

RISE OF THE DRONES II: EXAMINING THE LEGALITY OF UNMANNED TARGETING

HEARING

BEFORE THE
SUBCOMMITTEE ON NATIONAL SECURITY
AND FOREIGN AFFAIRS
OF THE
COMMITTEE ON OVERSIGHT
AND GOVERNMENT REFORM
HOUSE OF REPRESENTATIVES
ONE HUNDRED ELEVENTH CONGRESS

SECOND SESSION

APRIL 28, 2010

Serial No. 111-120

Printed for the use of the Committee on Oversight and Government Reform



Available via the World Wide Web: <http://www.fdsys.gov>
<http://www.house.gov/reform>

U.S. GOVERNMENT PRINTING OFFICE

64-922 PDF

WASHINGTON : 2011

For sale by the Superintendent of Documents, U.S. Government Printing Office
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RISE OF THE DRONES II: EXAMINING THE LEGALITY OF UNMANNED TARGETING

WEDNESDAY, APRIL 28, 2010

HOUSE OF REPRESENTATIVES,
SUBCOMMITTEE ON NATIONAL SECURITY AND FOREIGN
AFFAIRS,
COMMITTEE ON OVERSIGHT AND GOVERNMENT REFORM,
Washington, DC.

The subcommittee met, pursuant to notice, at 10 a.m. in room 2154, Rayburn House Office Building, Hon. John F. Tierney (chairman of the subcommittee) presiding.

Present: Representatives Tierney, Welch, Foster, Quigley, Flake, Duncan.

Staff present: Andy Wright, staff director; Boris Maguire, clerk; Talia Dubovi, counsel; LaToya King, fellow; Aaron Blacksberg and Bronwen De Sena, interns; Adam Fromm, minority chief clerk and Member liaison; Stephanie Genco, minority press secretary and communication liaison; Tom Alexander, minority senior counsel; Christopher Bright, minority senior professional staff member; and Renee Hayes, minority Brookings fellow.

Mr. TIERNEY. A quorum being present, the Subcommittee on National Security and Foreign Affairs' hearing entitled, "Rise of the Drones II: Examining the Legality of Unmanned Targeting," will come to order.

I ask unanimous consent that only the chairman and ranking member of the subcommittee be allowed to make opening statements. Without objection, so ordered.

I ask unanimous consent that the hearing record be kept open for five business days, so that all members of the subcommittee will be allowed to submit a written statement for the record. Without objection, so ordered.

And I ask unanimous consent that written testimony from the American Civil Liberties Union, Ms. Hina Shamsi and Mr. John Radsan, be submitted for the record. Without objection, so ordered.

Good morning again. Today the subcommittee continues its oversight of the use of unmanned weapons systems in the conflict in Afghanistan and around the globe. On March 23rd, the subcommittee held its first hearing on this emerging issue. We heard from a number of experts who testified to the wide array of issues implicated by the use of drones, including operational, political and ethical questions. Today we will take a closer look at one important aspect of drone use: the legality of using unmanned weapons to target individuals who pose a threat to our national security.

When the United States ratified the Geneva Conventions in 1955, the Senate Committee on Foreign Relations characterized the agreements as follows: “As a landmark in the struggle to obtain for military and civilian victims of war, a humane treatment in accordance with the most approved international usage. The United States has a proud tradition of support for individual rights, human freedom, and the welfare and dignity of man. Approval of these conventions by the Senate would be fully in conformity with this great tradition.”

Warfare has changed significantly since the Geneva conventions were written. But the ideals cited by the Senate Committee in 1955 have not. Today we will examine how these laws apply in modern times. The increasing reliance on unmanned weapons to target individuals has been well documented in the press. Over the past decade, the number of unmanned vehicles used by the Department of Defense has gone from a few hundred to several thousand.

Drones have been credited with eliminating senior leaders of the Taliban and other insurgent groups. And accounts of the recent addition of an American citizen to the target list have received widespread attention. These reports have raised serious questions about whether targeted killing and drone use comport with the relevant international and domestic laws.

The use of unmanned weapons to target individuals, and for that matter, the targeting of individuals in general, raises many complex legal questions. We must examine who can be a legitimate target, where that person can be legally targeted and when the risk of collateral damage is too high. We must ask whether it makes a difference if the military carries out an attack or whether other government entities, such as the Central Intelligence Agency, may legally conduct such attacks.

We must ensure that the administration’s understanding of the authorities granted to it by Congress do not exceed what Congress intended.

We have here today a distinguished panel of legal experts to help answer some of these questions. I understand that you are not going to agree on all of the answers, and probably not going to be able to give us totally all the answers. But we are looking to learning quite a bit from your conversation.

On March 25th, the State Department Legal Adviser Harold Koh gave a speech at the annual meeting of the American Society of International Law, in which he affirmed this administration’s commitment to following international law. In his words, this is a commitment to “following universal standards, not double standards.”

It is in this context, then, that we turn to our witnesses today, with the understanding that the United States is committed to following international legal standards, and that our interpretation of how these standards apply to the use of unmanned weapons systems will set an example for other nations to follow. I do not expect we will be able to answer any of these complex questions today. But I do hope that this will be the beginning of a conversation, one that this committee will continue with members of the administration, including Legal Adviser Koh.

And with that, I defer to Mr. Flake for his opening remarks.
[The prepared statement of Hon. John F. Tierney follows:]

**Statement of John F. Tierney
Chairman
Subcommittee on National Security and Foreign Affairs
Committee on Oversight and Government Reform
U.S. House of Representatives**

Hearing on “Rise of the Drones II: Examining the Legality of Unmanned Targeting”

As Prepared for Distribution

April 28, 2010

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Mr. FLAKE. I thank the chairman, and I thank the witnesses for coming.

Since we met last, obviously the administration has gone on record to state that the use of unmanned drones in combat is legal under international law. I look forward to hearing some further clarification.

I look forward to hearing from Mr. Anderson. He was here last time as a minority witness, and now he is a majority witness. I hope that the Republicans in Congress follow the same trajectory soon. Inside joke.

But anyway, we are glad to have you all here and appreciate your coming and testifying, and for Mr. Anderson coming back. Thanks.

Mr. TIERNEY. I could say that it shows that it is not the Senate, we can actually do things and agree. [Laughter.]

Let me introduce our witnesses from whom we will be receiving testimony today.

First on our panel is Mr. Kenneth Anderson, who was in fact with us at our last hearing. He is a professor at Washington College of Law at American University and a research fellow at Stanford University's Hoover Institution. He is an authority on international human rights, war, armed conflict and terrorism. He testified, as I said, at our first hearing. He has also previously served on the board of directors of America's Watch, the precursor to Human Rights Watch and is the founder and former director of the Human Rights Watch Arms Division. He holds a B.A. from UCLA and a J.D. from Harvard University.

Ms. Mary Ellen O'Connell is the Robert and Marion Short professor of law at the University of Notre Dame Law School. Ms. O'Connell's primary research focuses on international legal regulation of the use of force, as well as conflict and dispute resolution. She is the author of *The Power and Purpose of International Law*, as well as three case books on international law, and is active in a number of international law organizations, including the American Society of International Law and the Council on Foreign Relations.

Ms. O'Connell earned her B.A. from Northwestern University and was awarded a Marshall Scholarship for study in Britain where she received a Masters of science in international relations from the London School of Economics and an LLB from Cambridge University. She earned her J.D. from Columbia University.

Mr. David Glazier is a professor of law at Loyola Law School in Los Angeles. Prior to joining Loyola Law School, Professor Glazier was a lecturer at the University of Virginia School of Law and a research fellow at the Center for National Security Law, where he conducted research on national security, military justice and the law of war. Before attending law school, Mr. Glazier served 21 years as a surface warfare officer in the U.S. Navy. In that capacity, he commanded the USS George Phillip, served as the Seventh Fleet staff officer responsible for the U.S. Navy-Japan relationship and participated in U.N. sanctions enforcement against Yugoslavia and Haiti.

Mr. Glazier holds a B.A. in history from Amherst College, earned an M.A. from Georgetown University and holds a J.D. from the University of Virginia Law School.

Mr. William Banks is the founding director of the Institute for National Security and Counter-Terrorism at Syracuse University, where he is also on the board of advisors, a distinguished professor of law and a professor of public administration in the Maxwell School of Citizenship and Public Affairs. He is recognized internationally as an expert in constitutional law, national security law and counter-terrorism.

Mr. Banks authored a leading text in the field in 1990 entitled National Security Law. In 2007, he published a second leading textbook entitled Counterterrorism Law, to help define that emerging field as well. He is also editor and chief of the Journal of National Security Law and Policy. He holds his B.A. from the University of Nebraska and received his J.D. from the University of Denver.

So again, we have quite a bit of brainpower being thrust upon us here today, and we do appreciate your taking the time and making yourselves available to share with us that substantial expertise.

It is the policy of this subcommittee to swear in our witnesses before they testify, so I ask that you please stand and raise your right hands.

[Witnesses sworn.]

Mr. TIERNEY. The record will please reflect that all the witnesses have answered in the affirmative.

I can tell all of you, and remind Mr. Anderson, that your complete written statement will be in the record by agreement, unanimous consent of the committee. We ask that you try to keep your opening remarks to about 5 minutes if you could. You will see the light is green for the first 4 minutes; amber for the fifth minute, then red when it is about the time we would like you to come to not a screeching halt, but a nice conclusion of your remarks, so that we can have an opportunity to have a colloquy back and forth and ask some questions.

So if that is understood, Mr. Anderson, would you please begin with your remarks?

STATEMENTS OF KENNETH ANDERSON, PROFESSOR OF LAW, WASHINGTON COLLEGE OF LAW, AMERICAN UNIVERSITY, MEMBER, HOOVER TASK FORCE ON NATIONAL SECURITY AND LAW, THE HOOVER INSTITUTION, STANFORD UNIVERSITY; MARY ELLEN O'CONNELL, ROBERT AND MARION SHORT PROFESSOR OF LAW, NOTRE DAME UNIVERSITY; DAVID GLAZIER, PROFESSOR OF LAW, LOYOLA LAW SCHOOL; WILLIAM C. BANKS, DIRECTOR, INSTITUTE FOR NATIONAL SECURITY AND COUNTERTERRORISM, SYRACUSE UNIVERSITY, BOARD OF ADVISERS DISTINGUISHED PROFESSOR OF LAW AND PROFESSOR, PUBLIC ADMINISTRATION, MAXWELL SCHOOL OF CITIZENSHIP AND PUBLIC AFFAIRS

STATEMENT OF KENNETH ANDERSON

Mr. ANDERSON. Thank you, Mr. Chairman, and thank you to the committee for having us here today.

The last time that this committee held a hearing on this subject, I was a very strong voice of criticism of the administration and its senior lawyers for not having expressed any views as to the legality of the use of drones and targeted killing practices and the whole cluster of issues that we are in fact here to discuss today. I have been a very sharp critic of this, and in fact, was before this committee.

I am delighted to report, as everyone here knows, that a few days after that, and not in response to this, I know that this policy had been under consideration for a very long time at the State Department, Harold Koh, the Legal Adviser to State, delivered a speech in which he addressed these issues.

And I am both delighted that the issues have been raised publicly by the administration, by its most senior international lawyer, and as well, I am myself very happy with the contents. I am in the, I guess I would say, unaccustomed position of attempting somewhat to channel Legal Adviser Koh on this occasion.

He said in those remarks that there were four objections that he wanted to address in relation to targeted killing. One was that the very act of targeting a particular leader was itself a violation of the laws of war. And quite strikingly, in addressing that objection, he went to state practice. He didn't cite directly to law as such, he didn't cite court cases. He cited American state practice in the Second World War as a basis for stating that this was not contrary to international law, which I thought was actually quite striking in referring to the actual ways in which states behave as a source of law in these areas.

Second, he addressed the question of, is there something just really not OK, morally wrong or reprehensible or legally wrong about the use of high advance weaponry drones. And he said no, there is nothing particular about weapons systems, except in a very few cases of indiscriminateness, that will outlaw them. And being high-tech, and in fact, this is all good in this area, because it allows discrimination in targeting that is otherwise not there.

Third, he addressed the question of whether this is extra-judicial execution, and hence in violation of international treaties and covenants and so on, and whether in particular there is an obligation

to provide process or warning to people before targeting them where they have been identified by the United States as targets.

And here he introduced something that I think is of deep importance as a statement of U.S. policy. Because he very clearly distinguished between saying it is lawful to do this, both in an armed conflict governed by the technical body of the laws of war, and it is also lawful to do so when the United States is engaged in legitimate international self-defense as a category of the use of force separate from armed conflict, specifically as a technical matter. And he defended targeting without warning in each of those cases treated separately.

And then finally, and I think of great importance within the United States, the United States has had a long ban on assassination within its domestic rules. But it has never defined what it means by that. And he was very careful to reaffirm something that was said by his predecessor in 1989, Abraham Sofaer, and said that this is not assassination within the meaning of U.S. law.

Now, I support all of those, and in particular the distinction that was drawn between armed conflict and legitimate self-defense as a category, and would reiterate what I raised in the last hearing, which is, this discussion is not really about the use of drones on the battlefield in the traditional, ordinary sense as used by the U.S. military. It is for them a weapons platform like any other, and all the considerations of collateral damage and all the usual stuff that goes into targeting applies. But they don't really think of it any differently, as one can see from the last hearing.

The question here is, who and where. And it's the question, first of all, of whether it is lawful to target off of what one might consider a traditional battlefield, and whether there is in fact any legal distinction between going after your enemies, wherever they happen to be, on the one hand, and the CIA attacking people outside of traditional zones.

So let me bring this to a close by saying that the discussion that we are having is really the discussion about the lawfulness of the CIA using these kinds of weapons outside of the traditional battlefields. And that if for any reason that is considered not to be OK, that is considered to be criminal, that is considered to be a war crime, somebody had better tell the CIA about it, somebody had better tell the President about it, somebody had better tell Vice President Biden about it. Because they are all enthusiastic participants in this.

So it is a perfectly legitimate question to raise whether this is OK and lawful and the rest. But whatever the answer is, we should not leave the people who are carrying this out in legal uncertainty as to what that answer is.

Thank you, Mr. Chairman.

[The prepared statement of Mr. Anderson follows:]

**U.S. House of Representatives
Committee on Oversight and Government Reform
Subcommittee on National Security and Foreign Affairs**

**Subcommittee Hearing:
“Drones II”**

**Wednesday, April 28, 2010
Rayburn House Office Building**

**Written Testimony Submitted By
Kenneth Anderson
April 26, 2010**

Honorable Chairman and Members:

1. **Introduction**
2. My thanks to the Subcommittee, the Chairman and Members for inviting me to return to offer further testimony on the subject of unmanned aerial vehicles (UAVs) and “drone warfare.”
3. My name is Kenneth Anderson. I am a professor of law at Washington College of Law, American University, Washington DC, and a member of the Hoover Task Force on National Security and Law, The Hoover Institution, Stanford University, Stanford CA. My areas of specialty include the laws of war and armed conflict, international law, and national security law. (A brief biography is attached to this statement.)
4. This testimony follows on earlier testimony that I offered to this Subcommittee on March 23, 2010, on the general strategic and legal issues surrounding the use of drones by both the US military and the CIA in counterterrorism operations worldwide. That earlier testimony, which I do not repeat here, is available at the Subcommittee website.¹ (In addition, two additional background documents on this topic – an article in the Weekly Standard, “Predators Over Pakistan,” and a policy chapter in a Brookings Institution volume, “Targeted Killing in US Counterterrorism Strategy and Law,” are also downloadable at SSRN.com.)²

¹ The March 23, 2010 KA testimony is also available as a pdf file downloadable from SSRN.com, at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1579411.

² Kenneth Anderson, “Predators Over Pakistan,” Weekly Standard, March 8, 2010, available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1561229. Kenneth Anderson, “Targeted Killing in US Counterterrorism Strategy and Law,” in Benjamin Wittes, ed., Legislating the War on Terror: An Agenda for Reform (2009 Brookings Institution Press), available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1415070. In addition, I have blogged extensively on this topic at the international law professor blog, www.opiniojuris.org, and at the law professor blog, [Volokh Conspiracy, www.volokh.com](http://www.volokh.com).

5. DOS Legal Adviser Harold Koh's March 25, 2010 Statement

6. Harold Koh, Legal Adviser to the State Department, delivered an important speech on international law at the American Society for International Law on March 25, 2010, in which, for the first time, a senior lawyer – indeed, the most senior lawyer on international law – delivered a defense of the lawfulness of the US use of drone warfare.
7. As someone who has been a sharp critic of the silence of the administration's senior lawyers on this crucial topic (indeed, in my earlier testimony before this Subcommittee, on March 23), I welcome and applaud the Legal Adviser's forthright and robust statement. Although relatively short and, as the Legal Adviser noted, an authoritative and considered statement of US legal views rather than a formal legal opinion, it went a long way to assuaging concerns I had expressed on whether the administration's lawyers would stand with the political leadership on so important an issue.
8. The Legal Adviser's statement was noteworthy on several grounds. They include particularly the unmistakable and repeated distinction drawn between "armed conflict" in a strict legal sense and "self defense" as a separate basis for the use of force by the United States. In addition, the statement defended the development of such technologies and the efforts by the United States to develop technologically more sophisticated means of targeting and reducing collateral damage. It stated that there was no obligation to provide targets with "process" prior to striking. And it specifically stated that whether in armed conflict or self-defense, such operations did not violate the US domestic ban on "assassination."
9. The comprehensiveness of this defense of drone warfare, on both armed conflict and self-defense grounds, is impressive and persuasive, and is a major statement of the US view of international law on this topic.
10. The fact that this statement was delivered by the Legal Adviser to the State Department sends an important signal that this is not simply the view of DOD, or the CIA, or any intelligence agency – but the view of the United States, expressed as its "opinio juris," its considered view of its own obligations under international law, to the rest of the world.

11. The Distinction Between "Armed Conflict" and "Self-Defense"

12. As I testified on March 23, the fundamental question of drone warfare is not really the technological platform, but instead where and who operates it. On a traditional battlefield in the hands of the military, drones are simply another air support platform; issues surrounding use, targeting, and collateral damage are no different than for any other weapons system. The debate arises on two axes, one related to self-defense, and the other related to the role of the CIA.

13. Is it lawful to use drones in uses of force that do not constitute “armed conflict” with a non-state actor (Al Qaeda and similar groups) in a technical legal sense, because where the drone strike might take place is far away from the current places of hostilities? That question was answered firmly in the affirmative by the Legal Adviser’s statement; such strikes can be justified, even though separate and distinct from “armed conflict,” as lawful self-defense.
14. Such self-defense operations are not governed by the full panoply of treaty laws that attach to armed conflict – neither the full range of armed conflict law that applies conflicts between states, nor the limited Common Article 3 rules that apply to conflict with a non-state actor. Strikes outside of armed conflict can be undertaken under the doctrine of self-defense – and although lacking all the technical rules that only make sense in overt, army-against-army fighting, such self-defense operations must still adhere to fundamental customary law including, as the Legal Adviser noted, the principles of distinction and proportionality that are also foundations of the technical law of armed conflict. In other words, to say that these operations are not governed by treaty law applicable to overt warfare is not to say that they lack legal standards. On the contrary, they must adhere to the customary standards of necessity, distinction, and proportionality.
15. The Legal Adviser’s statement reaffirms and reinvigorates the traditional US view of self-defense, and I find little if anything in his statement that is inconsistent with – indeed, in my view it is a clear reaffirmation – of a speech in 1989 by then Legal Adviser Abraham Sofaer on the topic of transnational terrorism and self-defense.

16. **The Lawful Role of the CIA**

17. As I noted in my March 23 testimony, if one crucial issue about drone warfare is where it takes place – leading to the importance of the armed conflict/self-defense distinction – a second crucial issue is who is lawfully empowered to carry it out. In other words, the fault line in the argument over drone warfare is much less the weapon system than who uses it and where. In the hands of the military on the ordinary battlefield, it is not very different from other air platforms. The question, of course, is off the ordinary battlefield and in the hands of the CIA.
18. The lawfulness of the CIA’s operations under US domestic law is not at issue. The agency has been tasked by direct orders of the President, under the authority of a complex statute that provides for oversight and accountability within and between the political branches. The fundamental challenges come from influential parts of the “international law community” – NGOs, international organizations, activists, academics, UN officials, and others – who view the use of targeted killing as unlawful under international law, or likely so, and particularly so by the CIA and outside of the technical scope of armed conflict.

19. Drone warfare becomes controversial, in other words, almost entirely when it is used by the CIA – and in places outside of the Afghanistan, or a narrow slice of cross border regions with Pakistan. Used as a weapon in counterinsurgency by the US military, it is just another weapon. Used as a weapon in counterterrorism, however, directed against Al Qaeda and Taliban leadership away from the active locales of hostilities, whether further afield in Pakistan or still further afield in Yemen, Somalia, or elsewhere, by the civilian CIA – that is where the sharp arguments mostly take place.
20. The Legal Adviser nowhere mentions the CIA by name in his defense of drone operations. It is, of course, what is plainly intended when speaking of self-defense separate from armed conflict. One understands the hesitation of senior lawyers to name the CIA's use of drones as lawful when the official position of the US government, despite everything, is still not to confirm or deny the CIA's operations.
21. In my view, the next step in this evolving legal process should be to affirm what the Legal Adviser's statement says without naming the CIA. That process might involve the US government, in a no doubt difficult interagency consultation, in establishing new mechanisms for acknowledging operations that are widely known, widely discussed even by senior officials – if not operationally, then at least for the “hypothetical” of asserting their legality. In my view, it would be best to establish a formal category of unacknowledged but also obviously not covert operations by the CIA, with their own mechanisms of Congressional oversight and accountability.
22. The Legal Adviser's statement has announced the framework and done everything but say the words “CIA.” It is time to take the next step and say “the CIA.” The officers of the CIA who carry out these operations, whether planning or execution, merit the public acknowledgment that what they do is legal.
23. Congress ought to make clear, through pronouncement and resolutions and, even better, through legislation, that any attempts to use international or foreign legal process to go after these officers in pursuit of their duties at the intelligence agencies would be regarded as a serious and unfriendly act toward the United States. It is crucial that the two political branches send a single message that the United States stands behind its self-defense operations as such.

24. Distinctions in the CIA's Roles in Drone Warfare

25. The distinction between operations in armed conflict, as a technical legal status, and self-defense operations raises a legal issue that has been at the center of some of the criticism of CIA operations. Some commentators, including eminent laws of war scholars, have suggested that the activities of the CIA operating drones (including from locales in the United States) in the context of the armed conflict in AfPak constitutes unlawful combatancy by CIA personnel.

26. The question is not an idle one, if the State Department's position of a distinction between these two grounds for using force is accepted. The legal rules applicable to participants are different as between these two statuses. In an armed conflict, the rules by which combatants must distinguish themselves in order to qualify for combatant immunity apply, and there is a question as to whether that applies to CIA personnel whose activity is part of the armed conflict underway in the Afghanistan or Pakistan theatres.
27. I do not propose to offer here a detailed or definitive answer to the complex question of when and who is required, for example, to wear uniforms and what those must be in order to meet the requirements of the law of armed conflict. My understanding of the DOD view with regards to its own special forces in the early stages of the Afghanistan war, for example, was that context mattered and that US special forces, while commingled with Northern Alliance fighters, could dress as those militia fighters did, and meet the requirements. Context matters, including personnel flying a drone from an office in the United States.
28. In addition to the question of uniforms and marks identifying combatants, these questions also raise important questions for the United States, and DOD particularly, as to the lawful role of civilians in armed conflict. It is partly a question of the lawful role of civilians in support of US combatant forces, as well as when persons on the other side become lawful targets. The underlying question is the much-vexed topic in international law of war over what constitutes "direct participation in hostilities" (DPH). The views that most matter on this are those of the DOD, and I believe it is premature to opine on them until DOD has expressed an official view.
29. Similarly controversial and important is what constitutes the "armed conflict" in AfPak – does it cover all of Pakistan, so that these questions of DPH by CIA personnel matter as a matter of armed conflict law? Or are parts of Pakistan outside of the active border zones of overt hostilities – such that CIA operations there take place instead under the rationale of "self-defense," and so outside of the technical rules of armed conflict, including the formal rules for combatancy? I do not have definitive views on these questions, but I believe they are appropriate to put to the administration, DOD as well as DOS and the CIA, and to encourage the executive to express a view that it believes can serve as a long-run basis for US practice and legal policy.
30. That said, I do not believe that the CIA's current participation either in the theatre of hostilities or elsewhere is unlawful or contrary to international law under the laws of war or otherwise. There might, however, be useful prophylactic measures that could be taken to make that evident.
31. I believe it is appropriate for Congress to ask that the administration undertake a process to formulate a view of the participation of CIA personnel in an armed

conflict and what that means – a process that would likely be difficult because of issues of interagency review. However, in order to put the CIA’s activities on the best long-run legal footing, I believe that Congress should urge the administration to undertake what might be an arduous process of consultation and formulation of views.

32. Why Ever the CIA? Why Not *Always* the US Military to Use Force?

33. Lurking just behind many of the questions about the lawfulness of the CIA’s use of drones, where and how, is a much bigger policy issue. Congress ought to address it forthrightly. Why should the CIA, or any other civilian agency, ever use force (leaving aside conventional law enforcement)? Even granting the existence of self-defense as a legal category, why ever have force used by anyone other than the uniformed military? Drones raise this question if for no other reason that they can be operated far away from the strike zone, whether by CIA or military personnel. Why ever have the CIA use force?
34. That question is in some sense beyond what a hearing such as this can answer, but I raise it because one way or another, it needs to be addressed. It is behind many of the criticisms that are perennial in this activity. For this testimony, suffice it to say that the United States and many, many other leading countries in the world have found that there are circumstances that both justify the use of covert force, and that serious judgments as to the avoidance of greater harms is best served not by overt military force, but by covert or clandestine force, using civilians.
35. Those judgments might in any instance turn out to be wrong, but as a matter of international practice, states have both possessed and utilized clandestine civilian agents, without acknowledging them, in the past and today. The CIA offers to the President the ability to undertake operations of self-defense on a covert basis that this country – and likewise its friends and enemies alike – has deemed essential since the founding of the CIA at least. I raise this because it is important to recognize that not infrequently, arguments against drones are really proxy for arguments against the very idea of the CIA using force. That is an important argument to have, perhaps, but better to have it on its own terms, not indirectly by arguing about drones.
36. Finally, to be clear, the use of drones, or other use of force by civilian CIA agents in covert operations is not contrary to international law insofar as it is an exercise of lawful self-defense. The traditional view of the United States, as expressed in 1989 and reaffirmed today, is sovereignty and territorial integrity are very important in international law, but they cannot be used to shield transnational terrorists who have found safe haven.

37. Targeting US Citizens

38. Press accounts that the Obama administration had affirmatively placed the radical cleric, Anwar Al-Awlaki, currently presumed hiding in Yemen with Al Qaeda in the Arabian Peninsula (AQAP), on the kill-or-capture list and, thus, subject to a drone targeted killing attack, raised some excited discussion in the United States. The fundamental question was whether, under international law or US domestic law, the US government owed a targeted individual some form of judicial process before targeting him or her, or whether perhaps it was unlawful to target the person at all in favor of attempting to arrest and bring for trial under a law enforcement model of counterterrorism.
39. Commentators have correctly noted that that Legal Adviser's statement on drones covers not just targeted killing but, once seen in the context of a US citizen on the kill-or-capture list, is equally a statement that even a US citizen who has joined forces with transnational terrorists and is hiding abroad might be subject to targeted killing. The existing domestic law for making such a determination, the Legal Adviser's statement implies, is sufficient, and there is no obligation in US or international law to provide other process, such as judicial review, before a possible strike. Moreover, this is not an act of assassination, within the meaning of the US domestic prohibition, according to the Legal Adviser's statement. All of this seems to me correct as a matter of law and policy.
40. It bears noting, however, that the Legal Adviser's distinction between armed conflict and self-defense is equally relevant here as in other contexts. That is, it is not necessary that, for example, Al-Awlaki, be a "combatant" to be subject to a strike by the CIA. The legal justification of self-defense is separately available as a basis to attack. The standard in that case is not "combatancy," but the threat posed, immanence, and other traditional factors – including the US's long embrace of "active self-defense," meaning that a threat can be assessed on the basis of a pattern of activity already established in the past, without having to wait until a target is on the verge of acting.
41. Many of the critics of this policy in the United States seem not to appreciate that there is a distinction between the territorial United States, in which the CIA is not authorized to act, and extraterritorially.
42. Critics also frequently raise the spectre that all this is license for the CIA to attack an American – or frankly anyone – in, for example, London or Paris. As stated in my March 23 testimony, however, what is justified in the ungoverned regions of Somalia or Yemen is a different matter applied to places under the rule of law such as our friends and allies. The United States is not going to undertake a targeted killing in London. The diplomatic fiction of the "sovereign equality" of states makes it difficult to say, as a matter of international law that, yes, Yemen is different from France, but of course that is true.
43. The willingness of the Obama administration to assert plainly that it has no trouble targeting an American citizen who has taken up the cause of violence

against the United States and its citizens is a positive sign of resolve in counterterrorism by the administration. For one thing, it lessens at least slightly the incentive of terrorist groups to recruit Americans, which is likely to be no small matter over the long term. But as to the fundamental propriety of targeting an American without judicial process, extraterritorially?

44. The policy is far from unprecedented. Suppose that an American scientist in the Cold War had decided to defect to the Soviet Union with vital nuclear secrets that went to the heart of the US strategic arsenal. US citizen, and not military, and not a combatant, because despite the existence of a Cold War, no actual military conflict was underway. The CIA finds that its best chance to remove the threat is a sniper attack on the US scientist in East Berlin as he attempts to enter the Soviet embassy. Far fetched? Not really. Not an armed conflict and not a “combatant” in a technical legal sense – a US citizen targeted without judicial process, abroad, and under rationales of self-defense. The same concepts apply today, with respect to transnational terrorists, including Americans who take up the cause with them.

45. A Role for Congress?

46. This testimony has highlighted several matters on which Congress could play an important and useful role, primarily in offering support to the policies undertaken by the administration. One of these is to encourage and provide opportunities for other senior lawyers in the intelligence and defense communities to affirm, amplify, and expand on what the Legal Adviser has said.
47. A second role for Congress – and a deeply important one – is to specifically name the CIA as under the protection, so to speak, of these legal views on self-defense. This is of great importance in order to make clear that line officers and legal officials of the CIA are not being put in the untenable position of being tasked to carry out policies for which they might later be accused of violations of international law. Congress needs to clarify its lawfulness, and frankly make clear that countries that seek to gainsay the US’s own considered legal view on this topic, including allies and NATO allies, such as unsupervised prosecutors in Spain or elsewhere, will discover that there are consequences.
48. Congress should also invite the administration to elaborate its views of CIA actions inside Pakistan, to state whether it thinks such activities are part of the ongoing armed conflict, are separate from it, and how such views interact with legal doctrines of DPH. This is a topic on which there needs to be a coordinated legal view among DOS, DOD, CIA, DNI, and perhaps others.
49. Congress should explicitly endorse the Obama administration’s view that American citizenship does not preclude one from being targeted extraterritorially under laws of armed conflict, self-defense or US domestic law.

50. Congress should be strongly supporting, through budget processes and otherwise, the development of more discrete and discriminating drone-and-missile technologies to reduce collateral damage to the minimum that technology can allow, as well as to improve targeting identification.
51. Congress should invite the CIA to share what it believes it can regarding collateral damage involved in drone strikes.
52. If, as some commentators have suggested, the use of force threshold is gradually shifting toward smaller and more discrete uses of force by US actors, made possible by evolving drone technologies, then Congress should revisit the rules regarding oversight, review, and accountability to ensure that they take account of emerging realities about the use of force as perhaps a substitute – and highly desirable substitute – for large scale overt war.
53. Congress should make clear that it rejects utterly the argument made popular in the press in recent months that drone warfare is somehow dishonorable or that it somehow reduces the disincentives for the US to use violence, or that it makes violence too easy for the United States because its forces are not at risk, with the barely concealed implication that if American servicemen and women are not actively at risk of getting killed, because drones make it possible to take the fight to the enemy without having to fight through whole countries on the ground to get there – that drone warfare, that is, is somehow illegitimate, dishonorable, unlawful, or an enabler of the US to let loose its unrestrained propensity to use violence. It is none of those things, and Congress should say so.

54. Conclusion

55. I thank the Subcommittee, chairman and members, for this opportunity testify. Please be in touch with me should you have any further questions or seek additional views.

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April 28, 2010, Washington DC
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Mr. TIERNEY. Thank you, Mr. Anderson.
Mr. TIERNEY. Ms. O'Connell.

STATEMENT OF MARY ELLEN O'CONNELL

Ms. O'CONNELL. Thank you very much, Mr. Chairman, for the invitation to speak with you today about the law governing the use of weaponized unmanned aerial vehicles, also known as combat drones.

I should mention that I have been a professional military educator for the Department of Defense, and I will be drawing on that experience and the learning I gained in that context in making three points for you today.

First, combat drones are battlefield weapons. Second, the battlefield is a real place, where fighting occurs between organized armed groups. Battlefields and armed conflicts are not fictions created by lawyers. Third, permissible battlefield use of combat drone is governed by law regulating who may operate them, against whom they may be operated and how they may be used.

Turning to my first point, combat drones are a battlefield weapon. They launch missiles and drop bombs, a significant kinetic force. Such weapons are permitted on the battlefield, but we do not permit our police to have missiles or bombs in their arsenals. They are not allowed to use that kind of firepower in carrying out law enforcement activities.

Today in Afghanistan, our armed forces are involved in an armed conflict. They are facing an organized enemy capable of holding territory. In the coming battle for Kandahar, they will be permitted to use drones. And indeed, I would suggest to you that the use of drones in that context would be preferable to the use of airplanes dropping bombs from high altitudes.

The drone, of course, as you learned at your last hearing, has a video camera capability. It can send back very detailed information, including on the location of civilians in a combat zone and with regard to the details of civilian objects. In that way, the pilot of the drone, or the operator from a long distance can make much more precise targeting decisions than can be made from an airplane.

General McChrystal has wisely called for strict avoidance of civilian casualties in our counterinsurgency war in Afghanistan. And I believe that drone can help us accomplish this.

But outside of a war or an armed conflict, everyone is a civilian when it comes to the use of lethal force. The combatant's privilege to kill on the battlefield without being charged with a crime applies inside an armed conflict and not outside, which leads to my second point.

Armed conflict is a real situation that we know by the facts of fighting. Armed conflicts exist where organized armed fighting occurs, where there are intense hostilities. Armed conflicts cannot be created on paper, in a legal memo, that then translates into the right to kill as if you were on a real battlefield. The law I am explaining is derived from the Just War Doctrine. That doctrine has held that killing is only justifiable in situations of necessity. Battlefields where intense fighting is occurring is a per se situation of necessity. Off the battlefield, we give the police the right to use lethal force only in situations of immediate necessity to save a life. This

rule means police do not have bombs and missiles in their arsenals, they have handguns and rifles.

Even in places like Yemen and Pakistan, where there is armed conflict going on, the United States would only have the right to use combat drones in the armed conflicts that those governments are participating in, and not in some rogue operation of our own that has nothing to do with what those governments are trying to accomplish. We recognize neither of those states as failed states; indeed, we are very much dependent on both Yemen and Pakistan having strong governments, strong identities and being stable states.

In order to build that stability in both countries, we need to respect their sovereign rights as defined by international law. That means that we do not have the right to use military force except with their expressed permission and in pursuit of their aims.

Even when we are invited to join in an armed conflict, as we have been in Afghanistan, it is that invitation that makes it lawful for us to participate in that armed conflict. We have certain very strict rules in terms of how we may operate combat drones. First and foremost, only a combatant, lawful combatant, may carry out the use of killing with combat drones. The CIA and civilian contractors have no right to do so. They do not wear uniforms, and they are not in the chain of command. Most importantly, they are not trained in the law of armed conflict.

That is why we have reason to fear that CIA-directed combat operations are having disproportionate impacts on civilians, and they are pursuing their use of lethal force not in a way aimed at accomplishing the military objective, which in this case is to stop terrorists. We know from empirical data, and this is my final point, that the use of major military force in counterterrorism operations has been counterproductive. A Just War doctrine teaches that we should always and only use force when we can accomplish more good than harm. And that is not the case with the use of drones in places like Pakistan, Yemen and Somalia.

Thank you.

[The prepared statement of Ms. O'Connell follows:]

Congress of the United States
House of Representatives
Subcommittee on National Security and Foreign Affairs
Hearing: Rise of the Drones II: Examining the Legality of Unmanned Targeting
April 28, 2010

Lawful Use of Combat Drones

Mary Ellen O'Connell*

Combat drones are battlefield weapons. They fire missiles or drop bombs capable of inflicting very serious damage. Drones are not lawful for use outside combat zones. Outside such zones, police are the proper law enforcement agents and police are generally required to warn before using lethal force. Restricting drones to the battlefield is the most important single rule governing their use. Yet, the United States is failing to follow it more often than not. At the very time we are trying to win hearts and minds to respect the rule of law, we are ourselves failing to respect a very basic rule: remote weapons systems belong on the battlefield.¹

I. A Lawful Battlefield Weapon

The United States first used weaponized drones during the combat in Afghanistan that began on October 7, 2001. We requested permission from Uzbekistan, which was then hosting the U.S. airbase where drones were kept.² We also used combat drones in the battles with Iraq's armed forces in the effort to topple Saddam Hussein's government that began in March 2003.³ We are still using drones lawfully in the on-going combat in Afghanistan. Drones spare the lives of pilots, since the unmanned aerial vehicle is flown from a site far from the attack zone. If a drone is shot down, there is no loss of human life. Moreover, on the battlefield drones can be more protective of civilian lives than high aerial bombing or long-range artillery. Their cameras can pick up details about the presence of civilians. Drones can fly low and target more precisely using this

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¹ This testimony draws on the following publications by the author: *The Choice of Law Against Terrorism*, J. NAT'L SEC. LAW (forthcoming 2010); *Unlawful Killing with Combat Drones*, in SHOOTING TO KILL: THE LAW GOVERNING LETHAL FORCE IN CONTEXT (Simon Bronitt ed. Hart, forthcoming) available at <http://ssrn.com/abstract=1501144>; *Combatants and the Combat Zone*, 43 U. OF RICH. L. REV. 845 (2009); *Enhancing the Status of Non-State Actors Through a Global War on Terror*, 43 COL. J. TRANS. LAW 435 (2005); *Ad Hoc War*, in KRISENSICHERUNG UND HUMANITÄRER SCHUTZ—CRISIS MANAGEMENT AND HUMANITARIAN PROTECTION 405 (2004).

² Eric Schmitt, *Threats and Responses: The Battlefield; U.S. Would Use Drones to Attack Iraqi Targets*, <http://www.nytimes.com/2002/11/06/world/threats-responses-battlefield-us-would-use-dro...>

³ Brian M. Carney, *Air Combat by Remote Control*, May 12, 2008, <http://online.wsj.com/article/SB121055519404984109.html#printMode>

information. General McChrystal has wisely insisted on zero-tolerance for civilian deaths in Afghanistan. The use of drones can help us achieve that.

What drones cannot do is comply with police rules for the use of lethal force away from the battlefield. In law enforcement it must be possible to warn before using lethal force, in war-fighting this is not necessary, making the use of bombs and missiles lawful.

The United Nations Basic Principles for the Use of Force and Firearms by Law Enforcement Officials (*UN Basic Principles*) set out the international legal standard for the use of force by police:

Law enforcement officials shall not use firearms against persons except in self-defense or defense of others against the imminent threat of death or serious injury, to prevent the perpetration of a particularly serious crime involving grave threat to life, to arrest a person presenting such a danger and resisting their authority, or to prevent his or her escape, and only when less extreme means are insufficient to achieve these objectives. In any event, intentional lethal use of firearms may only be made when strictly unavoidable in order to protect life.⁴

The United States has failed to follow these rules by using combat drones in places where no actual armed conflict was occurring or where the U.S. was not involved in the armed conflict.

On November 3, 2002, the CIA used a drone to fire laser-guided Hellfire missiles at a passenger vehicle traveling in a thinly populated region of Yemen. At that time, the Air Force controlled the entire drone fleet, but the Air Force rightly raised concerns about the legality of attacking in a place where there was no armed conflict. CIA agents based in Djibouti carried out the killing. All six passengers in the vehicle were killed, including an American.⁵ In January 2003, the United Nations Commission on Human Rights received a report on the Yemen strike from its special rapporteur on extrajudicial, summary, or arbitrary killing. The rapporteur concluded that the strike constituted “a clear case of extrajudicial killing.”⁶

Apparently, Yemen gave tacit consent for the strike. States cannot, however, give consent to a right they do not have. States may not use military force against individuals on their territory when law enforcement measures are appropriate. At the time of the strike, Yemen was not using military force anywhere on its territory. More recently, Yemen has been using military force to suppress militants in two parts of the country. The U.S.’s on-going drone use, however, has not been part of those campaigns.

⁴ Adopted by the Eighth United Nations Congress on the Prevention of Crime and the Treatment of Offenders, Havana, Cuba, 27 August to 7 September 1990, <http://www2ohchr.org/english/law/firearms.htm>.

⁵ Doyle McManus, *A U.S. License to Kill, a New Policy Permits the C.I.A. to Assassinate Terrorists, and Officials Say a Yemen Hit Went Perfectly. Others Worry About Next Time*, L.A. TIMES, Jan. 11, 2003, at A1.

⁶ UN Doc. E/CN.4/003/3, paras. 37 – 39.

The United States has also used combat drones in Somalia probably starting in late 2006 during the Ethiopian invasion when the U.S. assisted Ethiopia in its attempt to install a new government in that volatile country. Ethiopia's effort had some support from the UN and the African Union. To the extent that the U.S. was assisting Ethiopia, our actions had some justification. It is clear, however, that the U.S. has used drone strikes independently of the attempt to restore order in Somalia. The U.S. has continued to target and kill individuals in Somalia following Ethiopia's pullout from the country.⁷

The U.S. use of drones in Pakistan has similar problems to the uses in Yemen and Somalia. Where military force *is* warranted to address internal violence, governments have widely resorted to the practice of inviting in another state to assist. This is the legal justification the U.S. cites for its use of military force today in Afghanistan and Iraq. Yet, the U.S. cannot point to invitations from Pakistan for most of its drone attacks. Indeed, for much of the period that the United States has used drones on the territory of Pakistan, there has been no armed conflict. Therefore, even express consent by Pakistan would not justify their use.

The United States has been carrying out drone attacks in Pakistan since 2004. Pakistani authorities only began to use major military force to suppress militancy in May 2009, in Buner Province. Some U.S. drone strikes have been coordinated with Islamabad's efforts, but some have not. Some strikes have apparently even targeted groups allied with Islamabad.

II. The Battlefield Defined

The Bush administration justified the 2002 Yemen strike and others as justified under the law of armed conflict in the "Global War on Terror."⁸ The current State Department Legal Adviser, Harold Koh, has rejected the term "Global War on Terror", preferring to base our actions on the view that the U.S. is in an "armed conflict with al-Qaeda, the Taliban and associated forces."⁹ Under the new label, the U.S. is carrying out many of the same actions as the Bush administration under the old one: using lethal force without warning, far from any actual battlefield.

Armed conflict, however, is a real thing. The United States is currently engaged in an armed conflict in Afghanistan. The United States has tens of thousands of highly trained troops fighting battles with a well-organized opponent that is able to hold territory. The

⁷ S. Bloomfield, *Somalia: The World's Forgotten Catastrophe*, THE INDEPENDENT, 9 February 2008, available at <http://www.independent.co.uk/news/world/africa/somalia-the-worlds-forgotten-catastrophe-778225.html> (last visited June 8, 2009); See also, CBS NEWS, *U.S. Missile Strike Hits Town in Somalia*, 3 March 2008, available at <http://www.cbsnews.com/stories/2008/03/03/world/main3898799.shtml> (last visited June 8, 2009); SPIEGEL ONLINE, *A Strike Against Al-Qaeda's Hornet's Nest*, 1 September 2007, available at <http://www.spiegel.de/international/0,1518,458597,00.html> (last visited June 8, 2009).

⁸ Remarks of National Security Adviser Condoleezza Rice, FOX NEWS Sunday with Tony Snow (*Fox News* v. broadcast, Nov. 10, 2002) transcript available at 2002 WL 7898884.

⁹ Harold Hongju Koh, *The Obama Administration and International Law*, Annual Meeting of the American Society of International Law, Washington, D.C., March 25, 2010, www.state.gov.

situation in Afghanistan today conforms to the definition of armed conflict in international law. The International Law Association's Committee on the Use of Force issued a report in 2008 confirming the basic characteristics of all armed conflict: 1.) the presence of organized armed groups that are 2.) engaged in intense inter-group fighting.¹⁰ The fighting or hostilities of an armed conflict occurs within limited zones, referred to as combat or conflict zones. It is only in such zones that killing enemy combatants or those taking a direct part in hostilities is permissible.

Because armed conflict requires a certain intensity of fighting, the isolated terrorist attack, regardless of how serious the consequences, is not an armed conflict. Terrorism is crime. Members of al Qaeda or other terrorist groups are active in Canada, France, Germany, Indonesia, Morocco, Saudi Arabia, Spain, the United Kingdom, Yemen and elsewhere. Still, these countries do not consider themselves in a war with al Qaeda. In the words of a leading expert on the law of armed conflict, the British Judge on the International Court of Justice, Sir Christopher Greenwood:

In the language of international law there is no basis for speaking of a war on Al-Qaeda or any other terrorist group, for such a group cannot be a belligerent, it is merely a band of criminals, and to treat it as anything else risks distorting the law while giving that group a status which to some implies a degree of legitimacy.¹¹

To label terrorists "enemy combatants" lifts them out of the status of *criminal* to that of *combatant*, the same category as America's own troops on the battlefield. This move to label terrorists combatants is contrary to strong historic trends. From earliest times, governments have struggled to prevent their enemies from approaching a status of equality. Even governments on the verge of collapse due to the pressure of a rebel advance have vehemently denied that the violence inflicted by their enemies was anything but criminal violence. Governments fear the psychological and legal advantages to opponents of calling them "combatants" and their struggle a "war."

President Ronald Reagan strongly opposed labeling terrorists combatants. He said that to "grant combatant status to irregular forces even if they do not satisfy the traditional requirements ... would endanger civilians among whom terrorists and other irregulars attempt to conceal themselves."¹²

The United Kingdom and other allies take the same position as President Reagan: "It is the understanding of the United Kingdom that the term 'armed conflict' of itself and in its

¹⁰ International Law Association, Initial Report of the Use of Force Committee, The Meaning of Armed Conflict in International Law (Aug. 2008, Rio de Janeiro) www.ilahq.org. See also, Mary Ellen O'Connell, *Defining Armed Conflict*, 13 J. CONFLICT & SECURITY LAW (2008).

¹¹ Christopher Greenwood, *War, Terrorism and International Law*, 56 CURR. LEG. PROBS. 505, 529 (2004).

¹² Ronald Reagan, Letter of Transmittal, The White House, January 29, 1987, reprinted in 81 AM. J. INT'L L. 910 (1987); but see response, Hans Peter Gasser, *An Appeal for Ratification by the United States*, 81 AM. J. INT'L L. 912 (1987).

context denotes a situation of a kind which is not constituted by the commission of ordinary crimes including acts of terrorism whether concerted or in isolation.”¹³

In the United States and other countries plagued by al Qaeda, institutions are functioning normally. No one has declared martial law. The International Committee of the Red Cross is not active. Criminal trials of suspected terrorists are being held in regular criminal courts. The police use lethal force only in situations of necessity. The U.S.’s actions today are generally consistent with its long-term policy of separating acts of terrorism from armed conflict—except when it comes to drones.

III. Battlefield Restraints

Even when the U.S. is using drones at the request of Pakistan in battles it is waging, we are failing to follow important battlefield rules. The U.S. must respect the principles of necessity, proportionality and humanity in carrying out drone attacks. “Necessity” refers to military necessity, and the obligation that force is used only if necessary to accomplish a reasonable military objective.¹⁴ “Proportionality” prohibits that “which may be expected to cause incidental loss of civilian life, injury to civilians, damage to civilian objects, or a combination thereof, which would be excessive in relation to concrete and direct military advantage anticipated.”¹⁵ These limitations on permissible force extend to both the quantity of force used and the geographic scope of its use.

Far from suppressing militancy in Pakistan, drone attacks are fueling the interest in fighting against the United States. This impact makes the use of drones difficult to justify under the terms of military necessity. Most serious of all, perhaps, is the disproportionate impact of drone attacks. A principle that provides context for all decisions in armed conflict is the principle of humanity. The principle of humanity supports decisions in favor of sparing life and avoiding destruction in close cases under either the principles of necessity or proportionality. According the International Committee of the Red Cross, the principles of necessity and humanity are particularly important in situations such as Pakistan:

In classic large-scale confrontations between well-equipped and organized armed forces or groups, the principles of military necessity and of humanity are unlikely to restrict the use of force against legitimate military targets beyond what is already required by specific provisions of IHL. The practical importance of their restraining function will increase with the ability of a party to the conflict to control the circumstances and

¹³ Marco Sassòli, *Use and Abuse of the Laws of War in the “War on Terrorism,”* 22 LAW & INEQ. 195, (2004), citing Reservation by the United Kingdom to Art. 1, para. 4 & Art. 96, para. 3 of Protocol I.

¹⁴ W. Michael Reisman & Douglas Stevick, *The Applicability of International Law Standards to United Nations Economic Sanctions Programmes*, 9 EUR. J. INT’L L. 86, 94-95 (1998).

¹⁵ Additional Protocol I, Art. 51(5); see also Judith Gardam, *Proportionality and Force in International Law*, 87 AM. J. INT’L L. 391 (1993).

area in which its military operations are conducted, may become decisive where armed forces operate against selected individuals in situations comparable to peacetime policing. In practice, such considerations are likely to become particularly relevant where a party to the conflict exercises effective territorial control, most notably in occupied territories and non-international armed conflicts.¹⁶

Another issue in drone use is the fact that strikes are carried out in Pakistan by the CIA and civilian contractors. Only members of the United States armed forces have the combatant's privilege to use lethal force without facing prosecution. CIA operatives are not trained in the law of armed conflict.¹⁷ They are not bound by the Uniform Code of Military Justice to respect the laws and customs of war. They are not subject to the military chain of command. This fact became abundantly clear during the revelation of U.S. use of harsh interrogation tactics. Given the negative impact of that unlawful conduct on America's standing in the world and our ability to promote the rule of law, it is difficult to fathom why the Obama administration is using the CIA to carry out drone attacks, let alone civilian contractors.

Conclusion

The use of military force in counter-terrorism operations has been counter-productive. Military force is a blunt instrument. Inevitably unintended victims are the result of almost any military action. Drone attacks in Pakistan have resulted in large numbers of deaths and are generally seen as fueling terrorism, not abating it. In Congressional testimony in March 2009, counter-terrorism expert, David Kilcullen, said drones in Pakistan are giving "rise to a feeling of anger that coalesces the population around the extremists and leads to spikes of extremism well outside the parts of the country where we are mounting those attacks."¹⁸ Another expert told the *New York Times*, "The more the drone campaign works, the more it fails—as increased attacks only make the Pakistanis angrier at the collateral damage and sustained violation of their sovereignty."¹⁹ A National Public Radio Report on April 26, 2010, pointed out that al Qaeda is losing support in the Muslim world because of its violent, lawless tactics.²⁰ We can help eliminate the last of that support by distinguishing ourselves through commitment to the rule of law, especially by strict compliance with the rules governing lethal force.

¹⁶ International Committee of the Red Cross, *Interpretative Guidance on the Notion of Direct Participation in Hostilities under International Humanitarian Law* 27 (May 2009), at 80-81.

¹⁷ William C. Banks, expert on U.S. national security law, e-mail to the author, Sept. 28, 2009 (on-file with the author).

¹⁸ Hearing of the House Armed Services Committee, *Effective Counterinsurgency: the Future of the U.S. Pakistan Military Partnership*, April 23, 2009 (Testimony of David Kilcullen).

¹⁹ Jan. 23, 2010, p. A3

²⁰ Dina Temple-Raston, *As Support Fades, Al-Qaida Shows Signs of Decline*, NPR, April 26, 2010, www.npr.org.

Mr. TIERNEY. Thank you.
Mr. Glazier.

STATEMENT OF DAVID GLAZIER

Mr. GLAZIER. Thank you, Mr. Chairman.

I would like to begin very quickly by thanking the chairman and members of the committee for holding this hearing. Because so much of the discussion after 9/11 has really been political. And as a citizen and a law professor, I am very appreciative of the fact that the committee really is interested in exploring the legal issues.

I think that there is no doubt about the fact that we are in an armed conflict. First of all, as a matter of international law, the world community has recognized 9/11 as an armed attack. And more importantly, as a matter of our domestic law, Congress has chosen to exercise its constitutional authority to authorize the use of military force against the organizations responsible for the 9/11 attack and any organizations that harbored them.

So it seems to me that as a matter of law, there is no dispute that we are in an armed conflict with al Qaeda and with the Taliban. And that therefore allows the United States to call upon the full scope of authority which is provided by the law of war.

Many people perceive that there is sort of a false dichotomy between compliance with stringent rules and the law of war and military and political success. The thing I would like to emphasize up front is that I really feel that this is a false dichotomy. I think we fail to recognize oftentimes how much the law of war was developed by warriors, and how much military necessity and the ability to accomplish what a nation needs to do to successfully prosecute an armed conflict is already addressed within that body of law.

I also want to suggest that the fact that many of the instruments which comprise the law of war are dated is not necessarily a major issue when it comes to dealing with modern technology like drones, because much of the law of war is expressed in the form of general rule and guiding principles, which can readily be applied to new technical developments that weren't anticipated at the time the war is developed. So principles like necessity, which Professor O'Connell has mentioned, requirements to discriminate in targeting on proportionality, these rule are easy to apply to modern technology, just as easy as they are to apply to the technology that existed at the time.

There certainly is nothing with the law that prohibits the use of drones. In fact, it is the ability of the drones to engage in a higher level of precision and to discriminate more carefully between military and civilian targets than has existed in the past, actually suggests that they are preferable to many older weapons.

Now, there certainly are issues with existing law that can come from bad choices made in their deployment. We know, for example, that some of the early attacks, which resulted in larger numbers of casualties, have caused significant fallout. But again, that is an area in which compliance with the law of war, which requires careful discrimination between military and civilian tactics, suggests that in fact following the rules enhances our ability to prevail in the conflict.

There are real issues, though, I think, with who can employ the weapons. That is something that I find very, very problematic. The law of war has rules as far as who can be combatants, who enjoy immunity from domestic laws for engaging in armed conflict. So for example, I think there is little doubt about the legality of the Air Force and National Guard use of drones, which is an ongoing basis. But it is interesting that the government is using CIA personnel who clearly are not lawful combatants under the rules specified in the law of war.

Now, we law of war scholars debate what is the legal significance of that. I think, though, that the majority view is that if you are not a privileged combatant, you simply don't have immunity from domestic law for participating in hostilities. And so the reality is that it seems to me, for example, that any CIA personnel who participate in this armed conflict run the risk of being prosecuted under the national laws of the place where they take place.

On the other hand, though, today our government is in the process of trying to hold some of our adversaries criminally accountable at Guantanamo under a legal theory that being a non-privileged belligerent and engaging in war constitutes a war crime. So if that is in fact our government's position, then our sense would be that the CIA personnel participating in this program are committing war crimes, and the individuals who have directed them to participate are committing war crimes.

So when we asked the government to sort of address these larger issues, it seems to me that one of the things we need to call upon them to do is to clarify the U.S. Government's view on this aspect. Because either we are wrong at Guantanamo or we are seriously wrong in using the CIA to participate in the program.

There are also issues about where the conflicts are taking place, which Professor O'Connell addressed. I think we will probably have some spirited discussion and disagreement on those issues during the questions. Thank you.

[The prepared statement of Mr. Glazier follows:]

Statement of
David W. Glazier
Professor of Law
Loyola Law School Los Angeles

Hearing on
RISE OF THE DRONES II:
EXAMINING THE LEGALITY OF UNMANNED TARGETING

United States House of Representatives
Committee on Oversight and Government Reform
Subcommittee on National Security and Foreign Affairs
April 28, 2010

Introduction

I would like to express my sincere appreciation to the Chairman and members of the Committee for the opportunity to address this timely and important subject.

My name is David Glazier and I am a professor of law at Loyola Law School Los Angeles. I spent twenty-one years as a U.S. Navy surface warfare officer, culminating in command of USS George Philip (FFG 12), before retiring to attend law school at the University of Virginia in the summer of 2001. I began detailed research on law of war related topics during the spring of my first year of law school which I have continued to the present date. I remained in Charlottesville as a research fellow at the Center for National Security Law for two years following my law school graduation, publishing law review articles on law of war topics and developing and teaching new Virginia course offerings on the Law of War and American Military Justice. I started work at Loyola in 2006 where I continue to teach and write about the Law of War as well as U.S. Constitutional Law, Foreign Relations Law, and International Law.

Witnesses during last month's hearing before this subcommittee noted that the use of unmanned drones gives rise to a number of potential technological, ethical, and legal issues. Other recent public discussion has questioned the wisdom of their current employment in Afghanistan and Pakistan from a policy perspective, suggesting that attacks perceived as indiscriminate because of "collateral" civilian casualties may do more harm in fueling support for our adversaries than we gain from these strikes. It is my intention to limit my remarks to what I understand to be the focus of this hearing – legal issues implicated by drone use – and I will concentrate on my own area of expertise, the law of war. I would just note upfront that while law of war compliance is not a panacea, past American military and political leaders, dating from George Washington, have perceived policy and public relations advantages from faithful law of war compliance even when not reciprocated by our adversaries. A number of these same officials played a substantial role in developing the current rules.

Although previous government use of the incoherent “war on terror” nomenclature has likely contributed to some of the confusion on this subject, I do not see any credible basis to dispute the idea that the United States is lawfully engaged in an armed conflict against al Qaeda and the resurgent Taliban in which it has the right to draw legal authority from the law of war. The world community has generally recognized the events of “9/11” as constituting an armed attack allowing U.S. invocation of the right of self-defense under Article 51 of the United Nations Charter. 9/11 remains the only event that the liberal western democracies comprising the North Atlantic Treaty Organization have recognized as an armed attack on a member state. Even more importantly from a domestic law perspective, Congress exercised its constitutional authority to permit a military response in the September 2001 Authorization for the Use of Military Force (AUMF). Leading foreign relations scholars, and more importantly, the U.S. Supreme Court in its *Hamdi* and *Hamdan* decisions, have recognized the AUMF as the functional equivalent of a declaration of war, permitting the President to exercise authority granted by the law of war in countering those responsible for perpetrating or aiding and abetting the 9/11 attacks. The fact that al Qaeda is not an actual state does not bar this from being an armed conflict. The United States has fought a number of previous conflicts against groups it refused to recognize as legitimate nations, including the Confederacy, Indian tribes, Philippine Insurgents, and the Viet Cong while applying law of war rules to both sides.

The Law of War and the Lawfulness of Drone Weapons

The necessary starting point in evaluating the legality of any weapons use is identifying the scope and content of the contemporary law of war. The only part of this corpus juris most Americans seem to have heard of is the four Geneva Conventions of 1949, although in my experience few even among educated audiences really know what they say. The irony is that the Conventions are narrowly focused on providing protections for persons who either never were, or no longer are, legitimate objects of attack including the sick, wounded, shipwrecked, prisoners of war, and civilians actually in the hands of a foreign belligerent. They thus have virtually nothing to say about the actual conduct of hostilities. It is necessary to look to the larger, but much less well known, body of other treaties and customary law rules governing armed conflict to find authority relevant to the question before this subcommittee. It is also worth noting that this law includes both specific substantive rules and more general governing principles. The latter, such as the requirement to distinguish between lawful military objects of attack and protected civilian persons and objects, remain fully applicable regardless of changing circumstances and can readily be applied even to technological innovations unforeseeable at the time of the rules’ development. In my opinion most of the frequently heard assertions that the law of war requires urgent updating to address “new” situations or technologies are overstated or outright erroneous.

Evaluating the legality of a weapons system requires a multi-part analysis. First, many types of weapons are the subject of specific prohibitions found either in treaty law, such as bans on chemical and biological weapons, blinding lasers, and anti-personnel land mines, or customary law rules, such as prohibitions on any use of exploding anti-personnel bullets, poisoned weapons, serrated bayonets, etc. Treaty bans are legally applicable only to states actually party to the relevant accord while customary law prohibitions are considered binding on all nations. There are no specific law of war bans which would apply to drone use, however.

Assuming a weapon falls outside these specific prohibitions, it is then necessary to evaluate its conformance with several customary law principles. As previously mentioned, the law of war requires “distinction” between “military objects” which are lawful objects of attack,⁴ and civilian objects which are not. A weapon incapable of discriminate employment, such as the V-1 flying bombs Germany fielded late in World War II, incapable of striking anything more precise than a general sector of a target city, runs afoul of this rule and should be considered unlawful. While a drone launching missiles can be misused as readily as any other weapons system, these weapons capable of discriminate employment rivaling or exceeding virtually any other system in any nation’s inventory. Indeed, it has been suggested that remote drone pilots, freed from the stress factor of being physically at risk while operating these systems, are able to be more careful in distinguishing targets than traditional warrior counterparts within the range of enemy weapons.

A second relevant principle bans the use of any weapon which causes “superfluous injury” or “unnecessary suffering.” While these terms are subject to some interpretation, it is indisputable that the law of war permits the killing or injuring of opposing combatants by means of both kinetic and explosive projectiles and missiles, so a drone launching weapons equivalent to those traditionally employed from other platforms is not at risk of violating this rule.

Some concern has been voiced about the remote nature of drone combat, particularly as currently employed in which operators may be shift-workers located in the United States, literally oceans away from the scene of combat and effectively invulnerable to counterattack. This practice violates historical notions of chivalry which emphasized personal combat—whether between knights of medieval Europe or flying aces over the trenches of World War I battlefields. Although commentators often identify chivalric values as contributing to modern law of war development, there is nothing in the law that requires mutual exposure to risk between opposing forces. Indeed, the history of lawful weapons developments reveals a continuing effort by virtually all states to develop weapons more effective or longer-ranged than those of potential adversaries, allowing the achievement of maximum military advantage at minimum risk to their own forces. The replacement of swords, spears, and bows with firearms, the development of artillery systems of increasing range and accuracy, and the torpedo-equipped submarine are all examples of lawful past efforts to achieve relative (albeit ultimately temporary) invulnerability. Naval and land mines are historic examples of lawful early efforts to use robotic technologies to inflict military damage in remote locations.

Legal Considerations in Drone Employment

Although there is nothing unlawful per se about using drones in combat, it is still necessary that their use conform to traditional rules governing the conduct of armed conflict, commonly known as *jus in bello*. These rules define, inter alia, who and what may be targeted, as well as when and where attacks may be conducted, and who may conduct them. While drones may be employed in a manner fully consistent with the law of war, there are some problematic aspects of

⁴ A military object may be one directly associated with the armed forces, such as a military base, ship, tank, aircraft, etc. or it may be a otherwise civilian object which is being used to achieve a specific military advantage, such as railroad being used to move troops or resupply combat units or a highway being used as a line of advance for an infantry unit.

current U.S. practice, including particularly who is conducting attacks and where they are taking place.

As previously noted, attacks are strictly limited to military objects, defined in Article 52 of Additional Geneva Protocol I of 1977 (AP I) as “those objects which by their nature, location, purpose or use make an effective contribution to military action and whose total or partial destruction, capture or neutralization, in the circumstances ruling at the time, offers a definite military advantage.”^{*} The law recognizes that in many cases civilian casualties will be unavoidable during strikes against otherwise lawful targets and adopts the principle of proportionality as the standard for judging their legality. AP I article 57 para. 2. (b) (iii) requires refraining from an attack “expected to cause incidental loss of civilian life, injury to civilians, damage to civilian objects, or a combination thereof, which would be excessive in relation to the concrete and direct military advantage anticipated.” The “Rendulic Rule” adopted by post-World War II war crimes trials employs a “reasonable commander” standard for liability in this area – if a reasonable commander would conclude an attack to be lawful based on the information they have or should have access to, then there is no criminal liability if it results in disproportionate civilian casualties. Civilian losses have clearly been a major political issue in U.S. strikes in Afghanistan and Pakistan but without detailed information on the value of the intended targets, facts surrounding the decision process, and accurate information about the resulting “collateral” casualties, it is impossible to remotely judge the lawfulness of individual strikes. Nevertheless publicly available information suggests this is an area requiring significant attention on an ongoing basis for both legal and policy reasons.

A unique aspect of the current drone strikes that seemingly differentiates them from most historic uses of force is the apparent deliberate long range targeting of specific individuals or small groups rather than physical objects of military value. There is nothing inherently problematic about selective targeting provided that the selected individuals are otherwise lawful objects of attack. A fundamental principle of armed conflict is that the adversary’s combatants: members of the armed forces and affiliated groups and units other than medical and religious personnel, are liable to attack at virtually any time or place during the duration of hostilities. Despite discussions of “battlefields” by some commentators as if it was a limitation on the scope of an armed conflict, the term is merely descriptive, not legal. A battlefield is nothing more than a location where a conflict party finds an adversary or military objective and conducts an attack. Once an individual affiliates with the armed forces, they become a lawful object of attack whether engaged in battle, on the playing fields of West Point, or even at home on leave with their family—subject only to the rule of proportionality governing civilian losses. Citizenship is also irrelevant under the law of war – it is the affiliation with the enemy’s forces rather than nationality per se that renders an individual liable to attack. The Supreme Court noted in *Ex parte Quirin* that U.S. citizenship was no bar to detention and trial of an individual as enemy who had violated the law of war, and the inherent logic would have supported engaging them in combat had they not been captured.

A complicating factor in the current conflict is the United States’ failure to clearly classify our adversaries within any recognized law of war categorization. If we consider al Qaeda and

^{*} Although the United States has refused to ratify Additional Protocol I, this provision, along with many other parts of the treaty are recognized as being declaratory of customary international law and accepted as binding on all states.

Taliban fighters as combatants then we can lawfully kill them or detain them for the duration of hostilities based simply on establishing that status. The fundamental privilege that the law of war confers on a combatant in exchange for this vulnerability is immunity from domestic laws, which ordinarily criminalize any act of violence to persons or property. As a result of this immunity, sometimes called “the combatant’s privilege,” their conduct must be judged under the law of war rather than ordinary criminal laws. We have refused, however, to accord members of al Qaeda and the Taliban the basic right to engage in combat against us. We have instead treated any such conduct, such as Omar Khadr’s alleged throwing a grenade at an attacking U.S. soldier, as criminal on the ground that these are not uniformed military personnel legally entitled to engage in hostilities. As a matter of law, this is tantamount to declaring these adversaries to be civilians. Civilians who engage in hostile activity can still be attacked, but only for such time as they are directly participating in hostilities. This classification thus imposes additional limitations on our authority to conduct drone strikes (or any other attacks) against them. There have been suggestions that U.S. targeting may have been expanded, at least for some period of time, to include Afghan drug traffickers who were supporting the Taliban with sale proceeds. This would clearly be unlawful by law of war standards, as would direct attacks on other individuals who are merely performing non-combat support functions, such as financiers, bookkeepers, propagandists, etc.

This issue is equally relevant to who conducts attacks on our behalf. There is no question that uniformed military personnel, whether regular, reserve, or national guard in federal service are lawful combatants entitled to “fly” drone strikes in a recognized armed conflict. But CIA personnel are civilians, not combatants, and do not enjoy any legal right to participate in hostilities on our behalf. It is my opinion, as well as that of most other law of war scholars I know, that those who participate in hostilities without the combatant’s privilege do not violate the law of war by doing so, they simply gain no immunity from domestic laws. Under this view CIA drone pilots are liable to prosecution under the law of any jurisdiction where attacks occur for any injuries, deaths, or property damage they cause. But under the legal theories adopted by our government in prosecuting Guantánamo detainees, these CIA officers as well as any higher level government officials who have authorized or directed their attacks are committing war crimes.

The final issue is one of geography. While lawful attacks are limited by specific concepts of “battlefields,” they are nevertheless geographically limited by traditional international law rules to the territory of states party to the conflict as well as international waters and airstrikes. Armed attacks may only be carried out in the territory of a “neutral” state either with that state’s permission or if the neutral fails to prevent opposing forces from using its territory to the detriment of another belligerent. The 1970 Cambodia “incursion” is perhaps the paradigmatic example of this principle. Although it provoked a huge domestic outcry, including the protest which resulted in the Kent State killings, and may therefore have been a political mistake, there is little real doubt that it was legal. International rules, which the United States government played the leading role in developing in the wake of the 1837 Caroline incident involving a British military incursion into New York, make it clear that the use of military force on the territory of a neutral without its consent are limited to situations of “the most urgent and extreme necessity” and can only be justified upon showing “a necessity of self-defence, instant, overwhelming, leaving no choice of means, and no moment for deliberation.”

It is entirely plausible that the governments of countries where U.S. strikes have taken place, such as Pakistan and Yemen, have in fact given their confidential approval and must simply maintain a public posture of denial for domestic political consumption. But if they have not given their permission, it is hard to believe that many of the strikes conducted realistically satisfy the imminency requirements established by international law. This law is intended, by design, to limit cross-border attacks to only the most extraordinary circumstances.

While some commentators have suggested that the United States can conduct drone attacks in self-defense beyond the scope of the congressionally-authorized armed conflict against al Qaeda and the Taliban, it is important to note that the same stringent legal criteria established for the violation of neutral territory apply to anticipatory self-defense as well. The 2004 report of the United Nations Secretary General's High-level Panel on Threats, Challenges and Change rejected the validity of the Bush Administration's expansive preemptive war doctrine while acknowledging that customary international law established a narrow right of anticipatory self-defense even under the U.N. Charter but that it was limited to situations where "the threatened attack is imminent, no other means would deflect it, and the action is proportionate." A sustained, even if sporadic, campaign of drone strikes beyond the scope of hostilities approved by Congress would also raise domestic constitutional issues.

Conclusion

Drone capabilities are progressing rapidly as the United States leads the way in developing and fielding these weapons systems. While the technology is new, it is a mistake to assume that old law is therefore inapplicable. Congress has authorized the President to conduct an armed conflict against al Qaeda and the Taliban, and the law of war includes governing rules and principles broad enough to provide meaningful legal regulation of drone employment. This law authorizes much of what the United States seeks to accomplish with these systems, at least when operated by actual military personnel. But some matters, such as the use of CIA personnel to conduct armed attacks clearly fall outside the scope of permissible conduct and ought to be reconsidered, particularly as the United States seeks to prosecute members of its adversaries for generally similar conduct.

Mr. TIERNEY. Thank you.
Mr. Banks.

STATEMENT OF WILLIAM C. BANKS

Mr. BANKS. Thank you, Mr. Chairman, Representative Flake, members of the committee. Thank you for the invitation to speak with you today.

In these brief oral remarks, I am going to focus indeed on the laws of the United States that govern the CIA's involvement in unmanned targeting.

The decision to target specific individuals with lethal force after September 11th was neither unprecedented nor surprising. In appropriate circumstances, the United States has engaged in targeted killing at least since the border war with the Mexican bandits in 1916. In a time of war, subjecting individual combatants to lethal force has been a permitted and lawful instrument of waging war successfully.

But new elements of targeted killing policy emerged in recent years in response to terrorism and to the threats against the United States. Among the new elements, of course, is the significant role for the CIA in controlling pilot-less drones to carry out the targeted killing policy.

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

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

By the 1970's, fitfully, the practice came to include targeted killing. After the Church Committee learned of and disapproved of CIA assassination plots in the mid-1970's, President Ford issued an executive order prohibiting CIA involvement in assassination, notably not restricted targeted killing, something we will discuss later. And Congress enacted intelligence oversight legislation that, as amended, continues to require reporting to Congress by the President of significant anticipated intelligence operations.

In the weeks after 9/11, President Bush signed an intelligence finding giving the CIA broad authority to pursue terrorism around the world. By statute, the finding must accompany any covert operation approved by the President, including those that permit targeted killing. In this particular classified finding, the President reportedly delegated targeting and operational authority to senior civilian and military officials. The 2001 finding was apparently modified in 2006 by President Bush to broaden the class of potential

targets beyond Osama bin Laden and his close circle and also to extend the boundaries of that authorization beyond Afghanistan.

In explicitly permitting the targeting of an individual with lethal force, the finding also more narrowly focuses the potential to inflict violence. Ever since the Hughes Ryan Amendment of 1974 Congress has authorized CIA covert operations if findings are prepared, delivered to select Members of Congress before the operation that is described, or in a timely fashion thereafter.

So long as the intelligence committees are kept fully and currently informed, the intelligence laws permit the President broad discretion to utilize the Nation's intelligence agencies to carry out national security operations, implicitly including targeted killing. Such an operation would follow intelligence law as "an operation in foreign countries other than activities solely intended for obtaining necessary intelligence unless it would be conducted pursuant to statutory authority."

To some, it seemed that the 2001 finding ran counter to the long-standing ban on political assassination. Enshrined in that executive order first issued by President Ford in 1976, the directive forbids political assassination but does not define the term. Just what does distinguish lawful targeted killing from unlawful political assassination?

The answer turns upon which legal framework applies, as we will discuss further here this morning. During war, whether authorized by Congress or fought defensively by the President on the basis of his authority, targeted killing of individuals combatants is lawful, although killing by treacherous means through the use of deceit or trickery is not. In peace time, any extra-judicial killing by a government agent is lawful only if taken in self-defense or in defense of others.

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

Thank you very much.

[The prepared statement of Mr. Banks follows:]

Testimony of William C. Banks
before the Subcommittee on National Security and Foreign Affairs,
Committee on Oversight and Government Reform,
United States House of Representatives
April 28, 2010

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

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

Introduction

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

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

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

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

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

Afghanistan campaign. However, on November 3, 2001, a missile-carrying Predator drone killed Mohammed Atef, al Qaeda's chief of military operations, in a raid near Kabul.⁶ Then, in early May 2002 the CIA tried but failed to kill an Afghan factional leader, Gulbuddin Hekmatyar, an Islamic fundamentalist who had vowed to topple the government of Hamid Karzai and to attack U.S. forces.⁷

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

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

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

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

During his campaign, President Obama promised to pursue terrorists around the world, including in their refuges in Pakistan. In 2009, President Obama ordered more drone strikes than President Bush ordered in two terms as President. In the first months of 2010, the pace quickened, as more than a dozen strikes were carried out in the first six weeks of the year, killing up to ninety suspected militants. The administration's legal position was outlined by State Department Legal Adviser Harold Koh in a March 24 speech. Koh offered a vigorous defense of the use of force against terrorists, including the targeting of persons "such as high-level al Qaeda leaders who are planning attacks."⁹ Koh indicated that each strike is analyzed beforehand based on "considerations specific to each case, including those related to the imminence of the threat, the sovereignty of the states involved, [and] the willingness and ability of those states to suppress the threat the target poses."¹⁰ Koh indicated that the operations conform to "all applicable

law,”¹¹ and are conducted consistent with the principles of distinction and proportionality. Just what constitutes “all applicable law” in the use of drones in targeted killing?

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

Conclusion

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

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

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

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

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

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

⁴ Gordon and Weiner, “A Nation Challenged”

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

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

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

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

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

¹⁰ Ibid.

¹¹ Ibid.

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

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

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

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

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

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

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

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

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

²¹ Gellman, "CIA Weighs 'Targeted Killing' Missions."

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

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

²⁴ Ibid.

Mr. TIERNEY. Thank you all.

It certainly gives us some food for thought. I am going to begin the questions and we will go around. I suspect more than one round here.

So, if I am listening to all of you, you all sort of agree that the who and the where are the principal issues here, who is using the drones and where that use is. I will watch your heads bob or go back and forth, or whatever, and stop if somebody disagrees with that.

So if it is on the battlefield, and the military is doing it, fine. Nobody has a problem with that. If it is on the battlefield and the CIA or some other civilian organization is doing it, some people have a question, or not? Some people do have a question. Ms. O'Connell.

So even if we are on the battlefield, we are in Afghanistan, for instance, engaged with who the military may think is al Qaeda or the people that they are in contest with, but they have the CIA doing the targeting of drones, or whatever, what is the issue there?

Ms. O'CONNELL. No, under international law of armed conflict, the CIA does not have the right to carry out battlefield killings. Professor Glazier and Professor Anderson both agreed with me on that, that the international law regulating the battlefield does not give the combatants privilege to kill without warning and not face prosecution to persons who are not members of the regular armed forces of a country, who are not under military discipline in a chain of command and not trained in the law of armed conflict.

And those important characteristics, which as Professor Glazier said, we are holding people at Guantanamo because they didn't meet those characteristics, those are failures, those are deficits on the part of the CIA. They simply have no right. We are already facing, 17 of our CIA agents are under indictment in Italy for attempting to kidnap someone off the streets of Milan, an alleged person with ties to al Qaeda. If that is what the rest of the world thinks is the right result with regard to kidnapping, you can imagine how the rest of the world views killing persons by the CIA. It is just a clear violation of international law.

Mr. TIERNEY. Mr. Anderson, you wanted to explore that?

Mr. ANDERSON. I would disagree in part with that. But I guess in terms of the framing issue that you raise, there are two issues implied. One is, what is the ability, if any, of the CIA lawfully to participate in something that is an armed conflict when they are civilians. It is more complicated, I think, than Professor O'Connell suggests, in the sense that their participation may or may not involve the combatant's privilege, but does not make it per se unlawful under international law necessarily. That is, there are questions about whether they are taking direct participation in hostilities. There are questions about their status as civilians in the conflict zone.

But then beyond that, there is a question as to where does this armed conflict run? Does it run outside Afghanistan? Does it run into—

Mr. TIERNEY. That was going to be the next extension of this on that.

Mr. ANDERSON. But that will be the question for the CIA. Then there are two different questions if one accepts that these are two different situations geographically.

Mr. TIERNEY. Let me take this a little bit further. Suppose now we are talking about the situation in Yemen with Anwar al-Awlaki. So I guess you would have to accept the fact or make the argument that he is associated with al Qaeda, or somehow an al Qaeda person, or you have a problem right off the get-go, if he is not associated with somebody that you can make an argument that you are in a conflict with, you have an issue. Is it OK for our military at that point in time, as this is an extension of our conflict, to use a drone and target this individual? Is that acceptable under international law?

Ms. O'CONNELL. No. That was a point of my remarks as well.

Mr. TIERNEY. The battlefield issue?

Ms. O'CONNELL. Yes. In Yemen, this particular case again, in 2002, when we carried out our first drone strike in Yemen and killed named individuals, the Air Force refused to carry out that operation. They were the ones operating drones at that time. And the CIA was willing to do it. The Air Force said, we don't have any right to kill in a situation in which we are not involved in a battle, in an armed conflict. And the Air Force was right, that was the correct legal intelligence.

Professor Glazier said that he agreed with this lawyer-created concept that we are in a worldwide self-defensive armed conflict against al Qaeda and the Taliban and others. And he said that this is supported by the world. In fact, after September 11th, the United Nations Security Council did find that the attacks gave rise to the right of the United States to engage in self-defense. But we engaged in the self-defense that the law of state responsibility gave us a right to engage in, and that was in Afghanistan. That was the state responsible for carrying out the attacks, for supporting al Qaeda in being able to carry out those attacks.

So we lawfully took the battle to Afghanistan. We engaged in lawful self-defense on the territory of the state where we had been attacked. But the rest of the world does not recognize the right to carry out attacks of a battlefield all over the world, such as in Yemen and in parts of Pakistan and in other places. There are many other countries that have been attacked by al Qaeda: Great Britain, Indonesia, Spain, Kenya. None of them consider themselves to be in an armed conflict all over the world against al Qaeda. They consider themselves to be involved in counterterrorism operations. And using the methods that they have used, they have been very successful.

The British have said, you are never in an armed conflict with terrorists. They are minor criminals, you do not elevate them to combatants. And President Ronald Reagan said the same. I agree with President Reagan, you cannot have an armed conflict with terrorists. They are mere combatants, they are not warriors and they should never be elevated to the level of warriors. Our warriors are in an armed conflict in Afghanistan. We should be using counterterrorism law enforcement techniques in other countries. We just don't have the right to bomb people where there is no armed conflict.

Mr. TIERNEY. This is where the 5-minute rule is particularly limiting.

Ms. O'CONNELL. I am sorry.

Mr. TIERNEY. No, it is for me, not for you.

Mr. Flake.

Mr. FLAKE. Let me expand on that a bit. When we talk about Yemen, how many attacks, Ms. O'Connell, do we know of that have been public, have we used in Yemen, as far as drone attacks?

Ms. O'CONNELL. I know of only three or four, one carried out in the Bush administration and the others in the Obama administration. The Obama administration has clearly stepped up the policy of using drones in non-armed conflict situations.

Mr. FLAKE. You were drawing some kind of distinction earlier with regard to whether or not we have permission from those states. But it seems from what you are saying, that shouldn't even make a difference.

Ms. O'CONNELL. There is a very key and often overlooked distinction. The invitation has to be to participate in the armed conflict that the government of the country is participating in. So Yemen right now is facing insurgencies in the north and the south. It has two rather minor insurgencies going on right now. They are getting some help from Saudi Arabia, they have requested that help with regard to one of these insurgencies. If they had asked us, the United States, to be also involved, we could use military force there, on their invitation, in their armed conflict.

But what we have done, and in 2002, the case we know the most about, this attack was not part of any armed conflict that the Yemeni authorities were involved in. It was six individuals in a vehicle in a remote area, and we killed all six persons, including a U.S. citizen. That is not an armed conflict that Yemen is engaged in. So even having consent in that case is not sufficient.

Mr. FLAKE. Mr. Banks, you mentioned the requirement that Congress be informed under the National Security Act. Is there any evidence that Congress has not been informed sufficiently with regard to these activities?

Mr. BANKS. Not to my knowledge, Representative Flake. It is of course a very broad grant of authority. And the reporting requirement is only ambiguously stated, but fully and currently informed. So that language would suggest that Congress, the intelligence committees, should know the details about those operations.

Mr. FLAKE. I take it you disagree, then, with the position that we can't or shouldn't be involved in targeted attacks in Pakistan or Yemen?

Mr. BANKS. Whether we should as a matter of policy is not my expertise. I think that the law may permit that. I don't think that the paradigm of armed conflict is the only body of law that may apply in that setting. I think the law of self-defense, part of customary international law, as well as the laws of the United States, constitutional powers of the President, the authorities that you, the Congress, have given to the President through the authorization for the use of military force, along with the intelligence laws that I made reference to in my remarks, I think all have a role to play in deciding what authority the United States has to operate in those non-traditional battlefield environments.

Mr. FLAKE. In that kind of environment, would it make a difference at all to make it legal, if you will, that the country give some kind of blanket or other kind of approval, as Yemen seems to have done, or Pakistan has certainly done?

Mr. BANKS. I think this host state consent is a very important ingredient, as Professor O'Connell suggested. But it is not necessary. I think Mr. Koh made that observation even in his March 25th address in articulating the posture of the administration on these matters.

Mr. FLAKE. Mr. Glazier.

Mr. GLAZIER. I do disagree with Professor O'Connell on one issue, and that is this sort of narrow definition of battlefield. It seems to me that battlefield is a descriptive term and not a legal term. And that in an armed conflict, those members of the enemy's forces who are legitimately targetable are essentially legitimately targetable anywhere.

Now, traditionally, armed conflict takes place in the country of the state parties and in international airspace and waters. So there are issues basically from the law of neutrality that talk about when you can exercise an armed conflict in another country. And it is certainly discouraged.

But if a neutral either were to give its consent or more importantly, if a neutral was not exercising its obligations to prevent its territory from being used to the detriment of a warring party, then in fact, as the United States went into Cambodia out of necessity during the Vietnam War, it is lawful for a country to conduct some limited operations under a high degree of necessity in countries which are not direct parties to the conflict.

Mr. FLAKE. Let's bring it to present day, real terms, the underwear bomber, we know now was trained in Yemen. If we had actual intelligence that he was being trained to do what he eventually did, and that he was in Yemen in one of these camps, the Yemeni authorities have given us blanket approval to go after, but it wasn't part of an armed conflict that the Yemeni government was involved in, Ms. O'Connell, are you still saying that would not be a justified action?

Ms. O'CONNELL. That is quite correct. Let me just say in response to Professor Glazier, international law clearly has a definition of what an armed conflict is and what a battlefield is. I chair the International Law Association's Use of Force Committee. We have issued a report in 2008 that shows, without doubt, what international law supports as the definition of armed conflict. And it is not in a place where there is no intense organized armed fighting. And you do not have the right to use military tactics in those places.

You have the right to use police enforcement measures. And that is what the United Nations said when they reviewed our Yemen strike in 2002. They said that was an extra-judicial killing. They did not say what Professor Glazier said, that because these were al Qaeda persons, they were related somehow to the armed conflict in Afghanistan and they could be killed. That is not what the U.N. said. The experts on this particular law said it was extra-judicial killing. And nothing has changed in the case that you bring up of the more recent so-called underwear bomber.

But let me just say, because there is some kind of view, I think, that we have come to have in the United States that this is somehow restrictive law, unreasonable law, that we should be able to go out and kill these people wherever we find them, that this is somehow making our country less safe. Quite the contrary.

I cite the Just War doctrine, because this is an ancient set of rules that really are consistent with our principles, and our sense of what works, how we can really repress violence, how we can really build the rule of law. And it is not by finding loopholes, interpreting broadly and loosely and using more force than is really necessary in these situations. Law enforcement works against terrorism, and that is what we should be doing.

But more importantly, when we don't follow the rule of law, and everyone knows that when these drone attacks occur in places like Yemen or rural Pakistan, everyone in the world is watching us. And they know there is something wrong with this. We are not holding ourselves up to the beacons of the rule of law. We are not sending a signal that we want to see all countries suppressing violence and promoting the rule of law.

This is a very dangerous policy, because it is not consistent with the law.

Mr. TIERNEY. Thank you.

Mr. Foster.

Mr. FOSTER. Thank you, Mr. Chairman.

Do any of you know how much training the drone operators receive in international law and these sorts of issues?

Ms. O'CONNELL. I quote Bill Banks as saying "none."

Mr. BANKS. I think Professor O'Connell is referring to a conversation we had about the known training of CIA personnel in that regard. That is true, although I have read recently that there may be some. But I have no inside information.

Of course, for members of the military, perhaps Professor Glazier should comment on law of war training.

Mr. GLAZIER. Well, I can't speak at all to what the CIA folks are getting. But I also note that, it sounds sort of an odd thing to say, perhaps, but the reality is that the U.S. military has always sort of emphasized law of war compliance among the practitioners, sort of in the form of giving them clear rules to follow. So the reality is that there are many situations which American service personnel may not even know that they have had law of war training, because they are given sort of specific rules to follow in carrying out armed conflict, often in the form of pocket cards, which reflect a combination of rules from the law of war, as well as policy judgments that the U.S. military hierarchy and civilian leadership has made in terms of how they want a particular conflict covered.

So it is not necessary to be able to poll an individual service person and say, have you had training in the law of war for there to in fact be law of war compliance. But I don't know what the CIA does.

Mr. FOSTER. Mr. Anderson.

Mr. ANDERSON. I think this is something of a——

[Remarks off mic.]

Ms. O'CONNELL. I just disagree a little bit with that. Mr. Foster, I think your question is very well put, because the interviews I

have done with drone operators, they have the final say about whether they press the button. So even if it has been cleared by Chairman Panetta, and to my knowledge, I don't believe he has been trained in the law of armed conflict.

But anyway, the drone operators are the ones who finally have the responsibility of pushing the button. So their training is highly relevant. If they are going after a named individual, and he is in a house with a number of other persons we have no information about, so that we have to err on the side that they are civilians, our fighting men and women know the rules of proportionality. And they are not going to make that strike.

For the CIA person, that name on the list is his sign that he has accomplished what he has set out to do. And that is a very different calculation for the strike.

Mr. FOSTER. My next question has to do with probably my ignorance of the exact definition of the battlefield. If we just look at the supply chain, if you consider for example, an IED used in Pakistan that is manufactured in Iran, say, and that may go through staging areas in Pakistan and be shipped by means that we can identify along the way, how far back in the supply chain can you go before you leave the battlefield?

Mr. TIERNEY. Can I just interject? My apologies, Mr. Foster. We are having some difficulty with the microphones. If I could ask each of the witnesses to pull them closer to them and make sure they are on when they speak, it will help with the recording of the hearing. Thank you.

Mr. FOSTER. Mr. Glazier.

Mr. GLAZIER. Again, I respectfully disagree with Professor O'Connell that the law of war provides a definition of the term "battlefield." The law of war provides a definition of military object. And military object is something that by its purpose or use creates a military advantage. An IED therefore is clearly a military object.

The issue then about how far back in the logistics chain that we can attack it I think then becomes a matter governed by sort of broader rules of law. Because we are not in an armed conflict with Iran, and there is nothing that makes it a crime for a nation to engage in the production of war materials and sell them to other countries. In fact, even during World War II, Switzerland provided war materials to other countries. And that was not a violation of any law. Switzerland was a neutral power and was not a legitimate object of attack.

So where the IED becomes a legitimate or lawful object of attack becomes where it either comes into the hands of terrorists in a country or location where it's legal to attack them or arguably where it comes into their possession in a neutral country and that neutral country is allowing its territory to be used by that group to the detriment of the country that is at war. So if we are in a war with al Qaeda, if when al Qaeda comes into possession of a weapon and if it is in a country which is not taking steps to prevent them from using their territory to our detriment, that, I think, is where we draw the line and where an attack becomes lawful.

Ms. O'CONNELL. I have a different view of the matter. First, I think it is important that the law, the current law is what we have in our minds. So 1949 is the Geneva Conventions, 1945 is the

United Nations Charter. These are the dates that we should be working from.

There has been a lot of confusion about the right to use drones in Pakistan because of events in Pakistan having an impact on our battles in Afghanistan. I think this is where some people who even understand that there is no such thing as a worldwide war against terrorists do have some confusion about why we aren't in a war in Pakistan as well as Afghanistan.

But that sovereign boundary between Pakistan and Afghanistan is highly significant. It is highly significant for our efforts to help support a stable and effective Pakistan, which is ultimately going to be our protection from terrorism and lawlessness in Pakistan. Respecting that border is essential.

Yes, there is some cross-border activity. There are people hiding. There are some munitions going across the border. But a series of cases from the International Court of Justice makes it clear in that situation, Afghanistan, with our help, has to protect against that kind of low level activity at the border. It can't make strikes into Pakistan against those kinds of activities. That is clearly unlawful.

And I would just use an analogy. Think about the way the United States would feel. We have a lot of lawlessness on our border with Mexico. Mexico is justifiably unhappy that we are not able to restrain narcoterrorists from getting across the border, bringing weapons in, bringing persons back and forth. And they have made complaints to us and they have told us to stop these criminals from getting across the border. Should we allow their police or their military to use combat drones to strike at hotels or places in Arizona where the Mexican military thinks that some of these people are hiding? Absolutely not.

If Mexico asks us, and of course, we are making an effort, as Pakistan is, and we will help Mexico even more. But we expect Mexico to do the main job of defense at their border. And that is what we have to expect Afghanistan to do, too.

Mr. GLAZIER. One thing I omitted from my statement is that there is, though, an imminence requirement for a strike in a neutral territory. So in other words, when I said that we could potentially strike at an IED in the possession of al Qaeda in a neutral territory, there does also though have to be an imminent nature to the threat. So if it was simply in a warehouse or being stockpiled or wasn't going to be used against us in the near term, then we don't have a right to strike a neutral territory.

But I do think that the right is perhaps a little bit more extensive than Professor O'Connell presents it.

Mr. TIERNEY. Thank you.

Mr. Duncan, you are recognized for 5 minutes, or thereabouts.

Mr. DUNCAN. Thank you, Mr. Chairman. I don't think I need 5 minutes. But I do have some concerns about this. I certainly have no sympathy for any terrorists or anybody who is attempting to kill Americans.

But I do have some concerns when I read, as I do in the committee briefing, that the number of drones has been increased in the Defense Department from 167 in 2002 to over 6,000 today. I guess it says in 2008, maybe there is more than 6,000 now. Unfortunately, I couldn't come and hear your testimony.

But a few months ago, I read an interview in the Washington Times which said that, where the top United Nations anti-terrorism official said that al Qaeda now had so few members that it was "having trouble maintaining credibility." Those were his words. I remember reading an earlier column by the conservative columnist Walter Williams who said that the threats from al Qaeda have been so exaggerated that al Qaeda had, I think fewer than 3,000 members at that time, and this was 2 or 3 years ago, I guess, and had no money and was made up mainly of high school dropouts who were living at home with their parents.

I saw another report after that said it had fewer than 1,700 members, and of course, all that was well before this interview by this United Nations official.

What I am concerned about, I have long thought, I mean, we have been in Afghanistan for 9 years, and in Iraq. I have long thought that the threat that is there has been greatly exaggerated. I am afraid that much of this is being done because of money and power. When I see us increasing the number of these drones to many thousands, I am very concerned that we are going to start seeing more incidents of innocent civilians being killed, or mistakes being made.

That is the concern that I have, more than anything else. I just thought I would add that to the hearing here this morning.

Thank you, Mr. Chairman.

Mr. TIERNEY. Thank you, Mr. Duncan.

Mr. Welch, you are recognized for 5 minutes.

Mr. WELCH. Thank you. My first observation is, every time I listen to Mr. Duncan, he makes more and more sense. Thank you.

Thank you very much for being here. Just a few questions. In the last month, there have been several news reports, of course, you had referred to this, I think, that an American citizen has been added to the target list. Just go down the line quickly, if you can, I don't have much time, but can the United States in your opinion legally target an American citizen?

Mr. ANDERSON. Yes. As they have done, and the information has been released on the basis that we know publicly, at least, the basis on which he is targeted. And the emphasis on the statements by the administration that this had gone from simply making statements about various things to active assistance in planning and operations.

Ms. O'CONNELL. An American citizen who takes up weapons against his country and fights our combatants on the battlefield, of course, may be killed in the course of that armed conflict. Otherwise that American citizen, as any person in the world, should be detained through law enforcement measures. If that person resists arrests, of course a very dangerous person may be killed in the course of resisting arrest. The fleeing felon rule. Otherwise, we all have human rights, Mr. Welch.

Mr. WELCH. Thank you.

Mr. GLAZIER. I will limit my answer to a strict law of war perspective. If the individual is affiliated with a legitimate adversary, and has essentially the status of a combatant or an individual in the chain of command of the combatant, then I believe they are a lawful target. In fact, under domestic law, I mean, the Supreme

Court held in *Ex parte Quirin* that it didn't matter whether a combatant might have a claim to U.S. citizenship. It was the fact of affiliation with the adversary that made them liable to targeting.

Mr. BANKS. I believe the answer is yes as well, and I would remind us that part of the authority here includes domestic law as well. The President's constitutional authorities and the law that you enacted in 2001, the authorization for use of military force, may permit targeting that individual.

Mr. WELCH. OK, thank you.

I want to ask you about this. Last year, the International Committee of the Red Cross put out interpretive guidance, as you know, to help define what can be considered "direct participation in hostilities." And again, I would like to just go down the line, I am sure you are all familiar with that. Do you agree with the ICRC's interpretation of the relevant law? If you don't, what would you change?

Mr. ANDERSON. Most of what is in the interpretive guidance is fine. But there are a number of provisions in there that I think are completely over the edge, in fact, and I am very surprised that the ICRC would put them out, given the fact that they could not command a majority of their own experts in that regard. Those primarily go to the question of part-time combatancy or civilians who take some part in hostilities, and the question of where you draw those lines. But I think that the way the ICRC has drawn them is really quite unacceptable.

Mr. WELCH. Thank you.

Ms. O'CONNELL. I have spent a very good deal of time studying the interpretive guidance. In fact, I believe Professor Anderson is not quite right, there were a few of the experts who have a dissenting opinion, but not a majority. The few who had a dissenting opinion were from countries where they wanted to have an expansive right to use military force and some of their allies.

And the unhappiness in the final product was that the ICRC, I think, did in fact take a step away from the strict definition of who is a direct participant in hostilities to appease these experts. But at the same time, it said, if we are going to do that, we have to add some other protections back in. So it actually raised the requirement of necessity for any killing.

I think on balance, taken together, those two elements, a looser definition of who is a potential target, but a higher and more restrictive right of when you may actually kill, is a balanced outcome in the end. If you are going to change the law, I think that is the only way you could do it. I think by now, because the ICRC is so influential, this is now becoming the standard.

I think in the end, we are going to be happy with it. But it has certainly been a difficult development process.

Mr. WELCH. Thank you.

Mr. GLAZIER. Just two quick comments. The first is that the higher standard may very well be a good idea. But I don't think it is reflective of the state of which nation states, nation states ultimately make the international law. I certainly think aspirationally it is probably good. But I think it exceeds the current state of the law.

The other thing I would just point out, as I am sure you are aware, but for the record, is that the ICRC guidance only really

comes into play if we are categorizing the adversary as civilians. Because it relates to the direct preservation of civilians. If an individual is in fact a warrior, or is treated as a combatant, then under the current law of war, that status makes them targetable at all times and essentially all places. So it is only if we are choosing to deny the adversary combatant status, which I think is a political choice that we have, we can then invoke a whole different set of rules.

Mr. BANKS. I would also make two comments. I think there are problems with the part-time warriors. I think the ICRC interpretation doesn't reflect the nuance that needs to be taken into account to get at insurgents and terrorists who go home at the end of the day. As Professor Glazier would say, an armed member of our armed forces of course enjoys no such privilege to go home and watch television at the end of the day. He is a target 24/7.

The second comment of course is that this, as I have said before today, this paradigm of the laws of armed conflict is only one of the spheres of authority that must be taken into account in deciding who may be reached as a target.

Mr. WELCH. Thank you. I yield back.

Ms. O'CONNELL. Could I just add briefly that in fact the interpretive guidance understands the point Professor Glazier was making, that it would be unfair to regular combatants if they were held to, if they didn't have the same necessity protection that direct participants have, non-traditional or unlawful combatants. So they have actually added the necessity requirement even to regular combatants. And I think it is only fair that our serving men and women in uniform get as much protection as somebody who is an unlawful combatant, or a direct participant in hostilities without the right to do so.

So I think that probably in the end, we would all agree, is a good thing. I think it also goes to the point that I have been trying to make, that the world does not accept that everywhere you go is a battlefield because of the person who is there. Internationally, we are coming to this understanding that killing really should be in situations of necessity. That is not all these places everywhere in the world. It is certainly not here in the United States, Germany, England, etc.

Mr. WELCH. Thank you, Mr. Chairman.

Mr. TIERNEY. Thank you for your questions on that.

Mr. Quigley.

Mr. QUIGLEY. Thank you, Mr. Chairman.

To the panel, Mr. Bynam from Georgetown University, talking about the need for greater oversight, said, "You need someone to effectively act as a devil's advocate within the system who is ideally outside the decision loop of such programs. It could be a U.S. attorney or something like the Foreign Intelligence and Surveillance Act court that makes judgments on secret wiretaps, because the simple requirement of going before a judge or an independent official to make a case for a targeted killing introduces a measure of accountability."

So what I would ask the panel is, do you agree with Mr. Bynam, should there be some sort of an independent third party to oversee and approve drone activities?

Mr. ANDERSON. I would disagree strenuously with the proposition that this is an area that should be judicialized. I think that it is not the proper frame for the U.S. judiciary, and I don't think that they would have any expertise, and inevitably would wind up turning it into something that would both make the intelligence and military uses of force less effective. At the same time, I believe it would also corrupt the domestic judicial process in the United States, because they would be involved in a series of activities with necessarily very murky lines to be drawn. I don't think that it is an appropriate role for the judiciary to be involved in.

I do think that there is a much greater role to be had for accountability and oversight coming from the Congress itself. Precisely as the prospect of drones raises the possibility of smaller and more discrete uses of force, in which case that can in some sense substitute for war. In that regard, I think that the right accountability mechanism actually rests with the Congress and not with any other body.

Mr. QUIGLEY. But who is the person that does that on the battlefield?

Mr. ANDERSON. I think the questions about the use of force that are most crucial here are ones that are actually being made by the CIA, and that requires the processes that Professor Banks had referred to, I think they actually need to be strengthened to require more consultation with Congress and more information to be given to Congress. I think that one of the important roles that Congress has in this is to be able to raise objections to particular things.

I think it is a much more complicated role for Congress, but I believe that it is actually the right mechanism to provide accountability.

Ms. O'CONNELL. I agree with Professor Anderson. Having a court involved would not help us get into compliance with the law of armed conflict. There is an assumption in the idea that somehow what the CIA is doing just needs some oversight. In fact, there is no justifying it, so how could a court help?

I agree with Professor Anderson that it is up to Congress to make sure that the executive branch remains in compliance with our fundamental obligations internationally to the extent that the executive is not doing it itself.

Mr. GLAZIER. I would just say that if the attacks are being conducted under the law of war, under military authority, then these issues are essentially addressed through the rules of engagement as far as deciding what level of oversight is necessary within the military chain of command. If this is activity that we are deciding is taking place deliberately outside of the law of war setting, and we are using basically national security laws and international rights or asserted rights to self-defense, then that does seem to me that is a matter for Congress to decide how they want to structure the law governing those matters.

Mr. BANKS. I agree that the courts should not be involved. I also share the view that Congress could do more than it has customarily. We have talked today about battlefield. It may be that in terms of oversight, one thing that Congress could consider is establishing criteria for the use of targeting outside of traditional battlefields.

In other words, you need something to oversee. You need more than what the law now says to be currently and fully informed. Your Bynam quote suggests that there should be some measure that could judge whether or not the efficacious behavior of our government has followed its policies. Could there be criteria for the use of force outside the traditional battlefield? Could those be statutorily conferred? Could they be then subject to oversight of the type that we have been discussing here?

Mr. QUIGLEY. And what would the precedent for that be?

Mr. BANKS. The precedent might be, as Bynam suggested in his comment, use of an intelligence court to review the surveillance requests of the Department of Justice, even though that is a judicial forum. I think that for all the reasons that have been offered here today, the courts are ill-equipped to be involved in that process. They wouldn't want to do it. The FISA court, I think, has a very full plate. And you are much more equipped, I think, to make those kinds of judgments in your role.

Mr. QUIGLEY. Thank you, Mr. Chairman.

Mr. TIERNEY. Thank you.

I am going to make some statements and ask you to react if you disagree with them and move along with that. If we have a situation where we have a battlefield like Afghanistan, the military is using drones, I don't think I have heard any of you disagree with that. I think all of you think there is question whether the CIA or other civilian organizations can do that with authority.

If we take one of the people involved in that conflict, some al Qaeda operative, and say he moves back over the border into Pakistan. Some of you think that it is fine for the military to go after him there, but some of you think that, again, there is a question and a problem with the civilians or the CIA doing it.

Is there a problem if you think that the Pakistanis have agreed to have the United States exercise this type of force? Am I right there? So if this al Qaeda person goes over the border in Pakistan, we are fighting that fight too, and you can use your drones to get them, and nobody on the panel seems to have difficulty there?

If that individual keeps traveling and goes to Yemen, I sense that some of you don't have a problem with the military going after him there. OK. So there is one individual going into Yemen, being targeted, and nobody has a problem with that, the military going after them, even though they may not be involved at that particular time in anything eminent. OK, I am going to keep moving this unless somebody jumps in on me here.

Ms. O'CONNELL. Mr. Chairman, when you said there is only one person, it makes it sound as though it is a majority vote and we are the Supreme Court and we get to decide whether killing that person in Yemen is lawful or not. I am really trying to be objective, this is not my personal opinion.

Mr. TIERNEY. No, no, it is the law. I want you to interpret the law for me.

Ms. O'CONNELL. This is what international law says. And the authorities that I am speaking of are the United Nations—

Mr. TIERNEY. I think we all understand that. Nobody is going to pin this on you. We are asking you as professors and legal scholars what the law of the land is out there.

Ms. O'CONNELL. I want to stand here with many, many others who agree with me, even though the three who have been called today don't share that view.

Mr. GLAZIER. I would like to speak for myself, rather than have someone else decide what my views are on this.

Mr. TIERNEY. Now is your chance.

Mr. GLAZIER. Exactly, sir. The international law that governs the use of force preemptively in other countries was basically crafted by the United States in discussion with the United Kingdom after the Caroline incident of 1837. It does, I may have sort of seemed a little bellicose in some of my earlier remarks, but it does in fact impose constraints of necessity and imminence. So I do think that this one individual as you have described, while they have moved across the border in Pakistan, they may still reflect that imminent threat.

But unless we actually had intelligence that said, "not only are they in Yemen, but they are on the verge of doing imminent harm to the United States from that position in Yemen," then in fact under the rules that the United States has taken the lead in crafting, that is too far removed, and we would no longer have the authority even for the military to use force at that point.

Mr. ANDERSON. I will round it out, I guess. I think one of the things we have to keep very much in mind here is that the United States has long had a policy, and has declared its legal view and it is reiterated in Harold Koh's statement as the considered view that where a country is unable or unwilling to prevent its territory from being used as safe haven for transnational terrorists, and this goes back decades and decades and decades, the U.S. view is that yes, there are imminence requirements and yes, there are Caroline requirements, and yes, there are numbers of other considerations.

But important as sovereignty and territorial integrity are, the United States regards it as lawful to be able to go and strike those persons where a country is unwilling or unable to control its territory.

Mr. TIERNEY. So an individual like al-Awlaki, if somebody were to go after him, are they using the combatant theory or the self-defense theory?

Mr. ANDERSON. I believe that the administration is using the self-defense theory at this point, because of where he is located and because I am not—actually, I can't tell you that. I wish I knew and I think it would be something where Congress should actually ask questions of the administration to find that out. I don't know.

Mr. TIERNEY. My concern there is if al-Awlaki goes back to Texas, is it then lawful to blow him up there?

Mr. ANDERSON. No. The territorial United States is a very, very different proposition from Yemen or any other place.

Mr. BANKS. For the practical reason that an arrest may be effected there in Texas.

Mr. TIERNEY. That presumes then an arrest couldn't be effected in some other country where he is.

Mr. BANKS. It does. If that alternative is available, we should pursue it.

Mr. TIERNEY. Is that generally agreed to by you, Mr. Anderson, as well?

Mr. ANDERSON. No, not entirely. I believe that as Harold Koh stated in his testimony, there is not an obligation to give process and there is not an obligation to give warning, once one has identified that person as being either a target in relation to an armed conflict or self-defense.

Mr. TIERNEY. And there is no obligation to arrest him, if that is possible, even if you could?

Mr. ANDERSON. There is no obligation to arrest him. Now, there is an obligation to identify him as a target and to show that there is some necessity about that. And the question of how much necessity may involve and probably should involve a question of, is this London and could we go to the authorities there in order to do that.

But the reality is that Yemen and Britain are really different.

Mr. TIERNEY. Where does this, the imminence of the threat come in on this? I know Mr. Koh spoke about that. A definition of that would be helpful.

Mr. ANDERSON. He raises that as one of the considerations that has to be taken into account as part of self-defense. So he is referring to what has been referred to as the Caroline doctrine.

But the United States has embraced for a very long time the idea that self-defense includes an "act of self-defense" where one is looking to the character of the threat and things they have done in the past and things that the group with which an individual is affiliated has done in the past, in order to decide that they constitute a threat. It is not some idea in the United States' mind, certainly, that it is looking and saying, "oh, they are about to cross the border with a nuclear weapon." It is not that kind of eminence.

Ms. O'CONNELL. I don't know what policy we have had for a very long time on this. The targeted killing of individuals has really begun after 9/11. We didn't take this view that we could go around with drones killing people of this kind. I think the comment that there is somehow a distinction between what we can do in the United States and the U.K. versus Yemen is really the telling point. If there is a worldwide armed conflict that we are justified in fighting out of self-defense and treating all the persons involved in al Qaeda as combatants we can kill without warning, then why isn't there an armed conflict in the United States where we can do the same thing? Or the United Kingdom or Germany?

In fact, the Bush administration took the view that we could do this. There were statements made to the Congress that we could. And that just shows that this is a fiction we are dealing with, created by lawyers. And it is not the reality and not what the law requires. There is no armed conflict happening in this country. Our official view of Yemen and Pakistan is that in those countries, we should be working with their authorities. We should not be dismissing them as unable or unwilling. And the more we do that, the more we undermine the respect their people have for them and their ability to do this job for us.

So it is counterproductive, it is non-factual, it is not our official position that either Pakistan or Yemen are unable or unwilling. Therefore we should not be treating them as combat zones.

Mr. TIERNEY. Does your opinion change if Yemen or Pakistan said to the United States, we would like you to get that guy?

Ms. O'CONNELL. No, because Pakistan and Yemen can only give us the authority that they have to give. If they are involved in an armed conflict, and Pakistan is now trying to clear the Swat Valley of certain Taliban forces, if they ask us to join with them in carrying out that particular action, and really, there is question under law of armed conflict whether named individuals can be targeted and brought to bear. Mr. Koh only mentioned one case of this, which was a World War II case involving Justice Stevens. And he regretted killing a named person. So this is really a question for warriors in an armed conflict.

The only thing that Pakistan or Yemen can ask us to do in terms of carrying out battlefield killing is to join with them in their own armed conflicts to try to support what they are doing.

Mr. TIERNEY. So if Yemen decided that this was a guy they wanted to have a conflict with, that he was part of some operation that they thought, or whatever, then they could do it?

Ms. O'CONNELL. Yes. And we can certainly help them, and we were helping them after the Cole attack. Our FBI people, with really good training in Arabic, who know terrorism networks, were working effectively with the Yemeni authorities. That is the route we should be pursuing and should have been pursuing in these last years.

Mr. TIERNEY. Thank you.

Mr. Flake.

Mr. FLAKE. Mr. Anderson, Legal Adviser Koh, his statement didn't specifically mention the CIA. Is there a reason for that? By saying there is authority, did that necessarily capture uniform or civilian operators? What is your feeling there? And should he have, and will they need to further clarify?

Mr. ANDERSON. I think that part of the difficulty is that although Director Panetta is all over the newspapers, deliberately in order to give information about the campaign that is taking place in Pakistan and elsewhere, it has never actually been officially admitted. And so I think that the difficulty for the State Department is how do you wind up providing official overt legal blessing to something that the agency itself doesn't formally admit actually takes place.

I believe that this has actually reached a counterproductive point for the CIA. I think that we actually need to define a body of operations in which it is denied and deniable and not acknowledged as such, but is not regarded as though it were covert. And yet the Director is in the newspapers talking about it. I think that we actually need to define some area between those things in order to be able to talk precisely about these kinds of legal and policy issues.

So I think that there would actually be a great deal of utility in inviting representatives from the intelligence agencies to come and talk about how they classify these things. I would be very interested in what Professor Banks has to say in particular about this, because I think he has much more experience.

But I think the failure to mention the CIA is largely on account of the fact that there has been no explicit acknowledgment of it. I think it needs to be named. I think the CIA needs that protection. And somebody needs to invite them to do that.

Mr. FLAKE. Before going to Professor Banks on that, if you were a defense attorney, defending either uniformed or civilian operator of drones, would you feel comfortable enough that the statement from the administration gives your client sufficient coverage there?

Mr. ANDERSON. I feel comfortable that it does give sufficient coverage. But I also think that it is kind of missing the point in a certain way. We know what is going on, it is acknowledged, it is out there on the table and I think that it has to be discussed in order to lay out clearly what the legal rules are.

I also think that, I mean, if I were a defense attorney, I would certainly assert that. I think that speaking as a neutral professor, I think that it needs to be said, I think that the CIA personnel need to know what the views of the political branches are on this, and need to have it clearly and explicitly stated.

It cannot be left in limbo, so to speak, of having even a small amount of uncertainty as to whether their actions are regarded as lawful or not. If Professor O'Connell's views about this are right, somebody should say so and make that policy. If the views that I have articulated are right, that needs—but the uncertainty needs to be taken away here.

Mr. FLAKE. Mr. Banks.

Mr. BANKS. I agree with Professor Anderson that greater clarity for the role of the intelligence community in this area would be a positive development. I think clearly Mr. Koh is speaking on behalf of the State Department and he was articulating what he said to be his view of the international legality of these operations. But he made reference not only of course to international law and the laws of armed conflict, but also to the Constitution of the United States and the President's powers as well as the authorization for the use of military force.

He did not, of course, refer to the intelligence laws that I have spoken about here this morning, and I think that is regrettable. In part, I believe it is for the reasons that Ken suggested, they don't illuminate the issues or supply the criteria that we might have to begin to evaluate these operations. Some kind of a middle ground that Professor Anderson suggests between deniable and Mr. Panetta in the newspapers I think might be a helpful development.

Ms. O'CONNELL. I think we really do owe our CIA operatives very good and clear legal advice. I think they were let down very badly by the advice with regard to interrogation, tactics and I think they are being let down now if they are being told that the drone operations are lawful.

It is one thing to develop a theory within the United States that could somehow justify it and that you have heard from my colleagues today. It is another thing in terms of what foreign countries believe, especially where those CIA agents are operating in Pakistan, Afghanistan or other countries. And in those countries, I am confident that the position I have presented to you is the one that is held there.

So our CIA agents who are involved in this activity are in jeopardy. We have 17 CIA agents who are under indictment in Italy for kidnaping. And at any time, if the Pakistani authorities decide that they are no longer friendly to us, or the Yemeni authorities, they can arrest and put on trial for murder persons involved in the

CIA and these killings. That position should be clarified to our agents.

It is one thing that we believe we are right in our theories, it is another thing what the rest of the world thinks. And I believe that our agents are in serious jeopardy.

Mr. FLAKE. Thank you.

Mr. GLAZIER. Congress can certainly clarify as a matter of domestic law and help the CIA folks out that way. But I think as a matter of international law, to participate in a killing, the best you can hope for is to have the belligerent's or combatant's privilege and immunity under the international law of war. But that we can only confer upon our uniformed military personnel. So I don't think there is anything that we can do that, as a matter of international law or as a matter of the laws of other countries, that is going to get the CIA folks out of the risk of some sort of foreign prosecution.

Mr. ANDERSON. I would add to that, I am sorry to take more time on this, but I would add to that Spain, for example, has been moving to alter its law in universal jurisdiction. They have had conversations with some people in Spain that were connected to that process and said, was that because of U.S. pressure that was brought about concerns about bringing prosecutions exactly of this kind that Italy has brought? And the answer was, no, the answer was nobody thinks that the U.S.'s view is important, because it will never wind up backing it up. And what matters is actually that we are concerned that China will be upset with this and that it would wind up cutting us off from contracts.

So I think that there are political avenues by which the United States can make it much, much more costly in order for foreign countries to be able to go after its personnel in that way. When the United States has formulated a view about what it thinks is the proper view of international law on that, it has political avenues that it is able to pursue, and it should be doing so.

Mr. TIERNEY. But as things stand right now, every single one of you thinks that a CIA person in country X that is not Afghanistan or Pakistan or whatever manipulating unmanned aerial vehicles and killing people with them is liable under international law for arrest and prosecution? Do we all agree to that? You do not. OK. You think that they are somehow immune?

Mr. ANDERSON. I think it depends very much on where they are doing it. If one is talking about Afghanistan or Pakistan—

Mr. TIERNEY. No, I excluded those.

Mr. ANDERSON. Sorry. Then, it depends again on where it is they were doing it in relation to international law. They may be liable under domestic law and that is one of the reasons that the CIA as a civilian agency is a civilian agency, that we have concluded as a country, as other states have, that we need to have a civilian capacity for covert action. Whether that is a good idea or a bad idea is another question.

But we have decided that we need a capacity for covert action that can involve civilian agents involved in violations of the domestic laws of other countries. And that may be a terrible idea, and maybe the Church Commission should have pushed that all the way to the point of saying, that will never happen again as a matter of U.S. law. But as it stands, it is lawful under domestic law,

even if it is unlawful under the local law of the place in which those agents are operating.

And that is one of the conditions that separates the CIA from the military. It may be a very bad policy or it may be a very good policy. But as a matter of law, that is, I think, where it stands.

Mr. TIERNEY. Thank you.

Mr. Foster.

Mr. FOSTER. Thank you.

Do any of you know whether an adequate historical record is being made of the activities of drones? Who signed off on which actions? No idea? OK.

I am just sort of looking at the mirror image problem. For example, if, let's say, the Taliban had the technology to launch a drone attack on the operators of the drones that are attacking them, so would it be legitimate under international law and U.S. policies for some Taliban that had the technology to go and launch drones? First off at the control bunkers in Nevada or wherever they are, and/or at the homes of where the operators live that do this, under the same set of standards that we apply to taking out those?

Mr. GLAZIER. Absolutely. The drone operators are essentially fulfilling a combatant function. So my interpretation is that they then become combatants. Now, of course, the CIA people, we might argue that they are civilians and therefore they fall under the "directly participating in hostilities" standard. But certainly, they are fulfilling such a military role that they are pretty liable. But the military people, definitely, if we are in an armed conflict, then the rules that govern armed conflict are supposed to apply even handedly to both sides. And just as we can target, we can in fact be targeted in turn.

Ms. O'CONNELL. I disagree with that, because I don't see the United States as the scene of an armed conflict. So there would be no right for others to bring battlefield weapons to this country. The right of persons in Afghanistan to resist our efforts, the persons who are trying to topple Hamid Karzai, they have the right to fight lawfully and to push the United States out of their country there. But no, no one has a right—

Mr. FOSTER. It is the joystick operators, it is where the explosion takes place but not where the joystick is operated.

Ms. O'CONNELL. If the persons in the CIA who are in the United States are committing unlawful activities because they have no right to kill in that setting. But that is a crime under international law. It is not something that allows another person, another group to come and use battlefield weapons here. They should follow law enforcement procedures and make complaints to the United States. Of course, they are in no position to do that.

So no, I really respect the battlefield. And I would never say that any of these groups that are fighting us and have the right to fight us in Afghanistan, for example, if they are carrying weapons openly and displaying that they are members of an organized armed group, they have the right under international law to fight us there. But they don't have the right to follow that here. There is no necessity to bring that fight here, and they don't have the right even to attack persons who are committing unlawful—

Mr. FOSTER. So you think command and control centers generally outside the field of combat are off limits from your—

Ms. O'CONNELL. No, under international law governing the use of force, the principle of necessity says that you can only use that armed force that is necessary to accomplish the military objective. The battle that we are fighting in Afghanistan now is to rid that country of insurgents. The limits on necessity in terms of what those insurgents can do have to do with our operations there.

And I would not say, there is some disagreement, I admit that this is not as clear a view, but it is part of the modern, growing trend toward focusing on necessity. So even I would say a command and control center outside the zone of armed conflict away, far away from the battlefield, and of course, that conflict in Afghanistan is being run by Afghanistan. We are there at their invitation. So we are not really the command and control in terms of international law.

So no, I think this country should be protected from those kinds of battlefield attacks.

Mr. GLAZIER. Well, that is contrary to the Supreme Court's decision in *Quirin*. And it is contrary to the law of war as nations understand it. Because when a nation goes to war with another nation, the two places that are clearly legitimate theatres of military operation are the territory of those belligerent parties.

And in *Quirin*, the Nazi saboteurs, the legal issue was not the Germans came to the United States to blow up war industries. The Supreme Court basically indicates in the decision that had they kept their uniforms, they had every right to do that. It was the fact that they shed their uniforms and buried them on the beach and tried to blend in with our civilian population that made them unlawful combatants.

So I don't believe that the United States can shelter itself from counter-attack by launching missiles from our own territory. Under Professor O'Connell's theory, we can fire ballistic missiles from the United States or we can fire cruise missiles from far offshore and yet, because those individuals are not on the battlefield, as she defines it, they are immune from military attack. This would be a theory that would be wonderful for the U.S. military. But it is simply not the law.

Ms. O'CONNELL. We are not at war with Afghanistan. We currently, since Hamid Karzai took over, we are there at their invitation. So no, they are not launching attacks. The state of Afghanistan, the state of Pakistan, are not at war with the United States. We are assisting them in putting down insurgencies. So the theatre of operations are in those countries under the leadership of those governments.

So this has nothing to do with *Kerin*, in which we were at war with Germany, another state that had sent those individuals here. Not to mention that is old law. But it has nothing to do with the current situation that we are talking about. We are not at war with Pakistan or Afghanistan or Yemen.

Mr. FOSTER. So if they had declared war on us in whatever category, then that would give them the right to go after our operators?

Ms. O'CONNELL. After October 7, 2001, when we went to war with Afghanistan, we took the fight there, if they had been capable of making counter-attacks under this territory, of course they could do that in self-defense or in a war with the United States. The same with Iraq. In March 2003, when we launched an attack on the state of Iraq, yes, Iraq, if they had had the capability, they could have launched a counter-attack on us. Our leaders should always remember that when they attack foreign countries, that it can come to the homeland.

But in both cases, our forces were far too strong and protected the homeland. It didn't come to that.

But in Iraq, Afghanistan, Pakistan, we are not at war with those countries. We are in support of their leadership.

Mr. FOSTER. Does anyone else have any comments on this?

Mr. ANDERSON. I disagree almost entirely with the analysis that has been presented. But I would actually make a slightly different comment, which is, I think it is very important for the subcommittee here to understand just both how much support there is for the various views if one goes to the international law community outside the United States, or if one goes to national security scholars here within this country, in that there is really a sense of ships passing in the night here, in which the consequences of one view or another are really serious. We are talking about criminal law, we are talking about acts of things that could potentially be considered as murder by the people that are carrying them out.

How one reconciles those things or doesn't reconcile them really matters. It matters as a matter of deep criminal law in this. My view on this particular issue is to agree with Professor Glazier, with one additional point, which is, we have long said, and I think correctly so, that where we are dealing with a terrorist group, that terrorist group doesn't actually have any right to be taking up arms at all.

So the idea that there is a reciprocal right to be able to come after us, it would be the view that the British had when the IRA said, "we are going to adhere strictly to the laws of war, and we are just going to go after British soldiers in some base somewhere abroad." The view of the British, correctly, was, this is a terrorist group, and they have no right to be taking up arms against us in any form. That will all be considered criminal.

And our view of al Qaeda would be exactly the same way, that the fact that we are launching attacks on them doesn't actually give them the right to launch attacks on us. It is not reciprocal in that way, because of the nature of the group.

Mr. GLAZIER. It matters very much how we define the armed conflict. If Professor O'Connell's view is correct, that we are simply now in a non-international armed conflict with Afghanistan, in other words, the conflict is simply between Afghanistan and remnants of the Taliban, and we are now there entirely at their invitation, that does make a difference. But I think that we are still in the armed conflict that Congress constitutionally authorized in the authorization of the use of military force. So I think that the United States still essentially has the right to combat the Taliban and al Qaeda in our own right. But if we do so, then the flip side of that is it makes us liable to attack ourselves.

I would also suggest that there is an alternative. One choice is to use this paradigm of the law of armed conflict. But another paradigm is sort of the piracy, or essentially, I think it is the way that Britain chose to treat the IRA, where because of the robustness of the threat, it is considered to be beyond the scope of law that ordinary law enforcement agencies can deal with and military force is required.

That is exactly how pirates were treated historically. But it was essentially conducted under laws much more akin to law enforcement rules, so that the military was under an obligation, even with pirates, little known, but they didn't just shoot pirates first and ask questions later. They at least made an effort to capture them. Then when they were captured, they were dealt with under a law enforcement paradigm and brought home for trial, under the constitutional provisions that govern a normal civilian trial.

So that is an option that is available to this government as a policy choice, to choose to treat terrorists essentially as pirates, or as terrorists have been treated in the past, using the military under constraints that are much more akin to law enforcement than to law of war.

Ms. O'CONNELL. I think David Glazier is exactly right, and we have really come to a crunch point. Are we in an armed conflict in Afghanistan and Iraq right now? Is that where we are engaged in armed conflict? Or are we really actually in an armed conflict all over the world with these non-state actors?

I just suggest to you again that the international lawyers who are specialists in this law around the world do not view it this way. Our armed forces know they are in an armed conflict in Afghanistan and in Iraq. That is the reality.

Mr. TIERNEY. Thank you all.

Mr. Welch, any more questions?

Mr. WELCH. Just an observation. I think that what you are saying now, the panel, goes to the heart of the challenge for us in Congress. Much of the analysis depends on what the nature of the conflict is, whether it is a police action. And as I understand it, many other countries that have been faced with terrorist threats have been the recipient of consequences of those threats have defined it more as a police action. Our country has defined it as an international global war on terror. That really guides analysis as much as anything else.

I appreciate all your contributions here. Thank you. Thank you, Mr. Chairman.

Mr. TIERNEY. Thank you. I think you have exhausted the panel up here. We have a lot of different things to mull over and we will continue to read. The ACLU statement has just come in and I will share that with the other members of the committee as well.

Do any of you have any final words that you want to leave with us?

Mr. BANKS. I would say that the metaphor that Professor Anderson used just now is quite apt, the ships passing in the night, different legal paradigm here. As Professor O'Connell just said, the prospect of asymmetric war with non-state actors does not fit neatly within any of the paradigms that have been discussed here today. It would behoove, I think, the Congress, to grapple with the

possibility of making adaptations or recognizing new dimensions of legal oversight that could allow us to adapt the laws that we have been working with for more than 200 years to this new era of warfare.

Mr. TIERNEY. Do you have any of those adaptations in mind in particular?

Mr. BANKS. I have a few. I think that considerable oversight improvement could be made in the area of intelligence that we have been speaking about here today. I think back to areas that are off today's topic, I think there is considerable work that is being done in the academic community and elsewhere on changes in detention, classification of fighters, targeting and the like that deserve congressional attention.

Mr. TIERNEY. Thank you.

Mr. GLAZIER. I would just like to offer the thought that, I tried to focus my remarks today on the law. And as has been noted by Professor O'Connell, there are real policy issues at stake as well. My personal belief is that in confronting these threats that the law of war is not an adequate solution, that there are, for many reasons, including the fact that we need to engage in activities in other friendly countries, even European countries, where there may be terrorist cells, we are dependent to a large measure on using criminal law in its standard form. And we are depending on international cooperation.

So it seems to me that one of the most important reasons to try to ground our conduct across the board in an area of law is to facilitate that international cooperation and to lay the groundwork for the ability to call upon, even to demand upon, other nations to cooperate with us in this effort. We have, for example, a whole series of terrorism treaties which basically require international cooperation in the field. Where we choose to exclusively treat this as an armed conflict, though, we give other countries the right essentially to step outside the scope of those terrorism treaties and say, look, the United States is at war, we don't have to cooperate in an armed conflict.

But if we don't conduct those portions of the operations that we choose to consider to be an armed conflict, in accordance with that law, I think we damage our credibility and we impair cooperation in those areas that we do want to treat under the law of criminal law.

Mr. TIERNEY. Well stated.

Ms. O'CONNELL. I want to echo what Mr. Duncan said, that we shouldn't exaggerate what al Qaeda is. There was a report on National Public Radio on Monday of this week that in fact, al Qaeda is losing significant support in the Muslim world because of their lawlessness, because of their violence. I firmly believe that we, the United States, can help bring about the final demise of al Qaeda through our commitment to the rule of law, especially by strict compliance with rules governing the use of lethal force.

We have rules, they are in place. We shouldn't try to manipulate them, to reinterpret them, to find loopholes in them, to say that they are quaint, obsolete, no longer of use to this country. We should uphold them, we should honor them, and we should distin-

guish ourselves from our enemies by our commitment to them.
Thank you.

Mr. TIERNEY. Thank you.

Mr. ANDERSON. I join Professor Banks particularly in what he said about oversight. I would also again reiterate my support for Dean Koh's statement. I think that it provided a very solid base for the United States to go forward. I think there are ways in which the Congress could build on those and invite the administration to elaborate those further, starting in the first place with specifically identifying the CIA as an actor in this.

At the end of the day, I believe that it is not about drones. I think that it is really a question about the proper role of the CIA in this, the proper role of covert action, the proper role of the use of advanced technologies by actors that may be outside of the military. I think those are enormously important policy and legal choices that the Congress will have to confront.

Mr. TIERNEY. All of us are grateful for your intellect and your time and your ideas that you have shared with us. I can only imagine that the people that study in your classes must enjoy being there and must get a lot out of it.

So thank you very much. And again, we always try to hold out the prospect that if we need to come back to you for your advice and consent, we are hoping that you will welcome that.

Again, thank you all very much. This meeting is adjourned.

[Whereupon, at 11:45 a.m., the committee was adjourned.]

