or associated forces that are engaged in hostilities against the United States or its coalition partners, including any person who has committed a belligerent act or has directly supported such hostilities in aid of such enemy forces”).

²⁵ Hamdi v. Rumsfeld, <http://www.law.cornell.edu/supct/html/03-6696.ZS.html>

²⁶ <http://www.cfr.org/counterterrorism/targeted-killings/p9627>

²⁷ Robert Chesney et al., Hoover Inst., A Statutory Framework for Next-Generation Terrorist Threats (2013), <http://media.hoover.org/sites/default/files/documents/Statutory-Framework-for-Next-Generation-Terrorist-Threats.pdf>.

those involved in 9/11," says Bellinger. "The farther we get from [targeting] al-Qaeda, the harder it is to squeeze [those operations] into the AUMF." ²⁸

If the Administration's use of force outside traditional battlefields is increasingly hard to justify under the AUMF, what should Congress do in response?

Congress could, of course, choose to do in 2013 what it refused to do in 2001, and broaden the existing AUMF to expressly permit the executive branch to use force to deter or preempt any future attacks or aggression towards the United States or U.S. interests. But such an expansion of the AUMF would give this and all future Administrations virtual carte blanche to wage perpetual war against an undefined and infinitely malleable list of enemies, without any time limits or geographical restrictions.

In my view, this would amount to an unprecedented abdication of Congress's constitutional responsibilities. In effect, Congress would be delegating its war powers almost wholesale to the executive branch. And while such a broad authorization to use military force could in theory be narrowed or withdrawn by a subsequent Congress, history suggests that the expansion of executive power tends to be a one-way ratchet: power, once ceded, is rarely regained.

Mr. Chairman, my guess is that few members of this committee would wish to contemplate such a broadened AUMF. What is more, it is worth emphasizing once again that while the Bush administration requested such open-ended authority to use force immediately after 9/11, Congress refused to provide it – even at a moment when the terrorist threat to the United States was manifestly more severe than it is now.

Today, the Obama Administration has not requested or suggested that it sees any need for an expanded AUMF. It would be utterly unprecedented for Congress to give the executive branch a statutory authorization to use force when the president has not requested it.

Similar flaws characterize proposals to revise the AUMF to permit the president to use force against any organizations he may, in the future, specifically identify as posing a threat to the United States, based on criteria established by Congress. This is the proposal made by the Hoover Institute White Paper co-authored by my colleague Jack Goldsmith. He and his co-authors argue that Congress could pass a revised AUMF containing "general statutory criteria for presidential uses of force against new terrorist threats but requir[ing] the executive branch, through a robust administrative process, to identify particular groups that are covered by that authorization of force."

While it would surely be useful for Congress to provide greater clarity on what, in its view, constitutes a threat sufficient to justify the open-ended use of military force -- amounting to a declaration of armed conflict-- such a revised AUMF would still effectively delegate to the president constitutional powers properly entrusted to Congress. Once delegated, these powers

²⁸ http://www.washingtonpost.com/world/national-security/administration-debates-stretching-911-law-to-go-after-new-al-qaeda-offshoots/2013/03/06/fd2574a0-85e5-11e2-9d71-f0feafdd1394_print.html

would be difficult for Congress to meaningfully oversee or dial back—and, once again, it is notable that the president has not requested such a power.

Mr. Chairman, Senator Inhofe, if what we're concerned about is protecting the nation, there is no need for an expanded AUMF. With or without the 2001 AUMF, no one disputes that the president has the constitutional authority (and the international law authority) to use military force if necessary to defend the United States from an imminent attack, regardless of whether the threat emanates from al Qaeda or from some as yet unimagined terrorist organization.

If Congress chooses to revise the AUMF, it would be far more appropriate to limit it than to expand it. The 2001 AUMF established – at least as a matter of domestic U.S. statutory law-- an indefinitely continuing state of armed conflict between the United States, on the one hand, and those responsible for the 9/11 attacks, on the other hand. This has enabled the executive branch to argue (both as a matter of U.S. law and international law) that it is the principles of the law of armed conflict (LOAC) that should govern the U.S. use of armed force for counter-terrorism purposes. But if the law of armed conflict is the applicable legal framework through which to understand the AUMF and through which to evaluate U.S. drone strikes outside of traditional battlefields, there are very few constraints on the U.S. use of armed force, and no obvious means to end the conflict.

Compared to other legal regimes, including both domestic law enforcement rules and the international law on self defense, the law of armed conflict is extremely permissive with regard to the use of armed force. The law of armed conflict permits the targeting both of enemy combatants and their co-belligerents. It also allows enemy combatants to be targeted by virtue of their status, rather than their activities: it is permissible to target enemy combatants while they are sleeping, for instance, even though they pose no "imminent" threat while asleep, and the lowest-ranking enemy soldier can be targeted just as lawfully as the enemy's senior-most military leaders. Indeed, uniformed cooks and clerks with no combat responsibilities can be targeted along with combat troops.

It is this highly permissive law of armed conflict framework that has enabled the executive branch to assert that "associates" of al Qaeda and the Taliban may be targeted beyond traditional battlefields, even though this expansion of the use of force beyond those responsible for 9/11 was not contemplated by Congress in the 2001 AUMF. Similarly, it is the law of armed conflict framework that has permitted the executive branch to assert the authority to target ever lower-level terrorists and suspected "militants," rather than restricting drone strikes to those targeting the most dangerous "senior" operatives. It is also the law of armed conflict framework that permits the executive branch to assert that it may target even those individuals and organizations that pose no imminent threat to the United States, in the normal sense of the word "imminent."

But as the threat posed by Al Qaeda dissipates and U.S. troops withdraw from Afghanistan, it is appropriate for the U.S. to transition to a domestic (and international) legal framework in which there are tighter constraints on the use of military force. Congress can help this transition along by clarifying that the existing AUMF is not an open-ended mandate to wage a "forever war," and requiring the president to satisfy more exacting legal standards before

military force is authorized or used.

In the event that the president becomes aware of a threat so imminent and grave he cannot wait for Congressional authorization prior to using military force, there is no dispute that he can rely on his inherent constitutional powers to take appropriate action until the threat has been eliminated or until Congress can act. However, by expressly granting the power to declare war and associated powers to Congress, our Constitution presumes that the president will only in rare circumstances rely solely on his inherent executive powers to use military force. Historically, non-congressionally authorized uses of force by the president have generally been reserved for rare and unusual circumstances, and this is as it should be.

Beyond these rare situations of extreme urgency, if the president believes that there is a sustained and intense threat to the United States, he can and should provide Congress with detailed information about the threat, and request that Congress authorize the use of military force to address the *specific* threat posed by a *specific* state or organization.

Congress should authorize the use of military force in these circumstances *only* -- there is no need for Congress to preemptively authorize the president to use military force indefinitely against unspecified threats that the president has not yet identified. And if Congress *does* authorize the use of military force at the president's request, the force authorized should be carefully tailored to the specific threat. Furthermore, Congress should be explicit about whether an AUMF is acknowledging or authorizing an ongoing armed conflict, on the one hand, or whether it is simply authorizing the limited use of force for self-defense, on the other hand.

International law imposes criteria for the use of force in national self-defense that are far more stringent than the criteria for using force in the course of an armed conflict that is ongoing. Unlike the international law of armed conflict, the international law of self-defense permits states to use force only to *respond* to an armed attack or to prevent an *imminent* armed attack, and the use of force in self defense is subject to the principles of necessity and proportionality. Under self defense rules (unlike law of armed conflict rules) individuals who pose no imminent threat cannot be targeted, and inquiries into imminence, necessity and proportionality tend to restrict the use of force in self defense to strikes against those who— by virtue of their operational seniority or hostile activities- pose threats that are urgent and grave, rather than speculative, distant or minor.

For this reason, I believe that if Congress wishes to refine or clarify the AUMF, it should consider limiting the AUMF's geographic scope, limiting its temporal duration, limiting the authorized use of force to that which would be considered permissible self defense under international law, or all three.

Expressly limiting the AUMF's geographic scope to Afghanistan and/or other areas in which U.S. troops on the ground are actively engaged in combat, for instance, would clarify that the *ongoing* armed conflict (and the applicability of the law of armed conflict) is limited to these more traditional battlefield situations. As noted above, such a geographical limitation would by no means undermine the president's ability to use force to protect the United States from threats emanating from outside of the specified region. Such a geographical limitation would merely

make it clear that any presidential desire to use force elsewhere would require him either to request an additional narrowly drawn congressional authorization to use force, or would require that any non-congressionally authorized use of force be justified -- constitutionally and internationally -- on self defense grounds, by virtue of the gravity and imminence of a specific threat.

Limiting the AUMF's temporal scope could be accomplished by adding a "sunset" provision to the AUMF. The current AUMF could be set to expire when U.S. troops cease combat operations in Afghanistan, for instance, or in 2015, whichever date comes first. Here again, such a limitation would not preclude the president from requesting an extension or a new authorization to use force, if clearly justified by specific circumstances, nor would it preclude the president from relying on his inherent constitutional powers if force becomes necessary to prevent an imminent attack.

Finally, the AUMF could be revised to clarify Congress' view of the applicable legal framework. Congress could state explicitly that it authorizes the president to engage in an ongoing armed conflict within the borders of Afghanistan between the U.S. and Al Qaeda, the Taliban and their co-belligerents, but that it does not currently authorize the initiation or continuation of an armed conflict in any other place, and expects therefore that any U.S. military action elsewhere or against other actors shall be governed by principles of self-defense rather than by the law of armed conflict.

There are many possible ways for Congress to signal its commitment to preventing the AUMF from being used to justify a "forever war." Each of these approaches has both benefits and drawbacks, and each would require significant further discussion. But I believe that Congress' focus should be on ensuring that war remains an exceptional state of affairs, not the norm. At a minimum, this should preclude any Congressional expansion of existing AUMF authorities.

Mr. Chairman, let me close with a plea for perspective. We live in a dangerous world: adversarial states such as North Korea and Iran remain bellicose; the changing role of near-peer powers such as China and Russia poses challenges to U.S. interests and global stability; the Middle East remains awash in violence, and technological advances could place lethal tools in the hands of irresponsible actors. We also face unprecedented challenges from our increased global interdependence: climate change, the interdependence of global financial systems and our ever-increasing reliance on the internet all create new vulnerabilities. Against the backdrop of these many dangers, old and new, the fear of terrorist attack should not be the primary driver of U.S. national security policy.

Terrorism is a very real problem, and we cannot ignore it, any more than we should ignore violent organized crime or large-scale public health threats. Like everyone else, I worry about terrorists getting ahold of weapons of mass destruction. At the same time, we should recognize that terrorism is neither the only threat nor the most serious threat the U.S. faces.²⁹ With the sole exception of 2001, terrorist groups worldwide have never succeeded in killing

²⁹ http://www.foreignpolicy.com/articles/2013/03/04/fp_survey_future_of_war

more than a handful of Americans citizens in any given year. According to the State Department, seventeen American citizens were killed by terrorists in 2011, for instance. The terrorist death toll was fifteen in 2010 and nine in 2009.³⁰

These deaths are tragedies, and we should continue to strive to prevent such deaths—but we should also keep the numbers in perspective. On average, about 55 Americans are killed by lightning strikes each year,³¹ and ordinary criminal homicide claims about 16,000 U.S. victims each year.³² No one, however, believes we need to give the executive branch extraordinary legal authorities to keep Americans from venturing out in electrical storms, or use armed drones to preemptively kill homicide suspects.

What's more, we should keep in mind that military force is not the only tool in the U.S. arsenal against terrorism.³³ Since 9/11, we've gotten far more effective at tracking terrorist activity, disrupting terrorist communications and financing, catching terrorists and convicting them in civilian courts,³⁴ and a wide range of other counterterrorism measures. Much of the time, these non-lethal approaches to counterterrorism are as effective as targeted killings. And in fact, there's growing reason to fear that the expansion of U.S. drone strikes is strategically counterproductive.

Former vice-chair of the Joint Chiefs of Staff General James Cartwright recently expressed concern that as a result of U.S. drone strikes, the U.S. may have “ceded some of our moral high ground.”³⁵ Retired General Stanley McChrystal has expressed similar concerns: “The resentment created by American use of unmanned strikes... is much greater than the average American appreciates. They are hated on a visceral level, even by people who've never seen one or seen the effects of one,” and fuel “a perception of American arrogance.”³⁶ Former Director of National Intelligence Dennis Blair agrees: the U.S. needs to “pull back on unilateral actions... except in extraordinary circumstances,” Blair told CBS news in January. U.S. drone strikes are “alienating the countries concerned [and] ...threatening the prospects for long-term reform raised by the Arab Spring... [U.S. drone strategy has us] walking out on a thinner and thinner ledge and if even we get to the far extent of it, we are not going to lower the fundamental threat to the U.S. any lower than we have it now.”³⁷

Mr. Chairman, Senator Inhofe, I believe it is past time for a serious overhaul of U.S. counterterrorism strategy. This needs to include a rigorous cost-benefit analysis of U.S. drone strikes, one that takes into account issues both of domestic legality and international legitimacy, and evaluates the impact of targeted killings on regional stability, terrorist recruiting, extremist sentiment, and the future behavior or powerful states such as Russia and China. If we undertake such a rigorous cost-benefit analysis, I suspect we may come to see scaling back on kinetic counterterrorism activities less as an inconvenience than as a strategic necessity—and we may

³⁰ <http://www.state.gov/j/ct/rls/crt/2011/index.htm>

³¹ <http://usatoday30.usatoday.com/weather/news/story/2012-01-09/lightning-deaths-storms-weather/52504754/1>

³² http://www.cdc.gov/nchs/data/nvsr/nvsr61/nvsr61_06.pdf

³³ http://www.whitehouse.gov/sites/default/files/counterterrorism_strategy.pdf

³⁴ <http://www.justice.gov/cjs/>

³⁵ <http://m.npr.org/news/Politics/178753575?textSize=small>

³⁶ <http://www.telegraph.co.uk/news/worldnews/asia/pakistan/9787912/Stanley-McChrystal-criticises-reliance-on-drones-as-strikes-hit-Pakistan.html>

³⁷ <http://www.politico.com/news/stories/0711/60199.html#ixzz2NUC4UwYa>

come to a new appreciation of counterterrorism measures that don't involve missiles raining from the sky.

This *doesn't* mean we should never use military force against terrorists. In some circumstances, military force will be justifiable and useful. But it *does* mean we should rediscover a long-standing American tradition: reserving the use of exceptional legal authorities for rare and exceptional circumstances.

Thank you for the opportunity to testify today.

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The Constitutional and Counterterrorism Implications of Targeted Killing Testimony Before the Senate Judiciary Subcommittee on the Constitution, Civil Rights, and Human Rights

April 23, 2013

Statement for the Record Submitted By
Rosa Brooks

Professor of Law, Georgetown University Law Center
Bernard L. Schwartz Senior Fellow, New America Foundation

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 U.S. 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 U.S. 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.

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In the first part of this testimony, I will first address some of the most common but *unfounded* criticisms of U.S. 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 U.S. drone policy. In the fourth section, I will first discuss the concept of the rule of law and the legal framework in which U.S. 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 U.S. targeted killings. In the fifth section, I will briefly address the question of what precedent U.S. 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 U.S. 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 U.S. 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 U.S. 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 U.S. 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 U.S. 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,

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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.³⁸ (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 U.S. drone strikes killed somewhere between 1,873 and 3,171 people overall in Pakistan, of whom between 282 and 459 were civilians.³⁹

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 20th century.⁴⁰ 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 1.⁴¹

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 1.⁴² More recent UN figures suggest a far lower rate, with as few as one civilian killed for every ten airstrikes in Afghanistan.⁴³ 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.⁴⁴ 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 U.S. armed forces or the Central Intelligence Agency with regard to drone strikes. The Obama Administration is reportedly finalizing a targeted killing "playbook,"⁴⁵ 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 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

³⁸ See <http://www.thebureauinvestigates.com/category/projects/drones/>

³⁹ <http://counterterrorism.newamerica.net/drones>

⁴⁰ See 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

⁴¹ See http://en.wikipedia.org/wiki/Casualties_of_the_Iraq_War

⁴² See <http://smallwarsjournal.com/jrnl/art/close-air-support-and-civilian-casualties-in-afghanistan>

⁴³ 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-U.S.>

⁴⁴ See <http://counterterrorism.newamerica.net/drones>

⁴⁵ See 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>

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targeted killing.⁴⁶ (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 U.S. drone policy also decry the fact that drones enable U.S. 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."⁴⁷ 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.”⁴⁸

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. A recent Air Force study found that 29 percent of drone pilots suffered from "burnout," with 17 percent "clinically distressed."⁴⁹

⁴⁶ See http://msnbcmedia.msn.com/i/msnbc/sections/news/020413_DOJ_White_Paper.pdf

⁴⁷ See <http://www.ewtn.com/library/COUNCILS/LATERAN2.HTM>

⁴⁸ 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)

⁴⁹ See <http://www.npr.org/2011/12/19/143926857/report-high-levels-of-burnout-in-u-s-drone-pilots>

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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.⁵⁰ Most drones are economical compared with the available alternatives.⁵¹ Manned aircraft, for instance, are quite expensive.⁵² 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.⁵³ 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,⁵⁴ precision drone technologies reduce the perceived moral and reputational costs of using lethal force. The U.S. 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 casualties cause pain and resentment within local populations and host-country governments and alienate the international community.

⁵⁰ See https://www.deloitte.com/assets/Dcom-Australia/Local%20Assets/Documents/Industries/Government%20Services/Public%20Sector/Deloitte_DefenseUAV_DI_CaseStudy_2Apr2012.pdf

⁵¹ See <http://www.economist.com/node/14299496>

⁵² See <http://fpc.state.gov/documents/organization/180677.pdf>

⁵³ See <http://www.nationaldefensemagazine.org/archive/2012/February/Pages/AirForceF-35s,DronesMaySquareOffinBudgetBattle.aspx>

⁵⁴ See <http://www.nytimes.com/2012/07/15/sunday-review/the-moral-case-for-drones.html>

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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 U.S. 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,⁵⁵ rather than terrorist masterminds.⁵⁶ Although drone strikes are believed to have killed more than 3,000 people since 2004,⁵⁷ 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."⁵⁸ What's more, drone strikes have spread ever further from "hot" battlefields, migrating from Pakistan to Yemen to Somalia (and perhaps to Mali⁵⁹ and the Philippines as well).⁶⁰

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?

⁵⁵ See http://articles.cnn.com/2012-09-05/opinion/opinion_bergen-obama-drone_1_drone-strikes-drone-attacks-drone-program

⁵⁶ See <http://www.washingtonpost.com/wp-dyn/content/article/2011/02/20/AR2011022002975.html>

⁵⁷ See <http://counterterrorism.newamerica.net/drones>

⁵⁸ See <http://www.washingtonpost.com/wp-dyn/content/article/2011/02/20/AR2011022002975.html>

⁵⁹ See http://www.longwarjournal.org/threat-matrix/archives/2012/06/did_the_us_launch_a_drone_stri.php

⁶⁰ See <http://www.brookings.edu/research/opinions/2012/03/05-drones-philippines-ahmed>

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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,⁶¹ 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 U.S. 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 U.S. drone strikes ultimately have on the stability of Pakistan, Yemen, or Somalia?⁶² 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?⁶³ As Defense Secretary Donald Rumsfeld asked during the Iraq war, are we creating terrorists faster than we kill them?⁶⁴

At the moment, there is little evidence that U.S. 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 military acquaintance of mine memorably put it, drone strikes remain “a tactic in search of a strategy.”

⁶¹ See <http://www.economist.com/node/21561927>

⁶² See <http://www.guardian.co.uk/world/2012/jun/05/al-qaida-drone-attacks-too-broad>

⁶³ 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

⁶⁴ See <http://www.usatoday.com/news/washington/executive/rumsfeld-memo.htm>

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4. Drones and the rule of law

Mr. Chairman, I would like to turn now to the legal framework applicable to U.S. 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.⁶⁵

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 U.S. 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, U.S. drone policy is on the verge of doing significant damage to the rule of law.

A. The Rule of Law

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

⁶⁵ See 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>.

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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 U.S. 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 U.S. 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,⁶⁶ and distinction.⁶⁷

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 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

⁶⁶ See generally the U.S. Army’s Operational Law Handbook, 2012, at 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

⁶⁷ See generally the U.S. Army’s Operational Law Handbook, 2012, at 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

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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.⁶⁸

This is a radical oversimplification of a very complex body of law.⁶⁹ 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-all⁷⁰ -- torture, rape are always crimes under the law of war, as is killing that is willful, wanton and not justified by military necessity⁷¹ -- 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 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

⁶⁸ See generally the U.S. Army’s Operational Law Handbook, 2012, at http://www.loc.gov/rr/frd/Military_Law/pdf/operational-law-handbook_2012.pdf

⁶⁹ See <http://ihl.ihlresearch.org/index.cfm?fuseaction=page.viewpage&pageid=2083>

⁷⁰ See <http://www.law.cornell.edu/uscode/text/18/2441>

⁷¹ See <http://www1.umn.edu/humanrts/instree/iccelementssofcrimes.html>

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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).⁷²

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 U.S. 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 U.S. 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 U.S. sometimes takes public credit for the deaths of alleged terrorist leaders, most of the time, the U.S. 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.⁷³ 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 U.S. 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 U.S. targeted killings. Are they, as the U.S. government argues, legal under the laws of war? Or are they, as some human rights groups have argued, unlawful murder?

⁷² 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).

⁷³ See <http://www.hrw.org/news/2011/12/19/q-us-targeted-killings-and-international-law>

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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 U.S. 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 U.S. 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:⁷⁴ to be "imminent," a threat cannot be distant or speculative.⁷⁵ 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 paper⁷⁶—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 U.S. 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 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,

⁷⁴ The most restrictive traditional formulation of the term imminent in international law can be seen in the famous 1837 Exchange of letters between U.S. 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/>

⁷⁵ See <http://opiniojuris.org/2012/03/07/why-preventive-self-defense-violates-the-un-charter/>

⁷⁶ See http://msnbcmedia.msn.com/i/msnbc/sections/news/020413_DOJ_White_Paper.pdf

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“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 U.S. 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 U.S. 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 U.S. government to target U.S. 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,⁷⁷ and insiders insist that executive branch officials go through an elaborate process in which they carefully consider every possible issue before determining that a drone strike is lawful.⁷⁸

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

⁷⁷ See <http://www.uta.edu/faculty/story/2311/Misc/2013,4,1,DronesTargetedKillingWhoCanWeKill.pdf>;

⁷⁸ See <http://www.state.gov/s/1/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>

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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 U.S. 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 U.S. 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.⁷⁹ In the international arena, all sovereign states are formally considered equal and possessed of the right to control their own internal affairs free of 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

⁷⁹ See <http://www.towson.edu/polsci/irencyc/sovrein.htm>

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invitation or consent, or when force is authorized by the U.N. Security Council, pursuant to the U.N. Charter,⁸⁰ 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.⁸¹ If the U.S. 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 U.S. 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 U.S. 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 U.S. 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.

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

⁸⁰ See <http://www.un.org/en/documents/charter/chapter7.shtml>

⁸¹ 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.

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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 U.S. counterterrorism, national security and foreign policy goals, and appropriate mechanisms for improving oversight, accountability and conformity to U.S. 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 21st 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.

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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 U.S. targeted killing policy on allies, and the impact on broader U.S. 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 U.S. 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, U.S. citizens have a right to understand the government’s views on the legality of targeting U.S. 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,

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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 U.S. targeted killing policy complies with U.S. 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*.⁸² 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 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

⁸² See <http://www.lawfareblog.com/2013/02/why-a-drone-court-wont-work/>

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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.⁸³ 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 U.S. 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 U.S. as much harm as good.

In particular, we need to address the rule of law implications of U.S. 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, 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.

⁸³ See http://elyon1.court.gov.il/Files_ENG/02/690/007/a34/02007690.a34.HTM

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One can argue, as the Obama Administration does, that current U.S. 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 U.S. 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.