DRONES AND THE WAR ON TERROR: WHEN CAN THE U.S. TARGET ALLEGED AMERICAN TERRORISTS OVERSEAS?

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HOUSE OF REPRESENTATIVES

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DRONES AND THE WAR ON TERROR: WHEN CAN THE U.S. TARGET ALLEGED AMERICAN TERRORISTS OVERSEAS?

WEDNESDAY, FEBRUARY 27, 2013

HOUSE OF REPRESENTATIVES
COMMITTEE ON THE JUDICIARY
Washington, DC.

The Committee met, pursuant to call, at 10:09 a.m., in room 2141, Rayburn House Office Building, the Honorable Bob Goodlatte (Chairman of the Committee) presiding.

Present: Representatives Goodlatte, Chabot, Issa, King, Franks, Gohmert, Jordan, Poe, Chaffetz, Marino, Gowdy, Labrador, Holding, Collins, DeSantis, Rothfus, Conyers, Nadler, Scott, Lofgren, Johnson, Pierluisi, Deutch, Bass, DelBene, and Garcia.

Staff Present: (Majority) Shelley Husband, Chief of Staff & General Counsel; Branden Ritchie, Deputy Chief of Staff & Chief Counsel; Allison Halataei, Parliamentarian & General Counsel; Sam Ramer, Counsel; Kelsey Deterding, Clerk; (Minority) Perry Apelbaum, Staff Director & Chief Counsel; and Danielle Brown, Parliamentarian; and Aaron Hiller, Counsel.

Mr. GOODLATTE. Good morning. The Judiciary Committee will come to order.

Without objection, the Chair is authorized to declare recesses of the Committee at any time, and we welcome everyone to today's hearing on "Drones and the War on Terror: When Can the U.S. Target Alleged American Terrorists Overseas?"

I will recognize myself first for an opening statement. On February 4, 2013, a confidential Justice Department white paper outlining the legal justification for targeted killings of U.S. citizens overseas was leaked to NBC News. The leak of this white paper brought renewed attention to an issue largely ignored during President Obama's tenure. Is the targeted killing of alleged American terrorists appropriate and under what circumstances?

The white paper also confirms a palpable shift in war on terror policy by this President. In 2007, Barack Obama, the then-junior Senator from Illinois, laid out his position on the war on terror. "To build a better, freer world, we must first behave in ways that reflect the decency and aspirations of the American people. This means ending the practices of shipping away prisoners in the dead of night to be tortured in far-off countries, of detaining thousands

without charge or trial, of maintaining a network of secret prisons to jail people beyond the reach of the law."

The same President who opposes the detention of foreign terrorists, who opposes the use of enhanced interrogation techniques on foreign terrorists, and who attempted to bring foreign terrorists to trial in New York City is now personally approving the killing of Americans. Ironically, the detention facility in Guantanamo remains open, and Khalid Sheikh Mohammed and his co-conspirators are being tried before a military commission.

Following the release of the white paper, a bipartisan group of Committee Members requested the opportunity to review the memos that formed the basis of the white paper. Our request was denied.

One of President Obama's first acts as President was to release the Bush Justice Department's enhanced interrogation techniques memos to the public. But he now refuses to provide his Justice Department's targeted killing memos not just to the public, but even to congressional overseers. We also invited the Justice Department to testify today. That request was denied, too.

According to at least one estimate, drone strikes against suspected al-Qaeda terrorists have increased sixfold under the Obama administration. Anywhere from 2,500 to 4,000 people have been killed by these strikes. What is more, this Administration is not just targeting foreign fighters, but American citizens as well.

President Obama ordered the killing of Anwar al-Awlaki, the American-born al-Qaeda cleric. In September of last year, U.S. forces killed al-Awlaki and his 16-year-old son in a drone strike in Yemen. America now knows the criteria used to nominate an American for targeted killing.

The white paper sets forth a legal framework for when the U.S. Government can use lethal force against a U.S. citizen who is a senior operational leader of al-Qaeda or an associated force and is located in a foreign country outside the area of active hostilities. The Justice Department claims that in such a case, lethal force would be lawful where three conditions are met.

An informed high-level official of the U.S. Government has determined that the targeted individual poses an imminent threat of violent attack against the United States. Two, capture is infeasible, and the United States continues to monitor whether capture becomes feasible. Three, the operation would be conducted in a manner consistent with principles of the laws of war.

Today's hearing will examine the Justice Department's white paper and the constitutional issues surrounding the targeted killing of Americans overseas. We have assembled an impressive panel of experts to help the Committee analyze these important issues.

Let me ask members of the staff to locate where that construction work is going on and ask them to allow us to conduct the hearing without the pain of drilling.

The targeted killing of Americans overseas has ignited a debate about the breadth of a President's commander-in-chief authority and the standard that should apply when targeting Americans. Is the white paper a fair reading of the law? Under what circumstances can the President decide to kill an American citizen? Is there any due process of law that must be granted before the

commander-in-chief can kill an American? Does the Administration's approach comport with the law? Should the President be able to decide unilaterally to kill Americans?

The American people deserve to know and understand the legal basis under which the Obama administration believes it can kill U.S. citizens and under what circumstances. Obviously, were the Justice Department memos made available or the Justice Department here to testify today, Members of the Committee could have a fuller understanding of the Administration's legal rationale. However, today's hearing will provide an initial public debate of the issue.

And now it is my pleasure to recognize the Ranking Member of the Committee, the gentleman from Michigan, Mr. Conyers, for his opening statement.

Mr. CONYERS. Thank you, Chairman Goodlatte and Members of the Committee and our distinguished witnesses present.

We are here examining a pressing matter, namely the use of unmanned aerial vehicles, drones, to strike at suspected terrorists abroad. First, let us make clear the House Judiciary's jurisdiction over the matter.

These are serious constitutional considerations involved, and that is what this Committee has been created for, as well as civil rights questions, which are also involved in this operation. Our Committee has direct oversight of the Department of Justice, which has issued legal opinions, although classified, that purport to establish the legal basis for the use of lethal force against terrorist suspects.

Now in the course of this issue that has been raised, numerous letters have been sent. And I want to point out that our latest one that was joined in with myself, Chairman Goodlatte, former Chairman Jim Sensenbrenner, Trent Franks, Jerry Nadler, and Bobby Scott, who wrote again to the President to renew our requests for all legal opinions related to drone programs.

I am pleased that we reached a clear bipartisan consensus on this issue. This Committee requires those documents to fulfill its oversight responsibility. This isn't a witch hunt. This is an inquiry, and we are all cleared for top secret. And we will work together to convince the Administration to satisfy our requests.

Let us examine a couple issues here. Targeted strikes against United States citizens, targeted strikes generally, and three, the odious so-called signature strikes. Now the need for oversight is clear. I am not convinced, as the title of the hearing before us suggests, by the Administration's legal rationale for the targeted killing of any United States citizen overseas.

The white paper describes a balancing test for the Fourth Amendment, unlawful seizure of a person or a life, and the Fifth Amendment, due process, which is tilted so far in favor of Government interests that a potential target appears to have little chance at meaningful due process when he is nominated without his consent, of course, to the so-called kill list.

I also remain unconvinced about the targeted killing of terrorist suspects who are non-citizens. Although the Administration appears to rest its claim of authority on the Authorization for Use of Military Force passed by the Congress in 2001, it is not clear that Congress intended to sanction lethal force against a loosely defined

enemy in an indefinite conflict with no borders or discernible end date.

And I am considerably troubled by the widely reported use of so-called signature strikes, where suspects need only display suspicious activity, but their identities are unknown prior to the Government's use of lethal force against them. That may be a CIA activity that should be sent over to the Defense Department, by the way.

Today—and I rush to a conclusion—we want to accomplish the following. We need to know more, and I hope that the way that we conduct this hearing individually among our Members of the Committee will convince the Administration that this is not personal, nor political, and that all we are seeking is information to which we are duly entitled. We have one Committee on Intelligence that has gotten two reports out of a dozen or more? That is not acceptable.

And with all due respect to an Administration that I support, we are creating a resentment on a visceral level, as General Stanley McChrystal has echoed, on a level that we can't even begin to imagine. McChrystal was the architect of counterinsurgency in Afghanistan.

"The resentment created by the American use of unmanned strikes is much greater than the average American appreciates." Well, I think we appreciate it, and I think that we want to have this become the first of a number of hearings.

I conclude by saying I don't think that the Attorney General of the United States can decline to come before this Committee on a subject that is so clearly within our jurisdiction, Mr. Chairman.

And I yield back my time.

Mr. GOODLATTE. I thank the gentleman for that expression of concern. I share it, and I will work with him and the other Members on his side of the aisle, as well as the other Members on our side of the aisle to see what we can do to bring about better cooperation because we are seeking information that this Committee is entitled to have.

We have a very distinguished panel. Without objection, all the Members' opening statements will be made a part of the record.

[The prepared statement of Mr. Conyers follows:]

Prepared Statement of the Honorable John Conyers, Jr., a Representative in Congress from the State of Michigan, and Ranking Member, Committee on the Judiciary

Thank you, Mr. Chairman. I very much appreciate that our Committee is examining such a pressing matter: the use of unmanned aerial vehicles, or "drones," to strike at suspected terrorists abroad.

JURISDICTION

Let me be clear: the House Judiciary Committee has direct jurisdiction over this issue.

We are the Committee in the best position to assess the serious constitutional and civil rights questions presented by the drone program.

Our Committee also has direct oversight of the Department of Justice, which has issued legal opinions, albeit classified, that purport to establish the legal basis for the use of lethal force against terrorist suspects.

Over the course of the 112th Congress, I, along with my colleagues Representatives Jerry Nadler and Bobby Scott, wrote several letters to Attorney General Eric Holder asking him to share those legal opinions with the Committee.

These letter requests were made on January 18, 2012, May 21, 2012, and December 4, 2012.

Although we did not receive the requested memoranda, the Justice Department did provide us with a copy of the recently-publicized white paper on the targeted killing of U.S. citizens.

Unfortunately, the white paper raises more questions than it answers, and does little to address our concerns regarding the broader use of lethal force against terrorist suspects.

On February 8, 2013, Chairman Goodlatte and I, together with Representatives Jim Sensenbrenner, Trent Franks, Jerry Nadler, and Bobby Scott, wrote to President Obama to renew our request for all legal opinions related to the drone programs.

I am pleased that we have reached a clear, bipartisan consensus on this issue: this Committee requires those documents to fulfill its oversight responsibilities, and we will work together to convince the Administration to satisfy our request.

CONCERNS WITH THE DRONE PROGRAMS

The need for oversight is clear. I am not convinced, as the title of the hearing may suggest, by the Administration's legal rationale for the targeted killing of a United States citizen overseas.

The white paper describes a balancing test for Fourth and Fifth Amendment rights titled so far in favor of government interests that a potential target appears to have little chance at meaningful due process when he is nominated to the so-called "kill list."

I also remain unconvinced about the targeted killing of terrorist suspects who are non-citizens.

Although the Administration appears to rest its claim of authority on the Authorization for Use of Military Force passed by Congress in 2001, it is not clear to me that Congress intended to sanction lethal force against a loosely-defined enemy in an indefinite conflict with no borders and no discernible end date.

And I remain deeply troubled by the widely reported use of so-called "signature strikes," where suspects display suspicious activity but their identities are unknown prior to the government's use of lethal force against them.

To date, the Administration has not even acknowledged that this program exists—let alone provided this Committee with the information it requires to examine the legality of the program.

GLOBAL CONCERNS

I am, of course, aware that drones offer a relatively precise means for targeting our enemies. If used responsibly, they can limit civilian casualties and do so without putting additional American troops in danger.

But we must be mindful that the rest of the world is watching us. In a recent interview, General Stanley McChrystal—the principal architect of U.S. counterinsurgency strategy in Afghanistan—reminded us that "the resentment created by American use of unmanned strikes . . . is much greater than the average American appreciates."

He continued, "They are hated on a visceral level, even by people who have never seen one or seen the effects of one."

No matter how far removed we are from the battlefield, we must remember that it still feels like war when missiles strike.

And, the United States will not be the only nation with this tactical capability for much longer.

Accordingly, the decisions we make—the process this Committee finds necessary before our government may lawfully kill a suspected terrorist, whether or not that suspect is a citizen—will set the example for those who follow.

I thank the Chairman, and I yield back.

[The prepared statement of Mr. Poe follows:]

Prepared Statement of the Honorable Ted Poe, a Representative in Congress from the State of Texas, and Member, Committee on the Judiciary

Today's hearing deals with one of the most important issues we face here in Congress, the question of when and where our Constitutional rights apply as Americans. We are here today because the Department of Justice has so far repeatedly

refused to provide Congress with the legal and constitutional justifications that they use to authorize the killing of a U.S. citizen who is abroad and allegedly a member of al-Qaeda or an associated force. The House Judiciary committee has requested this information, and it has been denied by the Department of Justice. Congressman Gowdy and I have written two letters to the Department of Justice requesting details on this justification and the Department of Justice has not answered us. The first letter was sent nearly three months ago. And, I would like to note, the Department of Justice is not here to testify today.

In fact, we are left to try and make sense of a vague outline from the DOJ white paper that was "leaked" to the media that lethal force is authorized if:

1. An informed, high-level official of the U.S. government has determined that the targeted individual poses an imminent threat of violent attack against the United States;
2. Capture is infeasible, and the United States continues to monitor whether capture becomes feasible;
3. The operation would be conducted in a manner consistent with applicable law of war principles.

But these guidelines leave us with more questions than answers.

- Who is a "high level official"? Who is this individual accountable to?
- What intelligence do they rely on? Does there have to be multiple sources? What if the intelligence is wrong?
- If targeted assassinations are outlawed under Executive Order 12333, how does a drone strike differ from a targeted assassination?

And then, there is the question of whether or not this legal interpretation could involve suspected terrorists in the United States. So far, the Administration's response has been they have "no plans" for the use of targeted drone strikes within the United States but that seems to at least leave open the possibility.

What about suspects in Mexico? France? Or other countries we are allies with? Is the Government permitted to target a U.S. Citizen anywhere in the world? Under this justification, does it mean that the Constitution no longer applies when a "high ranking official" determines that somebody is a terrorist? Should this "high ranking official" act as Judge, Jury and Executioner all at once? *Don't get me wrong, if an American citizen decides to join al-Qaeda and takes arms up against the United States, they deserve whatever is coming to them*, however shouldn't we have some sort of judicial review to look at the evidence to make sure we have the facts straight? After all, intelligence is sometimes wrong. That is the point of judicial review. Shouldn't we be 100% sure that this individual actually did join al-Qaeda? Not every case is going to be as clear as the Anwar al-Aulaqi case. Does it make sense to have a higher legal standard in order to listen to American's phone calls abroad then to target and kill that individual? (FISA court) These are all questions that Congress needs to weigh in on and that's why the Department of Justice needs to give us the information we have requested.

Mr. GOODLATTE. And we will turn now to our panel. We have a very distinguished panel joining us today, and I will begin by introducing the witnesses.

Our first witness is Mr. John Bellinger, a partner at Arnold & Porter LLP, a law firm here in Washington, D.C., where he advises sovereign governments and U.S. and foreign companies on a variety of international law and U.S. national security law issues.

Mr. Bellinger is also an Adjunct Senior Fellow in International and National Security Law at the Council on Foreign Relations, where he directs the Program on International Justice. He served as the Legal Adviser for the U.S. Department of State under Sec-

retary of State, Condoleeza Rice, from April 2005 to January 2009, earning the Secretary of State's Distinguished Service Award.

Mr. Bellinger received his Bachelor's degree from the Woodrow Wilson School of Public and International Affairs at Princeton University, his J.D. from Harvard Law, and most recently, a Master's degree in Foreign Affairs from the University of Virginia. We are fortunate to have him and his expertise with us today.

Our second witness today is Professor Robert Chesney, the Charles I. Francis Professor in Law and Associate Dean for Academic Affairs at the University of Texas School of Law. Professor Chesney specializes in a broad range of issues regarding U.S. national security law, such as military detention, the role of the judiciary in national security affairs, and terrorism-related prosecutions. He is a nonresident Senior Fellow of the Brookings Institution, as well as a team member of the Council on Foreign Relations. Previously, he served on President Obama's Detention Policy Task Force.

Mr. Chesney earned his Bachelor's degree in Political Science and Psychology from Texas Christian University and subsequently graduated *Magna Cum Laude* from Harvard Law School. We welcome his experience and expertise.

The third member of our witness panel is Mr. Benjamin Wittes, a Senior Fellow in Governance Studies at the Brookings Institution and co-director of the Harvard Law School Brookings Project on Law and Security. He is the author of "Law and the Long War: The Future of Justice in the Age of Terror," published in June 2008, and the editor of the 2009 Brookings book, "Legislating the War on Terror: An Agenda for Reform."

Mr. Wittes co-founded and is editor-in-chief of the Lawfare Blog, a nonideological discussion of "Hard National Security Choices." Between 1997 and 2006, he served as an editorial writer for The Washington Post, specializing in legal affairs. Mr. Wittes is also an alumnus of Oberlin College. We thank him for serving as a witness today and look forward to his insight into this complex topic.

Our final witness is Mr. Stephen Vladeck, a law professor from American University Washington College of Law, teaching courses in Constitutional Law, Federal Courts, International Criminal Law, and National Security Law, to name just a few. He is also a Fellow at the Center for National Security at the Fordham University School of Law in New York City. Mr. Vladeck has co-authored multiple legal textbooks and has served as a Law Clerk of appellate judges in both Florida and California.

He earned his Bachelor's degree in History and Mathematics from Amherst College and his J.D. from Yale, where he served as the Executive Editor of the Yale Law Journal. We are pleased to have him with us today.

We thank all of you for joining us. And Mr. Bellinger, we will started with you. Each witness has written statements that will be made a part of the record in their entirety. I ask that each witness summarize his or her testimony in 5 minutes or less.

To help you stay within that time, there is a timing light on your table. When the light switches from green to yellow, you will have 1 minute to conclude your testimony. When the light turns red, it signals that the witness' 5 minutes have expired.

Mr. Bellinger, welcome.

TESTIMONY OF JOHN B. BELLINGER, III, PARTNER, ARNOLD & PORTER LLP

Mr. BELLINGER. There we go. Thanks very much, Mr. Chairman and Members of the Committee, for coming for this important hearing today.

I dealt, as you heard, with many of the legal issues that are the subject of today's hearing when I served as the legal adviser for the National Security Council in the White House in the first term of the Bush administration. And then I was the legal adviser for the State Department in the second term of the Bush administration. I was in the White House situation room on 9/11 and spent all 8 years of my time dealing with many of these same issues.

Now both the Bush and the Obama administrations have concluded that the targeted killing of al-Qaeda leaders is lawful under both U.S. and international law under certain circumstances. Let me start with U.S. law.

The President's legal authority derives from the Authorization to Use Military Force Act of September 18, 2001, the AUMF, and also from the U.S. Constitution. The problem is the AUMF is now nearly 12 years old, and Congress should update it. It does not provide sufficient legislative authority for our military and intelligence personnel to conduct the operations necessary to defend against the terrorist threats that we face a decade after 9/11. And it also contains inadequate protections for those targeted or detained, including U.S. citizens.

Of course, in addition to the statutory authority granted by Congress, the President also has broad authority under the Constitution to take necessary actions to defend the United States against terrorist threats.

The targeted killing of American citizens raises additional legal issues because U.S. citizens have certain constitutional rights under the Fourth and Fifth Amendments of the Constitution even when they are outside the United States. But the extent of those rights is not clear. No U.S. court has previously opined on the issue of what amount of process is due to an American outside the United States before being targeted by his own government.

Now I agree with the principal conclusions of the Justice Department white paper that reportedly summarizes the laws applicable to killing an American citizen who is a senior operational al-Qaeda leader. In particular, I agree that an American citizen who is a senior al-Qaeda leader outside the United States does enjoy constitutional right to due process. But I also agree that it is sufficient due process for a senior informed Government official to conclude that the individual poses an imminent threat of violence against the United States before targeting the individual with lethal force.

I do not believe that prior judicial review is currently required or should it be required before the U.S. Government uses lethal force against an American citizen who is a senior al-Qaeda leader outside the United States. Now relevant to this Committee, the Congress may still want to specify the conditions and certain processes for targeting an American, and this Committee may want to

consider legislation on this issue. But these processes should reside inside the executive branch with appropriate notice to Congress.

Now both the Bush and Obama administrations have also concluded that international law permits the United States to use force through drone strikes or other means to kill al-Qaeda leaders in other countries in certain circumstances, and I want to emphasize that it is important for the United States to follow international legal rules rather than use force arbitrarily.

The executive branch and Congress need to be aware that what is sauce for the goose is sauce for the gander. Unless the U.S. Government specifies clear international rules with which it is complying, the U.S. will lack credibility if it criticizes other countries, such as Russia or China, who may use drones to conduct targeted killings with which the U.S. disagrees.

Now other countries, including many of our close allies, are growing increasingly alarmed by the large number of U.S. drone strikes, which reportedly have killed many civilians. The U.S. has a strong interest in demonstrating to our allies that its drone strikes are consistent with international law. Because if allies conclude that drone strikes violate international law or, worse, are war crimes, they are likely to stop sharing targeting information and may cease other forms of counterterrorism cooperation.

So if the Obama administration wants to avoid losing the intelligence support of its allies, Administration officials need to work harder to explain and defend the legality of this program. The speeches given by Administration officials have been very valuable, but the Administration needs to do more to address growing international opposition to its use of drones. And the Administration needs to be more transparent about who it is targeting and the procedures it applies to ensure that its targets are appropriate and to limit collateral damage to civilians.

I think the Obama administration should be able to release after the fact the names and background information of at least some of the people it has targeted. The release of more information should help address the concerns that U.S. targets individuals who do not pose significant threats.

So, in closing, I want to commend this Committee for holding this hearing, and I want to end with a plea for more bipartisanship on counterterrorism issues. Republicans and Democrats will not always agree on the same approach to dealing with terrorism, but these issues should not be used to divide the American people. We all face a common threat from terrorism, and we need to work harder to find bipartisan solutions to these difficult problems.

Thank you, Mr. Chairman.

[The prepared statement of Mr. Bellinger follows:]

Testimony of The Honorable John B. Bellinger III
Partner, Arnold & Porter LLP
and Adjunct Senior Fellow in International and National Security Law,
Council on Foreign Relations

Committee on the Judiciary, U.S. House of Representatives
February 27, 2013

"Drones and the War on Terror:
When Can the U.S. Target Alleged American Terrorists Overseas?"

Testimony of The Honorable John B. Bellinger III
Partner, Arnold & Porter LLP
and Adjunct Senior Fellow in International and National Security Law,
Council on Foreign Relations

Committee on the Judiciary, U.S. House of Representatives
February 27, 2013

Mr. Chairman, Ranking Member Conyers, thank you for inviting me to appear before you today to discuss legal aspects of targeted killings of American citizens abroad. The use of lethal force by the U.S. Government against American citizens raises extremely weighty legal and policy issues, and I am glad to see this Committee is examining them. I hope that Congress will address these difficult issues in a non-partisan manner.

I have many years of experience in the legal issues that are the subject of today's hearing, and I dealt with many of them while I was in the Bush Administration. I served from 2001 to 2005 as Senior Associate Counsel to the President and Legal Adviser to the National Security Council in the White House. I was in the White House Situation Room on September 11. After the 9-11 attacks, I advised the President, the National Security Adviser, and the National Security Council on a wide array of legal issues relating to the U.S. response to the attacks. I also chaired the interagency lawyers group responsible for reviewing sensitive intelligence activities. Prior to the 9-11 attacks, this group had already concluded that it would be lawful for the United States to use an armed Predator to kill Bin Laden or one of his al Qaida deputies. [1]

From 2005 to 2009, after managing Secretary Rice's confirmation process and transition to the State Department, I served as The Legal Adviser for the State Department, which is the Department's General Counsel and the most senior international lawyer in the U.S. Government. In this position, among other duties, I had extensive discussions for four years with U.S. allies regarding legal issues

[1] Prior to the 9-11 attacks, the Bush Administration concluded that it would be lawful under both domestic and international law for the CIA to use an armed Predator to kill Bin Laden or one of his deputies. *See* Report of the National Commission on Terrorist Attacks Upon the United States (the "9-11 Commission"), p. 211 ("The Deputies Committee concluded that it was legal for the CIA to kill Bin Laden or one of his deputies with the Predator. Such strikes would be acts of self-defense that would not violate the ban on assassination in Executive Order 12333.")

relating to combating terrorism, including issues relating to the use of force against, and detention and prosecution, of al Qaida terrorists.[2]

Prior to my service in the Bush Administration, I served as Counsel for National Security Matters in the Criminal Division at the Department of Justice (1997-2001); as Counsel to the Senate Intelligence Committee (1996); as General Counsel of the Commission on the Roles and Capabilities of the U.S. Intelligence Community (1995-1996); and Special Assistant to Director of Central Intelligence Judge William Webster (1988-1991).

I am now a partner in the international and national security practices of Arnold & Porter LLP. I am also an Adjunct Senior Fellow in International and National Security Law at the Council on Foreign Relations.

* * *

The U.S. use of unmanned aerial vehicles, or drones, to engage in targeted killings of specific individuals raises novel, complex, and controversial issues under both U.S. and international law. The targeted killing of U.S. citizens raises additional legal questions arising under the U.S. Constitution and U.S. statutes. I will address the domestic law issues as well as the international law issues, drawing in particular on my experience at the White House and the State Department.

The heavy U.S. reliance on drones to conduct attacks on terror suspects in foreign countries -- attacks which kill or injure an indeterminate number of civilians -- also raises difficult policy and ethical questions. Several former senior U.S. military and intelligence officials, including former Director of National Intelligence Dennis Blair and former Commander of U.S. Forces in Afghanistan General Stanley McChrystal, have pointed out that drone attacks, while effective in killing al Qaida leaders, may at some point cause the U.S. more harm than good. These are important questions for U.S. policymakers to consider, but I do not have sufficient information about the effectiveness of drone strikes, or their negative effects, to offer a view on them here.[3]

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[2] *See, e.g.*, John B. Bellinger III, "*Legal Issues in the War on Terrorism*," Remarks at the London School of Economics, October 31, 2006. http://www.state.gov/s/l/2006/98861.htm

[3] Dennis Blair, "*Drones Alone Are Not the Answer*," New York Times, August 14, 2011. http://www.nytimes.com/2011/08/15/opinion/drones-alone-are-not-the-answer.html; "*Retired*

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Domestic Law Issues

Both the Bush and Obama Administrations have concluded that the targeted killing of al Qaida and Taliban leaders is lawful under both U.S. and international law under certain circumstances. Under U.S. law, the President's legal authority derives from both the Authorization to Use Military Force Act of September 18, 2001 (the "AUMF") and the U.S. Constitution. The AUMF authorizes the President "to use all necessary and appropriate force against those nations, organizations, or persons he determines planned, authorized, committed, or aided the terrorist attacks that occurred on September 11, 2001, or harbored such organizations or persons, in order to prevent any future acts of international terrorism against the United States by such nations, organizations or persons." The AUMF provides legislative authorization for the U.S. military and intelligence agencies to detain or kill individuals covered by its terms. It does not distinguish between Americans and foreign nationals.

The AUMF is now nearly twelve years old and it is not clear that it includes sufficient congressional authority to take all necessary actions against terrorist groups or individual terrorists that now threaten the United States from Somalia, Yemen, or other countries. Specifically, it is not clear that these groups or persons are the same organizations or persons, or are closely associated or affiliated with the organizations or persons that planned, authorized, committed, or aided the 9-11 attacks. I have long urged that the AUMF be revised because it contains "insufficient authority for our military and intelligence personnel to conduct counterterrorism operations today and inadequate protections for those targeted or detained, including U.S. citizens."[4] It is unfortunate, and -- in my view, not good

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General Cautions Against Overuse of Hated Drones," Reuters, January 7, 2013 ("What scares me about drone strikes is how they are perceived around the world…The resentment created by American use of unmanned strikes ... is much greater than the average American appreciates.). http://www.reuters.com/article/2013/01/07/us-usa-afghanistan-mcchrystal-idUSBRE90608O20130107

[4] John B. Bellinger III, "*A Counterterrorism Law in Need of Updating*," The Washington Post, November 26, 2010. I also stated:

> "As U.S. forces continue to target terrorist leaders outside Afghanistan, it is increasingly unclear whether these terrorists, even if they are planning attacks against U.S. targets, are the same individuals, or even part of the same organization, behind the Sept. 11 attacks. *Moreover, no law, including this act, contains specific provisions for killing terrorists*

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government -- that the Obama Administration and Congress have been unable to put politics aside and agree on sensible amendments to the AUMF.

Of course, even if the AUMF does not provide clear authority to use force against all terrorists who now threaten attacks against the United States, the President still has broad authority under the Constitution to take necessary actions to defend the United States and U.S. interests. However, President Obama and many Obama Administration officials had previously criticized the Bush Administration for relying on the President's constitutional powers rather than legislative authorization to conduct counter-terrorist actions. It is not clear whether the Obama Administration has yet found it necessary to rely on the President's constitutional authority to conduct certain drone attacks, given the limiting language in the AUMF. Ideally, the AUMF should be amended to authorize necessary actions, so that the President may rely on both a specific legislative authorization and his own constitutional authorities.

The targeted killing of American citizens, such as Anwar al-Awlaki, raises additional legal issues beyond whether the Executive branch has authority to conduct such killings, because U.S. citizens enjoy certain constitutional rights under the Fourth and Fifth Amendments even when they are outside the United States. Therefore, American citizens have more legal protections under U.S. law before they may be targeted than do foreign nationals. However, the extent of these rights is not clear. No U.S. court has previously opined on the issue of what amount of process is due to an American outside the United States before being targeted by the U.S. Government. I am not aware that the Bush Administration ever confronted precisely this question in any detail.

I have read the "Department of Justice White Paper" that reportedly summarizes the Justice Department's view of the laws applicable to killing an American citizen who is a senior operational al Qaida leader. The White Paper contains a more detailed description of the legal analysis first provided by Attorney General Holder in his remarks at Northwestern Law School in March 2012. I agree with the general legal analysis in the White Paper and the Attorney General's

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who are U.S. citizens and who enjoy at least some constitutional rights, such as the Yemen-based radical cleric Anwar al-Aulaqi, whose purported targeting is the subject of a lawsuit brought by civil liberties groups." (Emphasis added.)

http://www.washingtonpost.com/wp-dyn/content/article/2010/11/25/AR2010112503116_pf.html

speech. In particular, I agree that an American citizen who is a senior al Qaida leader outside the United States does enjoy a constitutional right to due process before being targeted. But I also agree that it would be sufficient due process for a senior, informed government official to conclude that the individual posed an imminent threat of violence against the United States before targeting the individual with lethal force. Under Supreme Court precedents, it is appropriate for the Executive branch to balance the private interest of the targeted individual against the interest the government is trying to protect, and the burdens the government would face in providing additional process.

As I have written previously, I do not believe that prior judicial review is currently required, nor should it be required, before the U.S. Government uses lethal force against an American citizen outside the United States.[5] This does not mean that Congress should not consider mandating certain additional protections before an American citizen is targeted by the U.S. Government. In particular, Congress, as the elected representatives of the American people, may want to specify the conditions and certain processes for targeting an American. In general, however, I believe these processes should reside inside the Executive branch, with appropriate notice to Congress.

Even if the bottom line of the Obama Administration's White Paper -- that the President has the authority to order the killing outside the United States of an American who is an al Qaida leader -- is correct, the Paper still raises many important and controversial legal issues and concerns. I will mention only two of them here.

First, what is the level of the "informed, senior official" who must determine that a targeted American citizen poses an imminent threat of violence? Is it a Cabinet-level official, or a lower-level official? What other officials are involved in making the determination?

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[5] In October 2011, I wrote in the Washington Post:

> "The killing of Awlaki raises additional legal concerns because U.S. citizens have certain constitutional rights wherever they are in the world. Some human rights groups have asserted that due process requires prior judicial review before killing an American, but it is unlikely that the Constitution requires judicial involvement in the case of a U.S. citizen engaged in terrorist activity outside this country.

John B. Bellinger III, "*Will Drone Strikes Become Obama's Guantanamo?*" The Washington Post, October 2, 2011. http://articles.washingtonpost.com/2011-10-02/opinions/35279231_1_drone-strikes-anwar-al-awlaki-drone-program

Second, the White Paper requires that the targeted American pose an "imminent threat of violent attack against the United States." But the White Paper specifically adopts a "broader concept of imminence." The Paper concludes that it would be sufficient if the targeted individual had "recently been involved in activities posing an imminent threat of violent attack against the United States, and there is no evidence suggesting that he has renounced or abandoned such activities." This seems to suggest that an American who is a senior Al Qaida leader may be targeted based on his status, provided he has been recently involved in planning terrorist attacks against the United States.

International Law Issues

Both the Bush and Obama Administrations have also concluded that international law permits the United States to use force -- through drones strikes or other means -- to kill suspected terrorists in other countries in certain circumstances. The international law issues include both whether the United States has the right to use force against a target in a foreign country and whether the use of force against a specific individual is lawful.

Under the U.N. Charter, to which the United States is a party, the United States may not use force in or against another U.N. member country, unless 1) the country consents; 2) the U.N. Security Council authorizes the use of force; or 3) the use of force is justified as an action in self-defense. Certain countries (such as Yemen[6]) have apparently consented to U.S. drone attacks against terror suspects in their countries; a country is not required to announce its consent publicly, and it is not clear how many foreign governments have given private consent. In cases where a foreign government has not given consent, both the Bush and Obama Administrations have stated that the U.S. has the right under international law to use force to defend the United States against attacks from terrorists in that country, if the government of the country is "unwilling or unable" to give its consent. Although both Administrations have believed that this is the proper interpretation of international law, many countries and international legal experts do not agree with the U.S. position that a country may use force against terrorists in another country simply because the harboring country is unwilling to unable to stop the threat.

[6] "*In Interview, Yemen President Acknowledges Personally Approving Drone Strikes*," The Washington Post, September 29, 2012. http://articles.washingtonpost.com/2012-09-29/world/35497110_1_drone-strikes-drone-attacks-aqap

A more controversial issue is whether international law permits the U.S. (or any country) to conduct targeted killings of specific individuals in another country outside the context of a traditional armed conflict between the two countries. The position of both the Bush and Obama Administrations has been that targeted killings of al Qaida leaders are permissible because the United States is in an international "armed conflict" with al Qaida. The Bush Administration position was that individual leaders of al Qaida could be targeted with force because they were leaders of a group with which the U.S. was in an armed conflict or because they posed they an imminent threat of violence to the United States. The Obama Administration has been more ambiguous regarding whether a non-American al Qaida leader may be targeted based on al Qaida membership alone or whether each individual must also pose an imminent threat of violence. When targeting Americans, the Obama Administration White Paper makes clear that the American target must pose an imminent threat of violence, although the White Paper adopts a "broader concept" of imminence, as noted above.

Some members of this Committee may question whether it matters whether the U.S. use of drones complies with international law, provided it is permissible under U.S. domestic law. But U.S. compliance with international law is important. Both the Bush and Obama Administrations have endeavored to demonstrate that the U.S. use of force against terrorist is consistent with both international law and U.S. law. The U.S. has long been a world leader in the development of the international laws of war (such as the Geneva Conventions and Convention on Certain Conventional Weapons), and Presidents of both parties have worked hard to show that the U.S. -- as a country committed to rule of law -- complies with its international legal obligations, whether derived from treaties to which the U.S. is a part or from customary international law accepted by the United States. Congress and the American people should also want the United States to be viewed by other countries as following international rules, rather than using force arbitrarily or lawlessly.

Equally important, the Executive branch and Congress need to be aware that "what is sauce for the goose is sauce for the gander." Other countries are rapidly developing drone technology and may use drones to engage in targeted killings which the U.S. Government may want to condemn. Unless the U.S. Government specifies clear international rules with which it is complying, the U.S. will lack

credibility if it criticizes other countries -- such as Russia or China -- who use drones to conduct targeted killings in ways with which the U.S. disagrees.[7]

In addition, other countries, including many U.S. allies, are growing increasingly alarmed by the large number of U.S. drone attacks, which reportedly have killed thousands of militants and an unknown number of civilians. American civil liberties groups -- who have been stirred up by the killing of Anwar al-Awlaki -- are now encouraging these foreign concerns. Foreign parliaments have begun to question whether their governments are sharing intelligence with the United States to help in targeting. In the United Kingdom, the son of an individual allegedly killed by a U.S. drone strike in Pakistan has sued the British government for information relating to British intelligence support for U.S. drone strikes. Two different U.N. officials have suggested that U.S. drone strikes may constitute war crimes; one of the officials has established an investigative unit reporting to the U.N. Human Rights Council to investigate the use of drones by the U.S. and other countries to conduct targeted killings.[8]

The U.S. has a strong interest in demonstrating to its allies that its drone strikes are consistent with international law. John Brennan has acknowledged that "the effectiveness of our counterterrorism activities depends on the assistance and cooperation of our allies."[9] If allies conclude that drone strikes violate international law and/or amount to war crimes, they are likely to stop sharing targeting information and may cease other forms of counter-terrorism cooperation. This happened during the Bush Administration when European governments concluded that intelligence information might be used to abuse detainees or prosecute them in military commissions.

Many European governments are reportedly growing increasingly uncomfortable about sharing intelligence that might be used to in drone strikes.

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[7] "*Chinese Plan to Kill Drug Lord with Drone Highlights Military Advances*," The New York Times, February 20, 2013. http://www.nytimes.com/2013/02/21/world/asia/chinese-plan-to-use-drone-highlights-military-advances.html

[8] "*U.N. To Probe Errant U.S Drone Attacks*," http://www.upi.com/Top_News/US/2012/10/26/UN-to-probe-errant-US-drone-attacks/UPI-59031351236600/ UPI, October 26, 2012

[9] "*Strengthening Our Security by Adhering to Our Values and Laws*," Remarks of John Brennan, Harvard Law School, September 16, 2001. http://www.whitehouse.gov/the-press-office/2011/09/16/remarks-john-o-brennan-strengthening-our-security-adhering-our-values-an

According to the *New York Times*, "Many in Britain's intelligence community…are now distinctly worried they may face prosecution."[10]

If the Obama Administration wants to avoid losing the intelligence support of its allies and having its drone program become as internationally maligned as U.S. counter-terrorism policies during the Bush Administration, Administration officials must work harder to explain and defend the legality of the U.S. program.[11] Administration officials, including John Brennan, Eric Holder, former Legal Adviser Harold Koh, and former DoD General Counsel Jeh Johnson, have given a series of important speeches that have laid out much of the legal rationale for the drone program. These speeches have been very valuable. But they have mostly been given to audiences in the United States and have had little impact outside the United States. The Administration needs to work harder on international outreach to address growing international opposition to its drone program.

The Administration should also be more transparent about who it is targeting and the careful procedures it applies to ensure its targets are appropriate and to limit collateral damage to civilians. As a former national security lawyer, I recognize that there are significant constraints on what information can be publicly released. Bush Administration officials struggled with the same issues when trying to defend publicly the detention of individuals at Guantanamo. But the Obama Administration should be able to release -- after the fact -- the names and background information of at least some of the people it has targeted. The release of more information about the program should help to address concerns that the U.S. targets low-level insurgents who do not pose significant threats.

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[10] "*Drone Strikes Prompt Suit, Raising Fears for U.S. Allies*," New York Times, January 30, 2013. http://www.nytimes.com/2013/01/31/world/drone-strike-lawsuit-raises-concerns-on-intelligence-sharing.html?_r=1&

[11] In November 2011, I wrote in the Washington Post:

> Even if Obama administration officials are satisfied that drone strikes comply with domestic and international law, they would still be wise to try to build a broader international consensus. The administration should provide more information about the strict limits it applies to targeting and about who has been targeted. One of the mistakes the Bush administration made in its first term was adopting novel counterterrorism policies without attempting to explain and secure international support for them.

John B. Bellinger III, "*Will Drone Strikes Become Obama's Guantanamo*?" The Washington Post, October 2, 2011. http://articles.washingtonpost.com/2011-10-02/opinions/35279231_1_drone-strikes-anwar-al-awlaki-drone-program

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I want to close by commending this Committee for holding this hearing on the important issue of targeted killings. But -- as someone who spent eight years handling national security legal issues in the Bush Administration and explaining the U.S. legal position to our allies -- I also want to end with a plea for less partisanship on counterterrorism matters. Republicans and Democrats will not always agree on the same approach to dealing with terrorism -- whether detention, interrogation, military commissions, or targeted killings -- but these issues should not be used to divide the American people. Moreover, we weaken our credibility with other countries when we cannot present a united approach to dealing with terrorist threats. As Americans, we all face a common threat from terrorism, and we should work harder to find bipartisan solutions to these difficult problems.

Mr. GOODLATTE. Thank you, Mr. Bellinger.
Mr. Chesney, welcome.

TESTIMONY OF ROBERT CHESNEY, CHARLES I. FRANCIS PROFESSOR IN LAW, ASSOCIATE DEAN FOR ACADEMIC AFFAIRS, UNIVERSITY OF TEXAS SCHOOL OF LAW

Mr. CHESNEY. Thank you, Mr. Chairman. Thank you, distinguished Members of the Committee, for the opportunity to be here to testify today.

Mr. GOODLATTE. Pull it close.

Mr. CHESNEY. Thank you.

Let me come straight to the point. The Constitution does not require judicial process in the narrow circumstances at issue here today for the reasons Mr. Bellinger just stated and stated in the white paper. However, I believe that a limited and carefully calibrated judicial role would be permissible as a constitutional matter and desirable as a matter of policy. So how might this be the case?

You need to bear in mind that there are two very distinct scenarios that arise when the Government uses lethal force in a targeted manner. The classic scenario that comes readily to mind for most of us when we talk about armed conflict is that of a soldier in the field who encounters a situation that requires an instant judgment as to whether someone is an enemy, whether a shot should be taken.

Judicial involvement at that stage would, of course, be grossly impractical. It would be contrary to tradition. I think that is relatively common ground. But that is not the end of the story.

We are speaking this morning exclusively of a situation in which the Government is intentionally targeting a specifically identified person. Unlike the classic armed conflict scenario I just described, the scenario actually at issue here is a two-stage process with very different questions at issue and very different exigencies at different points in time.

Now, for better or worse, there have been a flood of leaks that give us a fair sense of how this process actually unfolds currently. At stage one, the question is whether the available intelligence suffices to establish that the nominated individual is notionally within the scope of the Government's asserted targeting authority. If so, that opens the door to the possible use of force later on, should that person be located.

Stage two arrives only later, if and when the target actually is located. Now at that point in time, sensitive questions do arise as to whether, for example, the person that is being observed is, in fact, that nominated target and then whether the circumstances would allow for a particular attack to be lawful and desirable. My point is that stage two is akin to the classic time-sensitive scenario I first described, but stage one is quite different.

Indeed, it is no accident that based on the public reporting of what actually takes place within the Obama administration at stage one, it in many ways resembles a judicial process already. Dossiers of information are assembled. They are put before a group for debate and discussion. Multiple parties weigh in in debate what, if anything, the intelligence suffices to prove. And debates take place regarding the notional legal boundaries of the Government's targeting authority.

The point is judicial involvement at stage one would be relatively much less intrusive, much less unconventional than it would be at

stage two. And while I do not think it is possible to say that the Fifth Amendment due process clause clearly requires adoption of a system for review of these stage one issues, and while I rush to add that, of course, there is no current way to get that review—not unless and until Congress acts—I do think that the due process interests of the individuals involved, who, after all, may not actually be senior operational al-Qaeda leaders after all, it suffices to counterbalance the competing Article II concerns that a proposal for judicial review at stage one would otherwise raise or would raise.

Now let me clarify precisely what it is I think a judge could properly be asked to do in this so-called stage one review. There are really two elements to this. One task would be to confirm or clarify the law with respect to notionally which U.S. persons could be targeted. This could result in affirmation of the white paper's position and the Attorney General's prior speech on this subject. Perhaps it would result in a narrower view or a broader view, but a judge could make that determination.

Whatever the result of that substantive legal inquiry, the court's core task, of course, would be to determine whether the information that has been put forward to suggest that a particular American is within the scope of that authority actually is sufficient to that task. Now if the category is defined simply in terms of membership in the enemy force, which is effectively what goes on at the Guantanamo habeas proceedings currently, the court would be able to consider that question. It is the sort of question courts have been grappling with in the habeas process for the past 4 years.

If, instead, the test is something along the lines of the white paper test, it would be more complicated. Certainly, the court at that stage could consider the person's organizational links, position in the organization.

As to imminence, which, of course, is a central part of the white paper test, if you met a strict temporal definition of imminence, which is now what the white paper is talking about, that sounds like a stage two determination that can only be decided at a time exigent moment. But of course, the white paper describes a form of imminence that is probably better thought of as constant and continuing organizational commitment to attack. That could be assessed at stage one.

Feasibility of capture, in contrast, is a stage two issue, not something that judges could appropriately intervene with or review at stage one.

I am out of time. So I will close simply by quickly noting that there is an objection that comes from a different direction to this proposal, and that would be that the Article III jurisdiction of the courts could not extend to a situation like this, which would be an ex parte proceeding. It would be a significant issue. It is not obvious that the courts have the power to do this.

However, I think that the analogy to the FISA system actually is a good one. I know that we will hear more about this in a moment from my colleague Professor Vladeck. Suffice to say that in the FISA context, there is very little actual prospect of adversarial testing of the FISA orders that are issued. In the end, it rarely happens, and when it does, it is always done on an ex parte basis anyways.

Thanks for your patience, and I look forward to answering your questions.

[The prepared statement of Mr. Chesney follows:]

Written Statement of Professor Robert Chesney

Charles I. Francis Professor in Law
Associate Dean for Academic Affairs
University of Texas School of Law

United States House of Representatives
Committee on the Judiciary

February 27, 2013

"Drones and the War on Terror:
When Can the United States Target
Alleged American Terrorists Overseas?"

Written Statement of Professor Robert M. Chesney

Charles I. Francis Professor in Law
University of Texas School of Law

February 27, 2013

Chairman Goodlatte, Ranking Member Conyers, and members of the committee, thank you for the opportunity to testify today.

In the pages that follow, I consider whether there is a useful—and constitutional—role that the judiciary might play in connection with the use of lethal force against U.S. persons overseas for counterterrorism purposes. I conclude that there is, though that role is a narrow one requiring very careful calibration. Before explaining that conclusion, however, I wish to make two threshold points.

First, this conversation should focus on the use of lethal force against U.S. persons (*i.e.*, citizens and lawful permanent residents) without respect to the weapons or weapons platform that might be involved. It is true that we have grown accustomed to equating lethal force in the counterterrorism setting with the use of "drones" (*i.e.*, remotely-piloted aircraft). That is perhaps to be expected; drones are the focus of intense public curiosity and media scrutiny, and important policy questions arise as a result of their particular capacity for loitering, gathering intelligence, striking with immediacy, and projecting force into regions that are not easily accessible by ground forces. But if the task at hand is to identify the legal boundaries hemming in the government's capacity to use lethal force overseas against U.S. persons, then it is a mistake to frame the issue solely in terms of drones. The same issue would arise, after all, if we were speaking instead of missiles launched by manned aircraft, sea-launched missiles, shells from artillery, or bullets from a rifle. Below, therefore, I refer to the use of lethal force without specifying particular weapons or weapons platforms.

Second: Though I conclude below that some form of judicial review in this setting would be *permissible* as a constitutional matter and desirable as a matter of policy under certain conditions, I do not mean to suggest that such review is strictly *required* by current law, still less that the government acted unconstitutionally in using force in the particular case of Anwar al-Awlaki[1] or that the positions set forth in the Justice Department's White Paper are incorrect. On those matters, I am in general agreement with the views set forth by Benjamin Wittes and John Bellinger in their testimony today.

Having said that, I turn now to my primary focus: What can and should Congress do, going forward, with respect to the potential role of the judiciary in decisions to use lethal force against U.S. persons abroad for counterterrorism purposes? I start with an overview of the distinct constitutional issues implicated by this subject, and then turn to a survey of the options for judicial review. In addition, I also provide a concluding section that highlights larger trends

[1] For an overview of the *international* law issues raised by al-Awlaki's case, see Robert Chesney, *Who May Be Killed? Anwar al-Awlaki as a Case Study in the International Legal Regulation of Lethal Force*, 13 YEARBOOK OF INTERNATIONAL HUMANITARIAN LAW 3 (2010), http://ssrn.com/abstract=1754223.

that are destabilizing the overall legal architecture of U.S. counterterrorism policy, separate and apart from the issue of targeting U.S. persons in particular.

1. Clarifying the Constitutional Issued Raised by Targeting a U.S. Person

The prospect of the U.S. government purposefully killing known U.S. persons overseas, for counterterrorism purposes, raises issues under at least three distinct constitutional headings. First, it raises the question whether the category of persons subject to attack must be narrower when U.S. persons are at issue than would otherwise be the case, in light of the Fourth and Fifth Amendments. Second, it raises the question whether the Fifth Amendment requires some additional procedural safeguards to be employed in the course of determining whether a specific U.S. person falls into the category of persons notionally subject to attack. And third, it raises the question whether the Fifth Amendment separately requires some particular set of procedural safeguards when it comes to a decision actually to attack such a person in some specific manner.

a. The Substantive Scope of the Government's Targeting Authority

The first set of issues concern the substantive scope of the government's authority to use lethal force. That is, what actions or associations define the category of persons lawfully subject to targeting in general, and does the Constitution require that category to be construed more narrowly when the target is known to be a U.S. person?

Consider first the baseline question of how the government currently defines the scope of its targeting authority in general (*i.e.*, assuming no U.S. person in the fact pattern). It is, famously, a complicated and controversial subject, both at the organizational and individual levels.

Part of the problem stems from the fact that there are two distinct, but partially-overlapping, legal architectures at issue in the counterterrorism setting. First, there is the familiar claim that the United States is in an armed conflict with al Qaeda and the Afghan Taliban, as well as with their "associated forces." Under this heading, the United States claims authority to act consistent with the law of armed conflict, including (at least in some locations) authority to target based on the status of being a member of one of these groups (and perhaps also authority to target based on the conduct of providing support to such groups, though this is less certain). Second, there is the separate—and older—claim of authority to use force in national self-defense in order to prevent terrorist attacks, quite apart from whether a state of armed conflict can be said to exist. This rationale does not necessarily depend on a linkage to al Qaeda or the Afghan Taliban, though al Qaeda has long implicated it (and, indeed, this was the apparent basis for the use of lethal force against al Qaeda in 1998).

Even if we focus solely on the armed conflict model—and even if we set aside objections to the claimed relevance of this model, which will soon grow stronger thanks to the looming drawdown in Afghanistan—significant uncertainty arises. Part of the problem is increasing indeterminacy at the organizational level. I explain this phenomenon in detail in Part 4, below. For now, it suffices to say that there has long been some degree of uncertainty with respect to

which entities are properly thought of as either part-and-parcel of al Qaeda itself, or as an "associated force." That problem is growing worse.

Meanwhile, problems also arise at the individual level. In the Guantanamo habeas litigation, the courts have repeatedly approved the use of military *detention* in connection with persons shown to be members of al Qaeda, the Taliban, or associated forces, and in dicta the courts have suggested that the same may be true for non-member supporters of these groups. Whether this approach carries over lock, stock, and barrel to the targeting context is less clear, however. First, news accounts suggest sharp internal debate within the Obama administration with respect to the use of military detention in the case of a non-member supporter of al Qaeda arising outside of Afghanistan. If that is correct, it is hard to imagine that there is not at least as much debate when it comes to targeting a non-member supporter outside of Afghanistan. Second, Obama administration officials have suggested that, at least as a matter of policy, they do not support targeting on the basis of membership standing alone outside the "hot battlefield" context, but instead require additional showings to the effect that the person is currently involved in operational planning and that a capture operation would not be feasible.

Those two constraints—insisting upon involvement in current operational activity, and forbidding force when capture is a feasible alternative—are at the heart of the matter when we turn our attention to the question whether U.S. person status—and hence eligibility for constitutional protections—further constrains the scope of the government's authority to target. Simply put, the question is whether either the Fourth or Fifth Amendments make these conditions a matter of constitutional requirement, rather than just policy choice, when U.S. persons are purposefully targeted (as opposed to being harmed incidentally in the course of lawful attacks purposefully targeting others).

The better view is that some version of these limitations is indeed required. Some would disagree, arguing that U.S. persons who join the enemy in war should be subject to the same liabilities as are the rest of the enemy's forces, including status-based targeting and exposure to the use of force as a first resort. That may be so, but there is a problem with the analogy. The relevance of the armed-conflict model already is the subject of considerable dispute, particularly with respect to persons who are not connected with the relatively-conventional battlefields of Afghanistan—*i.e.,* precisely the fact patterns most likely to be relevant in the case of a U.S. person target. The armed-conflict model is growing ever more frayed, moreover, thanks to the declining U.S. commitment to sustained combat operations in Afghanistan and the accelerating threat posed by newly-emergent groups in other locations.

b. Procedural Safeguards at Stage 1: Determining If a U.S. Person Is Targetable

In any event, let us assume for the sake of discussion that we have clarity as to the substantive boundaries of the category of persons who in theory might be targeted. The next question is whether the Constitution requires the government to employ special safeguards in the course of determining whether a given U.S. person falls within that category.

Again, some might argue that the answer must be no, insofar as the government is acting under its war powers or otherwise in the name of national self-defense. That is, one might argue

that a U.S. person who joins the enemy cannot complain of receiving the same relatively-limited procedural safeguards that would be provided in the case of an attack on a non-U.S. person, because the Fifth Amendment is context-sensitive and is satisfied without more in that circumstance. And one might go further and argue that any effort by Congress to require something further would itself be unconstitutional as an infringement on the President's Article II authorities and obligations.

There are two problems with these perspectives, however. First, as noted above, at least some uses of force against U.S. persons for counterterrorism purposes will take place in circumstances that do not clearly justify the analogy to wartime practices. Second, and more significantly, it not clear that this analysis is correct even as to situations that indisputably amount to armed conflict. Consider, in this regard, the Supreme Court's decision in *Hamdi v. Rumsfeld*. Though a majority of the justices agreed that a U.S. citizen could be held without criminal charge as an enemy combatant if he was captured in Afghanistan as an arms-bearing fighter for the Taliban, a separate majority concluded that the Fifth Amendment required that he have a fair opportunity to contest the government's factual claims if he so desired. That is to say, the citizen in that case might well be subject to the same liabilities as other enemy fighters, but he nonetheless did have a clear constitutional right to additional procedural safeguards when it came to the fundamental question of whether he was an fact an enemy fighter in the first place.

To this one might respond that detention is different from targeting. That argument might seem counterintuitive, given that the consequences of targeting are more severe than for detention. Yet the idea that one gets *less* process when targeted does make sense from the point of view of the practicalities involved. The idea is that targeting involves little or no opportunity for sustained ex ante reflection, let alone complex safeguards along the lines of a judicial or administrative screening process. From that perspective, additional safeguards might be wholly impractical and unduly costly. Detention, in contrast, involves no temporal exigency at all from the government's viewpoint, thus leaving more room for insistence upon procedural safeguards.

The description of targeting as an activity associated with time pressure (perhaps intensely-exigent time pressure) makes perfect sense in some circumstances, particularly those that most readily come to mind if we are thinking of things through an armed conflict lens (though the same exigency can arise in pure law enforcement settings too, as when a police sniper must make a snap judgment in a hostage-rescue scenario). Take the example of a conventional armed conflict involving a clash between the professional armed forces of two states. For the soldier on patrol, the artillery officer, and the pilot circling overhead, targeting is not typically a matter of first identifying and assessing and then later locating and attacking specific, named individuals. The general idea, instead, is for forces in the field to use factors such as uniforms, location, and conduct to determine whether other persons in the field are part of the enemy force and hence subject to attack—and they may have very, very little time to make this determination.

But not all targeting-related decisions are like this, even during armed conflict. Consider settings such as Afghanistan, where soldiers in the field of course do engage in immediate target identification along the lines described above, but on a separate track substantial resources simultaneously are devoted to the systematic mapping of insurgent networks, including

determinations as to whether specific persons are in fact insurgents. The latter track gives rise to the possibility of two-stage targeting. At stage one, a determination is made that a specific, known person is in fact part of an enemy force (and may be the object of capture or attack if located). Stage two arises later, if and when intelligence points to some individual in the field who may actually be that pre-designated person. At that stage, decisions must be made as to whether there is sufficient reason to believe that the individual is in fact the previously-identified target, and if so whether and how to attack given the surrounding circumstances. Both stage one and stage two may be time-pressured, of course, but not typically in the same way as occurs with a soldier's obligation in the field to make a split-second decision whether to shoot.

That said, time pressure might continue to be an overriding practical concern if we were speaking here solely of the high-velocity cycle of integrated operations and intelligence exploitation pioneered by special operations forces in theater in Afghanistan over the past several years and in Iraq before that. But that does not appear to be the central issue when it comes to the possibility of using lethal force against U.S. persons in a counterterrorism setting.

While there is little in the way of an officially-acknowledged account of the process by which the U.S. government makes such determinations, there has been no shortage of accounts conveyed by insiders to journalists.[2] The resulting public record suggests that the baseline model for the U.S. military's use of lethal force outside of Afghanistan involves a Washington-centric, slower version of the two-stage, individualized targeting model described above. In this version, the stage one "nomination" process involves a substantial amount of interagency screening and debate as to whether the person in question falls within the targetable category and should in fact be targeted, followed by further review from the president's special assistant for homeland security and counterterrorism and then a final determination by the president himself. (Media accounts also suggest that the CIA operates its own two-stage model, albeit without the same interagency input at stage 1).[3]

The significance of all this, of course, is that the reported two-stage model associated with the use of lethal force outside Afghanistan is slow-paced enough at *stage one* to allow for a quasi-judicial process to unfold within the executive branch, with representatives of various agencies and departments reviewing the intelligence and debating its implications en route to multiple further stages of review. It does not follow that the Fifth Amendment therefore necessarily requires still further procedural safeguards be employed at this stage. It does suggest, however, that temporal exigency is no across-the-board objection.

c. Procedural Safeguards at Stage 2: Whether to Strike in a Particular Instance

Contrast that conclusion with the circumstances that are likely to prevail at stage two of the targeting process. At stage two, we assume that a particular person previously was

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[2] *See, e.g.*, http://www.lawfareblog.com/2013/02/klaidmans-chronology-of-changes-to-drone-strike-procedures/.

[3] Those same media accounts also suggest that in some locations outside Afghanistan the government has adopted a separate track permitting the use of "signature strikes," in which observations of behavior and location are used to identify categories of targetable persons rather than specifically-known individuals, in keeping with the conventional model described above. By definition, however, signature strikes do not involve the knowing attempt to kill a U.S. person—or any other known, specifically-identified person—and hence I do not treat them here.

nominated and approved for targeting, and that now there is intelligence suggesting the location of that person. The core issues now are whether the person under observation actually is the same individual as the one approved for targeting at stage one, and if so whether the particular circumstances would justify a strike bearing in mind a range of considerations such as the risk and likely magnitude of collateral damage. The important point here is that it seems far more likely at stage two than at stage one that the temporal-exigency obstacle will be present to a degree that sharply limits the range of options for additional procedural safeguards.

2. A Limited, Defensible Option for Judicial Involvement

Whether it makes sense for Congress to create a mechanism for judicial review in this context depends very much on the particulars of the proposal. Key variables include: whether the proposal is limited to U.S. persons; whether it is limited to certain geographic areas; what substantive standard the judge(s) may be asked to apply; what burden of proof the government will be asked to meet; whether the proceedings will be ex parte and in camera; and whether the review will come before or after an attack actually occurs.

a. Personal Scope: Whom Would Review Protect?

In theory, a judicial review mechanism need not be limited to the targeting of U.S. persons. But if Congress does enact a judicial-review system, it is far more likely to withstand constitutional challenge if it is so limited. Any proposal for judicial involvement in decisions to use force will prompt objections from those who view this as an unconstitutional interference with the President's Article II authorities and obligations. Legislation of this kind would be far more likely to survive if weighty constitutional considerations also rest on the other side of the balance—as would be the case if the system is designed to vindicate the Fourth and Fifth Amendment rights of U.S. persons. This approach also has the virtue of bringing judicial review into play only on rare occasions (at least on current reasonably-foreseeable trends), thus avoiding practical objections pertaining to the limited bandwidth of the judiciary or the burdens that might be placed on the government itself.

b. Subject-Matter Scope: What Exactly Would the Court Be Asked to Do?

Should Congress move forward with a plan to create a judicial review system for targeting U.S. persons, the most important task will be to carefully frame the question(s) that the court would be asked to answer. The more than such a system appears to call for judicial second-guessing of decisions that in the past have always been reserved to military commanders—*i.e.*, the more the system seems to interject judges into run-of-the-mill targeting decisions in the context of armed conflict, particularly those where time is of the essence—the more likely it will be to encounter fatal constitutional objections under Article II, not to mention biting policy criticisms. And so the question arises: is there a useful but narrow way to frame the task that might be put before the court?

One possible response would be to limit the court's jurisdiction to situations arising in specific geographic locations. This has superficial appeal insofar as it seems to resonate with notions that the United States is more clearly involved in armed conflict in some locations than

in others. Setting aside the point that the U.S. government does not claim to be in an armed conflict with al Qaeda solely in one or more limited geographic locations, this approach is undesirable in that it would very likely become both over- and under-inclusive over time. There is, fortunately, a better way to go about defining (and cabining) the scope of judicial review in this setting: extend it *only* to the "stage one" phase described above, where an initial determination is being made as to whether a specifically-identified individual is, notionally, within the scope of the government's targeting authority.

On this model, the court would be tasked with no more (and no less) than reviewing the government's determination that a particular U.S. person is in fact within the category of persons subject to targeting. Much like the Guantanamo habeas litigation, this would require judicial assessment of the abstract legal boundaries of that category (something that Congress could of course weigh in on in the course of creating the judicial review structure, it if it wished to address any of the questions noted above with respect to this substantive question), and then separately it would require a determination as to whether there is adequate information supporting the government's claim that the particular person in question falls within that category. These are precisely the same questions that the current interagency screening process already is grappling with in cases of this kind. Simply put, the idea here would be to duplicate that procedure, but this time with an independent decision maker in the form of an Article III federal judge.[4] The idea is most definitely *not* to interject judges into the time-sensitive decisions that arise at "stage two," when intelligence suggests that the person may have been located and time-sensitive questions arise as to whether an attack at that point would be lawful and desirable.

This approach is not without difficulties. Most obviously, it would still generate significant Article II objections. If limited to U.S. persons (thus bringing offsetting constitutional considerations to bear) and especially if confined to "stage one" circumstances detached from conventional combat decision-making, those objections might still have bite but would be less likely to prevail. It would help, in this regard, if the system were to be designed to operate within very strict time parameters, along with an emergency opt-out for genuinely exigent circumstances that might still arise even at "stage one."

More expansive forms of review are possible, but also more problematic on Constitutional and policy grounds. The most obvious extension would be to encompass not just stage one determinations, but also stage *two* determinations involving the immediate decision to strike at a particular time and place. This approach has the virtue of creating an opportunity to address errors with respect to whether a particular person in the field is in fact whom the government thinks him to be, but it seems especially vulnerable to criticism on temporal exigency grounds. Extension to this scenario also would run the risk of moving down the slippery slope towards judicial involvement in other aspects of targeting decisions, such as collateral-damage estimation. These costs are not worth incurring, especially since the core

[4] It is worth noting that this could certainly encompass a review of such matters as the person's alleged connection to and role within some particular terrorist group (if that is the predicate for the asserted authority to kill the individual). It would not make sense for "stage one" review to encompass the question of whether a capture operation is feasible, however, as that question cannot be determined until stage two arrives and the actual circumstances of the individual's location come to light.

concerns raised by the al-Awlaki example (*i.e.*, whether the intelligence sufficed to show that he was in fact within the category of targetable persons, and whether the government's understanding of the boundaries of that category) could be fully addressed with a "stage one" review.

Assuming these questions were settled, others would remain. Consider the burden of proof. It is difficult if not impossible to say that the Constitution clearly requires some particular calibration on this dimension. Courts might one day settle the matter if given the chance, but as an initial matter Congress has little choice (should it go down this road) but to take its own position on the subject. In the Guantanamo habeas setting, the courts were left to their own devices on the same issue, and largely settled on a preponderance of the evidence standard (though the D.C. Circuit has occasionally hinted that something less demanding might suffice). One might simply extend that approach to the targeting review, though a strong argument can be made that this is unrealistically demanding in this circumstance (which may not involve the exigent time pressures of "stage two," but also will not afford the same degree of leisure as in the detention-review context). That said, the standard must have some teeth if the exercise is to be worth the candle; a mere *de minimis* showing of "some evidence" might not be demanding enough.

Another matter of system design to be considered is the matter of adversariality. Many of the warrant proposals that have been floated recently have referred to the Foreign Intelligence Surveillance Court (the "FISC") as a model for judicial involvement in this arena, or perhaps even as the actual vehicle for it. There is much to be said for piggybacking on the FISC structure, including its demonstrated capacity for keeping secret highly-classified information about sources-and-methods and other sensitive information, as well as the fact that its judges through their FISC work have considerable exposure to questions concerning the linkages among various foreign terrorist organizations and the nature of individual connections to those groups. But it should be noted, too, that the FISC system is not just in camera (meaning the public may not observe its proceedings) but also ex parte (meaning that it is not an adversarial process, but rather one in which the government normally appears alone to argue its case). This is obviously central toward the security of the FISC system, and also to its constitutionality in the face of Article II objections. Ironically, however, it also draws attention to a very different constitutional objection to this entire enterprise: it might lie beyond the judicial power in light of the Article III case-or-controversy requirement.

In theory, the FISC avoids this problem at least in part for the same reason that ordinary search warrant proceedings do: there may well come a point down the line at which the warrant may be contested in an adversarial setting. This is, however, a razor-thin legal fiction. FISC-authorized surveillance is only very rarely contested in a subsequent criminal trial, and though on paper it is *possible* for the judge in a criminal trial to make such post-hoc review of the FISC's action adversarial in the sense of allowing the defendant (or at least defendant's counsel) access to the underlying FISC application, in actual practice this *never* actually happens; judges invariably decide such suppression motions on what amounts to an ex parte basis as well. Were Congress to extend the FISC's duties to encompass some form of "stage one" review, it would indeed raise questions under the case-or-controversy requirement—but they would not

necessarily have more bite than those already associated with the FISC over the past thirty-five years.

There are many more things that might be said about the pros and cons of this limited judicial-review option. For example, it is important to be realistic about the degree of deference judges involved in such a process likely would afford to the government—an indeterminate factor that is easy enough to invoke or mention yet notoriously difficult to quantify or control. Conventional wisdom holds that judges on the whole tend to defer to the executive in national security-related litigation, notwithstanding occasional exceptions that pointedly decline to do so. Whether judicial involvement in the context of targeting U.S. persons would be toothless thus is a function not just of the burden of proof, as noted above, but also judicial willingness to second-guess the determinations of government officials in this especially high-stakes environment. My initial inclination was to think that this would indeed render review largely toothless, but upon further reflection—including consideration of the independence that district judges in particular demonstrated in the course of assessing evidentiary claims in the Guantanamo habeas litigation—I am persuaded that this would not be the case. In the final analysis, I would expect judicial disagreement with the executive to be rare, but by no means impossible—and hence worthwhile without being unduly disruptive.[5]

3. A Larger Set of Concerns: The Destabilizing Legal Architecture of Counterterrorism

Here at the conclusion of my remarks, I wish to switch gears to emphasize a point of broader significance. Though our focus in today's hearing is on the legal questions that arise when the government's uses force against U.S. persons in particular, it is important to bear in mind that the larger legal architecture of counterterrorism is destabilizing quite apart from the U.S person/non-U.S. person distinction.

The first post-9/11 decade was shot-through with legal debates concerning detention, interrogation, and prosecution. By the end of that decade, however, things had begun to appear relatively stable from both a legal and a political perspective. Powerful elements of cross-party and cross-branch consensus emerged, as the Obama administration continued the bulk of the Bush administration programs and policies, Congress repeatedly legislated in support of those policies, and the courts began issuing rulings in the context of the Guantanamo habeas cases endorsing the combined executive-congressional view that there existed an armed conflict with al Qaeda. The appearance of stability was an illusion, however, for the most vexing legal issues not only remained unresolved, but were rapidly becoming both more difficult and more relevant.

These open issues fall under two headings. First, there remains sharp dispute regarding the relevance of the laws of war (i.e., the "law of armed conflict" or "international humanitarian law") to U.S. uses of force against terrorism suspects outside the geographic boundaries of Afghanistan. Second, there is dispute as well as to the precise identity of the enemy in this conflict. In the past, however, these issues were masked to a considerable extent by a pair of stabilizing factors, both of which have usually been present in the context of the highly-influential caselaw generated by the Guantanamo habeas litigation. The first stabilizing factor is

[5] I wish to add that I would oppose the creation of an ex-post nominal damages action, such as my colleague Professor Vladeck has proposed, unless it was accompanied by

the war in Afghanistan. The United States for more than a decade has been involved directly in an undisputed armed conflict in Afghanistan, with relatively-little doubt that the laws of war were pertinent at least there. Because case after case arising out of Guantanamo traces back to Afghanistan, it has been deceptively easy to find the laws of war relevant as a framework for assessing the U.S. government's authority. The second stabilizing factor is similar. Whatever doubts there might be about the scope of the conflict at the organizational level, there has never been much dispute that it at least encompassed the original al Qaeda network and the Afghan Taliban—and case after case arising out of Guantanamo traces back to one or both of those entities.

These stabilizing factors are rapidly eroding, and increasingly irrelevant to the fact patterns that matter most in the counterterrorism setting. The United States is drawing down in Afghanistan, and though it may maintain forces there, it is more likely than not that the use of force in Afghanistan beyond 2014 will resemble current uses of force in Yemen, Somalia, or Pakistan—i.e., episodic, low-intensity uses of force that will generate dispute as to whether an armed conflict exists and whether the laws of war are relevant. This development of course runs with the grain of larger trends associated with American hard power, as a combination of budget pressure, domestic political fatigue, diplomatic conditions, and technological advances pulls the U.S. government toward the use of low-profile, low-commitment exercises of power and away from high-visibility, heavy-footprint engagements. In short, it is growing ever more difficult to avoid the always-contested questions associated with whether and when the laws of war are relevant for the use of force.

Meanwhile, the identity of the enemy grows ever less clear, thanks to the simultaneous decimation, diffusion, and fragmentation of al Qaeda. The lingering elements of the core al Qaeda network remain dangerous despite the extraordinary success of the United States and its allies in killing or capturing its personnel. But other dangerous groups have emerged in the interim, and more will follow. Some of these can fairly be described as descendants of regional al Qaeda cells, but with increasing degrees of tactical, operational, and even strategic independence. Al Qaeda in the Arabian Peninsula (AQAP) and al Qaeda in Iraq (AQI) arguably reflect this model. Other groups originate independently, but gravitate to an uncertain degree into the al Qaeda orbit, as in the case of al Shabaab and al Qaeda in the Islamic Maghreb. And of course not every group emerging out of the Salafist extremist milieu has even that degree of connection to al Qaeda. Recent events in North Africa illustrate the point. The upshot of it all is that, a dozen years removed from the post-9/11 AUMF, it is ever-more difficult to say that we have a clear conception—shared not just within the executive branch but also with the public and with allies—as to the identity of the enemy.

These trends have profoundly destabilizing implications for the legal architecture of U.S. counterterrorism policy. It is not that the U.S. government can no longer plausibly assert authority to detain or to kill when faced with threats outside of Afghanistan or involving groups on the fringes of the original al Qaeda organization. The point, rather, is that in such cases we should expect far more legal disagreement than has been the case in the recent past, with consequent increases in the friction the U.S. government encounters in terms of domestic politics, international cooperation on security matters, and—possibly—litigation. For a more thorough exploration of this topic, please see my forthcoming article *Beyond the Battlefield,*

Beyond al Qaeda: The Destabilizing Legal Architecture of Counterterrorism, MICHIGAN LAW REVIEW (forthcoming 2013), available for free download at http://ssrn.com/abstract=2138623.

Mr. GOODLATTE. Thank you, Mr. Chesney.
Mr. Wittes, thank you very much.

TESTIMONY OF BENJAMIN WITTES, SENIOR FELLOW, THE BROOKINGS INSTITUTION

Mr. WITTES. Thank you, Mr. Chairman, Members of the Committee, for inviting me to testify on the question of when the United States may lawfully target alleged American terrorists overseas.

I want to explain and defend the legal rationale underlying the Administration's lethal targeting of a U.S. citizen in the narrow circumstances of a person who is abroad and believed to be a senior operational leader of al-Qaeda or its associated forces. The ability to kill one of its own citizens is one of the most awesome and terrifying powers a people can vest in its government, and the power to do this without judicial check is certainly anomalous in a society that provides for judicial review of countless lesser exertions of government power.

As Federal District Judge John D. Bates, who presided over the al-Awlaki case, wrote, "How is it that judicial approval is required when the United States decides to target a U.S. citizen overseas for electronic surveillance, but that according to the Government, judicial scrutiny is prohibited when the United States decides to target a U.S. citizen overseas for death?"

Yet there is something equally terrifying, I would suggest more terrifying, about a government unwilling, as a consequence of its own legal views, to protect its people from ongoing threats of attack from its citizens overseas. In dealing with major al-Qaeda figures overseas who hold American citizenship therefore, the Obama administration has, therefore, confronted a slippery slope with not one, but two distinct bottoms.

Down one side lies a Government empowered to do terrible things without sufficient legal justification or oversight. Down the other side lies a Government powerless to confront very real threats to the safety and lives of its citizens while terrorist figures operate with impunity from sanctuaries in ungoverned spaces. It is not enough to avoid sliding down one of these slippery slopes. U.S. policy must avoid both.

With that as background, let us consider for a moment the targeting powers that the Obama administration is not claiming with respect to Americans overseas who affiliate themselves with the enemy. It is not claiming the authority to target any such American citizen, only an American citizen who is a senior operational leader of al-Qaeda or one of its co-belligerent forces. It is not claiming the authority to target even such a senior operational terrorist if his capture is a feasible alternative.

It is not claiming the authority to target an American citizen who poses no imminent threat to American lives, and it is not claiming the authority to act without compliance with the laws of war. Given this rather restrictive posture, it is not surprising there is only one reported case of U.S. forces actively targeting a specific American citizen with lethal force.

The Administration's view of this matter has four subsidiary components, each of them, in my view, clearly correct. First, the United States is in a state of armed conflict with al-Qaeda, the Taliban, and its associated forces. Second, in this armed conflict—as, indeed, in any armed conflict—the United States is lawfully en-

titled to target the enemy with lethal force. Third, there exists no general immunity from targeting for U.S. citizens who sign up to wage war against their own country. And fourth, whatever the Constitution's due process guarantees may require before targeting a U.S. citizen, these requirements are more than satisfied by a rigorous judgment that a person like Anwar al-Awlaki meets the Administration's narrow test for targeting.

To understand why this position must be correct, consider a domestic hostage situation. In such a situation, even law enforcement will use targeted killings, and it will do so without judicial preapproval when the threat to the lives of the hostages is adequately serious. Nobody takes the position that such actions constitute unlawful extrajudicial killings. I submit that the case that truly meets the Administration's legal test, like Anwar al-Awlaki, is not profoundly different from this hostage situation.

Now a mounting chorus of critics has insisted that judicial review must be a feature of the legal framework that authorizes the targeting of American nationals. Whatever the merits of proposals to create judicial review mechanisms, and this is an extremely difficult question, one point is very clear. Current law simply does not provide for prospective judicial involvement in targeting decisions.

It is, therefore, hard to fault Attorney General Holder for having failed to bring the Anwar al-Awlaki case for prospective review before a court that does not exist.

In summary, the Obama administration has taken a measured and serious position concerning the targeting of Americans overseas, one that reserves the right to target in the most extreme cases while leaving open the question of the minimum criteria for targeting to be lawful in less dire circumstances. It is a position that is neither radical, nor surprising, and it ought not raise concerns that the Administration is claiming undue presidential power.

Thank you for this opportunity to share my views on this important subject. I look forward to your questions.

[The prepared statement of Mr. Wittes follows:]

Prepared Statement of Benjamin Wittes

Senior Fellow

The Brookings Institution

before the

House Committee on the Judiciary

"Drones and the War on Terror: When Can the U.S. Target Alleged American Terrorists Overseas?"

February 27, 2013

INTRODUCTION

Thank you, Mr. Chairman and members of the committee, for inviting me to testify on the question of when the United States may lawfully target alleged American terrorists overseas. I am a Senior Fellow in Governance Studies at the Brookings Institution. I co-founded and am Editor in Chief of the *Lawfare Blog*, a website devoted to balanced and sober discussion of "Hard National Security Choices." I also serve on the Hoover Institution's Task Force on National Security and Law. I am the author or editor of several books on subjects related to law and national security: *Detention and Denial: The Case for Candor After Guantánamo* (2011), *Law and the Long War: The Future of Justice in the Age of Terror* (2008), and *Legislating the War on Terror: An Agenda for Reform* (2009). I have written extensively about the legal underpinnings of U.S. targeted killing operations. Currently, I am co-authoring a book with Professor Kenneth Anderson of American University's Washington College of Law, entitled *Speaking the Law: The Obama Administration's Addresses on National Security Law*, from which this testimony is partially adapted. The views I am expressing here also reflect those of Professor Anderson—but not those of any other person or entity.

In this testimony I want to explain the essential legal rationale underlying the administration's position with respect to the lethal targeting of an American citizen abroad who is believed to be a senior operational leader of Al Qaeda or associated forces. I also intend to address some of the misreadings of the administration's view, which have cast it in a far more menacing light than its rather restrained reality justifies. In fact, as I will explain, there is nothing extraordinary about the administration's position, which actually claims very little in the way of power to target Americans. The exact contours of the administration's thinking remain somewhat clouded by its refusal to release the legal memoranda that underlie both its public statements and the leaked "White Paper" that has recently garnered so much attention. What's more, the precise legal theory may vary somewhat depending on whether military or covert forces do the targeting.

That said, enough is public to draw the following conclusion: No significant aspect of the administration's position on this subject ought to give rise to concern that it is claiming undue power.

What the Obama Administration Is and Is Not Claiming

The ability to kill one of its own citizens is one of the most awesome and terrifying powers a people can vest in its government. And the power to do so without judicial check is certainly anomalous in a society that provides for judicial review of countless lesser exertions of government power. As federal district Judge John D. Bates has written, "How is it that judicial approval is required when the United States decides to target a U.S. citizen overseas for electronic surveillance, but that, according to [the government], judicial scrutiny is prohibited when the United States decides to target a U.S. citizen overseas for death?"[1]

Yet there is something equally terrifying about a government unwilling to protect its people from ongoing threats of attack from overseas. And sometimes—remarkably rarely, actually—those threats come from American citizens who have taken leadership positions in organizations devoted to attacking the United States, with which the United States is in a state of armed conflict, and against which Congress has authorized the use of necessary and appropriate force.

Commentators often characterize strong governmental powers as a slippery slope. But in dealing overseas with major Al Qaeda figures who hold American citizenship, the Obama administration confronts a slippery slope with not one, but two distinct bottoms. Down one side lies a government empowered to do terrible things to its nationals—and to the nationals of other countries—without sufficient legal justification or oversight. Down the other slope lies a government powerless to confront very real threats to the safety and lives of its citizens while terrorist figures operate with impunity from sanctuaries in ungoverned spaces. It is not sufficient to avoid sliding down one of these slippery slopes. American policy must avoid both.

With that as background, consider for a moment the targeting powers the Obama administration is *not* claiming with respect to Americans overseas who affiliate themselves with the enemy:

- It is not claiming the authority to target just any such American citizen—only an American citizen who is a senior operational leader of Al Qaeda or one of its associated (that is, co-belligerent) forces.

[1] *Al-Aulaqi v. Obama*, 727 F. Supp. 2d 1, 8 (D.D.C. 2010).

- It is not claiming the authority to target any American citizen, even a senior operational terrorist, if his capture is a feasible alternative. In other words, if capture by law enforcement or military means offers the government a plausible basis to proceed, it will not use lethal force.
- It is not claiming the authority to target an American citizen who poses no imminent threat to American lives.
- It is not claiming the authority to act contrary to international law, including the laws of war and the U.N. Charter's protection of nations' rights of sovereignty.

Given this rather restrictive posture, it is not surprising that there is only one reported case of U.S. forces—whether military or covert—actively targeting a specific American citizen with lethal force. While four American citizens are known to have been killed in drone strikes, only one of those individuals—Anwar Al-Aulaqi—appears to have been the specific target of the strike in which he was killed. The others, including Al-Aulaqi's son and Samir Khan, were collateral deaths in strikes on others.

The point is that the authority by which the Obama administration claims to target citizens under certain narrow circumstances is not a broad claim of executive power. To the contrary, while the claimed power is important in conceptual terms—as it represents such a dramatic exercise of governmental power with respect to the individual—the Obama administration has only asserted a very limited targeting authority with respect to citizens, and it has used it sparingly. That claim—that targeting an American citizen overseas is lawful in a war authorized by Congress when the target is a senior operational leader of Al Qaeda or its co-belligerents, his capture is not feasible, he presents an imminent threat to the United States, and the operation against him is conducted in a manner consistent with applicable law of war principles—is an entirely reasonable one.

The Administration's Substantive Position

The administration's view of this matter has a number of subsidiary components, each of which warrants brief explication.

First, the administration contends that the United States is in a state of armed conflict with Al Qaeda, the Taliban, and associated forces. President Obama himself made the point in a major address as early as May 2009 that warfare lay at the heart of the relationship between the United States and certain foreign terrorist organizations, saying, "Now let me be clear: we are indeed at war with Al Qaeda

and its affiliates."[2] The administration has since consistently maintained that the United States' use of force in the current conflict is authorized by Congress—specifically by the Authorization for the Use of Military Force ("AUMF")[3]—and consistent with international law.[4]

The nature of this conflict, it bears emphasis, involves *actual* war—not war as a metaphor for policy seriousness, but armed conflict in the strict legal sense. This is the government's position—including the Congress's position—even though the enemy is not a state. In the parlance of international law, the United States considers itself as fighting a "non-international armed conflict"—that is, an armed conflict against something other than another sovereign state. Since many U.S. actions using lethal force would constitute murder or other crimes during peacetime, this is actually a pivotal point.

Another important aspect of the government's view of the conflict is that the war is not limited to Al Qaeda itself, but also includes its "affiliates," at least when those affiliates qualify as "associated forces." This is an intentional framing of the activity and identity of these groups so as to treat them within the framework of co-belligerency for purposes of international law. And while many commentators have asserted that the armed conflict is limited legally to particular theaters of conflict or hot battlefields, the administration has consistently rejected this notion as well. Attorney General Eric Holder addressed this point in a major address last March at Northwestern University:

> Our legal authority is not limited to the battlefields in Afghanistan. Indeed, neither Congress nor our federal courts have limited the geographic scope of our ability to use force to the current conflict in Afghanistan. We are at war with a stateless enemy, prone to shifting operations from country to country. Over the last three years alone, Al Qaeda and its associates have directed several attacks—fortunately, unsuccessful—against us from countries other than Afghanistan. Our government has both a

[2] President Barack Obama, Remarks by the President on National Security (May 21, 2009).

[3] Authorization for Use of Military Force, Pub. L. 107-40, 115 Stat. 224 (2001).

[4] *See, e.g.*, Legal Adviser Harold Koh, The Obama Administration and International Law (Mar. 25, 2010).

responsibility and a right to protect this nation and its people from such threats.[5]

The notions that an armed conflict exists, that it is not limited to Afghanistan but extends at least to those places from which the enemy strikes, and that it includes Al Qaeda's co-belligerent forces are all contested by advocacy groups, international organizations, and prominent figures in the legal academy. Importantly, as Holder noted, however, they have not been contested either by the Congress or by the courts. The AUMF did not specify a legal geography of the conflict and thereby create zones of impunity to which this country's military enemies might flee and from which they might then attack—and Congress has never sought to impose geographic limits on the conflict after the fact either. In fact, Congress in 2012 specifically reaffirmed—as least as regards detention authority—that the AUMF was still a vital document and reached members and supporters of enemy groups, including associated forces. It did so, once again, without reference to geography.[6] What's more, the courts, in Guantánamo detention cases, have recognized both that the armed conflict extends beyond the hot battlefield of Afghanistan[7] and that the executive branch's authority to use force extends beyond core Al Qaeda and Taliban forces and includes "associated forces."[8] In other words, there is no dispute among the branches of government that the United States is in a state of armed conflict with Al Qaeda and its co-belligerents, wherever they may be.

Second, in this armed conflict—as, indeed, in any armed conflict—the United States is lawfully entitled to target the enemy with lethal force. The existence of an ongoing armed conflict means that, legally speaking, the administration can strike, assuming the target is a lawful one, whenever it wants. As a matter of international law and domestic AUMF authority, it does not have to do a separate legal analysis of whether force can be used against each individual member of enemy forces or

[5] Attorney General Eric Holder, Address at Northwestern University School of Law (Mar. 5, 2012) ("Northwestern Address").

[6] The National Defense Authorization Act for Fiscal Year 2012 ("NDAA") reaffirmed detention authority under the AUMF. *See* Pub. L. 112-81, § 1021, 125 Stat. 1297, 1562 (2012). The NDAA does not speak to the question of targeting authority.

[7] *See, e.g.*, *Salahi v. Obama*, 625 F.3d 745, 750- (D.C. Cir. 2010) (Reversing a grant of habeas corpus despite the fact that detainee was captured in Mauritania, nowhere near any hot battlefield, and transferred to U.S. custody).

[8] *See, e.g.*, *Khan v. Obama*, 655 F.3d 20, 21 (D.C. Cir. 2011) (affirming the detention of a petitioner found to be "part of" Hezb-i Islami Gulbuddin, an associated force of Al Qaeda and the Taliban).

whether each individual member poses an imminent threat; a single conflict is, after all, already under way. Nor is there some general legal obligation to seek to capture a lawful target before attacking using lethal force where the target is not *hors de combat*. Similarly, there is no obligation to give warning or to offer surrender before launching an attack, though surrender must be accepted once completed. While the administration has made it clear that, as a policy matter, it does prefer to capture whenever possible—to reap the intelligence harvest of interrogations, to avoid unnecessary death, and to bring suspects to justice in the criminal justice system—this is generally not a legal requirement but a set of prudential, humanitarian, and tactical considerations.

Again, this point should engender no particular controversy—though it nonetheless does. The ability to target the enemy in an armed conflict with lethal force is a simple, and lawful, operational necessity in a world in which enemy organizations in countries and locations impossible to reach by law enforcement continue to threaten the United States. The fact of armed conflict—and the consequent availability of targeting—does not mean automatic recourse to hostilities, of course. There are many places in the world where the United States can and does pursue terrorists through law enforcement, interdiction of terrorist financing, and other non-hostilities-based tools of counterterrorism. But there are other places in the world that are weakly governed, ungoverned, or simply hostile to the United States, where terrorist groups responsible for September 11 have fled, or in which associated terrorist groups or cells have arisen and joined the conflict against the United States. The armed conflict framework, and the inherently-tied authority to target the enemy with lethal force, is essential to reaching these actors and denying them sanctuary from which to attack this country.

Third, there exists no general immunity from targeting for U.S. citizens who sign up to wage war against their own country. Americans have fought in foreign armies against their country in numerous armed conflicts in the past, and their citizenship has never relieved them of the risks of that belligerency—nor does it convey any need for judicial review of targeting decisions. U.S. nationals fought for Axis countries during World War II, for example. And it would have been impossible to prosecute the Civil War had some principle required the Union Army to refrain from targeting U.S. citizens—or required judicial review of targeting decisions directed against citizens. This principle is no different if a rebel leads Al Qaeda operations against the United States in Yemen than if he leads an army against U.S. forces in Virginia.

Fourth, whatever the Constitution's guarantee of Due Process may require before targeting a U.S. citizen aligned with the enemy overseas—and the administration assumes it does impose some demands—these requirements are more than

satisfied by a high-level, rigorous internal judgment that this person is a senior operational leader of Al Qaeda or its affiliates who poses an imminent threat, whose capture is not feasible, and whose targeting would be consistent with the laws of war.

To understand why this position must be correct, consider an example from an entirely different context: a domestic hostage situation. In such situations, even law enforcement will use targeted killings, and it will do so without judicial pre-approval when the threat to the lives of the hostages is adequately serious and when there are no available alternatives. What's more, police officers will not wait until the threat to the hostages is imminent in the sense that the hostage-taker is literally lifting his gun to kill innocents in real time. Rather, they will often act—including with lethal force—within the windows of opportunity that circumstances may offer them. Nobody takes the position that such actions constitute unlawful extra-judicial killings. Rather, we accept that the preservation of the lives of the hostages justifies the use of lethal force based on standards totally different from the standards of proof and evidence that would suffice before a judge or jury. Importantly, the standards ordinarily applied to such uses of lethal force against U.S. citizens do not sound in *process* but instead in the Fourth Amendment balancing test of *Tennessee v. Garner*[9] and *Scott v. Harris*.[10] As the Supreme Court put it in *Garner*, "[w]here the officer has probable cause to believe that the suspect poses a threat of serious physical harm, either to the officer or to others, it is not constitutionally unreasonable to prevent escape by using deadly force."[11]

I submit that the case that truly meets the administration's legal test—and only one such case has presented itself—is not profoundly different from this hostage situation. Yes, the action was taken by military or covert operatives, not police and not pursuant to law enforcement authorities. And yes, the imminence of the harm Anwar Al-Aulaqi threatened was, in some temporal sense, less certain. Al-Aulaqi was not, after all, literally holding hostages, and the precise window of time in which he posed a serious threat to American lives was not entirely clear. The nature of terrorist plots, which involve great secrecy and operational security, means that authorities may not know how imminent a threat really is; hostage takers are less subtle. In another sense, however, the problem Al-Aulaqi posed was far less controllable and far more threatening than an ordinary hostage standoff. Remoteness gave him relative security. And critically, the government *had no other*

[9] 471 U.S. 1 (1985)

[10] 550 U.S. 372 (2007).

[11] 471 U.S. at 11.

obvious tool by which to neutralize the threat he posed. Indicting him and seeking his extradition from a country that does not have custody of him, can't keep track of its prisoners, and lacks full control over its territory was not a promising avenue. A capture operation would have involved much greater risk to U.S. forces and foreign civilians and a much greater affront to the sovereignty of a country that seems to allow unacknowledged American air strikes but is not especially eager to have American boots on the ground. To have declined to act in that situation would have been, perhaps, to decline the last and only opportunity to prevent an attack on American civilians—and the Constitution no more requires that than it requires that police forego the shot at the hostage taker.

In short, the administration's position with respect to the targeting of a tiny number of senior, overseas operational terrorists who hold American citizenship, far from a radical claim of new executive powers of life and death, is actually a restrained and careful claim of powers that are—in and of themselves—well-established. We should regard the power to target the high-level operational terrorist who poses an imminent threat to American lives, and whose capture is not feasible, as an inevitable consequence of a war against a highly-networked enemy which attacks from far-flung safe havens beyond the reach of law enforcement.

What "Imminent" Does and Does Not Mean

A great deal of confusion and anxiety about the targeting of American citizens has flowed from the inelegant discussion in the White Paper of the word "imminent." Neither the White Paper nor Holder's speech makes clear what precise legal question the concept of imminence is addressing in its analysis. It is a bit of a mystery, in fact, whether the administration is using it to address resort-to-force matters under international law, domestic separation-of-powers questions, issues of the constitutional rights of the targets, as a possible defense against criminal prohibitions on killing Americans, or perhaps as a prudential invocation of the standards of international human rights law. What is clear is that the administration, for whatever reason, has limited itself in targeting Americans overseas to circumstances of an imminent threat. And its specific characterization of imminence has produced a barrage of criticism. The criticism, in my view, is unwarranted and rests on a misreading of the White Paper. Although it is true that the administration is using the term in a manner slightly relaxed from its common-sense meaning, many commentators and media figures are dramatically overstating the degree of relaxation. A word of explanation on this point is in order.

The term "imminent threat," as the administration uses it, is something of a term of art—one that does not equate precisely to the common understanding of the word. Attorney General Holder has openly emphasized—consistent with the U.S. view of imminence in other national-security law circumstances—that this use does not mean imminence in some immediate temporal sense. It does not mean, for example, the last chance to act before disaster strikes. Rather, this definition of imminence incorporates a more flexible notion of an open window in time to address a threat which, left unaddressed, has independent momentum toward an unacceptable outcome. The Constitution, Holder explained,

> does not require the president to delay action until some theoretical end-stage of planning—when the precise time, place, and manner of an attack become clear. Such a requirement would create an unacceptably high risk that our efforts would fail and that Americans would be killed.
>
> Whether the capture of a U.S. citizen terrorist is feasible is a fact-specific, and potentially time-sensitive, question. It may depend on, among other things, whether capture can be accomplished in the window of time available to prevent an attack and without undue risk to civilians or to U.S. personnel. Given the nature of how terrorists act and where they tend to hide, it may not always be feasible to capture a United States citizen terrorist who presents an imminent threat of violent attack. In that case, our government has the clear authority to defend the United States with lethal force.[12]

The White Paper's wording on the subject of imminence is unfortunately imprecise, but it should not be over-read as authorizing—as one journalist put it—the killing of top Al Qaeda leaders "even if there is no intelligence indicating they are engaged in an active plot to attack the U.S."[13] In reality, the White Paper says something much more modest: that a finding of imminence does not require "clear evidence" that "a specific attack" will take place in the "immediate future." It goes on to say that for those senior Al Qaeda leaders who are "continually planning attacks," one has to consider the window of opportunity available in which to act against them and the probability that another window may not open before an attack comes to fruition. The result is that a finding of imminence for such a senior-level Al Qaeda operational leader can be based on a determination that such a

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[12] Holder, Northwestern Address.

[13] Michael Isikoff, "Justice Department Memo Reveals Legal Case for Drone Strikes on Americans," *NBC News* (Feb. 4, 2013).

figure is "personally and continually" planning attacks—not on a determination that any one planned attack is necessarily nearing ripeness.

The confusion arises largely out of a single, poorly-worded and easily misunderstood passage on page 8 of the White Paper:

> a high-level official could conclude, for example, that an individual poses an "imminent threat" of violent attack against the United States where he is an operational leader of Al Qa'ida or an associated force and is personally continually involved in planning terrorist attacks against the United States. Moreover, where the al-Qa'ida member in question has recently been involved in activities posing an imminent threat of violent attack against the United States, and there is no evidence suggesting that he has renounced or abandoned such activities, that member's involvement in al-Qa'ida's continuing terrorist campaign against the United States would support the conclusion that the member poses an imminent threat.[14]

The temptation is to read this passage broadly, as stating that targeting may be predicated on nothing more than an unrenounced history of plotting attacks—and without regard for the target's present-day activities. In my view, however, such a reading places the White Paper at odds both with other public administration statements and with the history of U.S. interpretation of "imminence" in the international law context. The better way to understand the passage is that the first sentence of the paragraph states the general rule: that an Al Qaeda operational leader may be considered an imminent threat if he is "personally continually" planning attacks against the United States. The second sentence states the view that when evaluating whether a potential target is personally and continually planning such attacks, his recent activity is important to that evaluation, and a recent history of plotting major attacks will tend to support the inference that a person is currently plotting as well—at least to the extent it is not contradicted by some sort of renunciation of violence.

Read this way, the passage strikes me as both correct and unsurprising. If one is trying to assess whether Anwar Al Aulaqi is personally and continually planning major attacks against the U.S., after all, surely it is not irrelevant that he had only recently coaxed Umar Farouk Abdulmutallab onto a plane with a bomb,[15] emailed

[14] Department of Justice White Paper, "Lawfulness of a Lethal Operation Directed Against a U.S. Citizen Who is a Senior Operational Leader of Al-Qa'ida or An Associated Force" at 8 ("White Paper").

[15] *See* Government's Sentencing Memorandum, *United States of America v. Umar Farouk Abdulmutallab*, No. 2:10-cr-20005 at 13-14 (E.D. Mich., Feb. 10, 2012) (noting defendant's

with would-be terrorists in Britain about how to carry out attacks on aviation,[16] and corresponded with Nidal Hassan in the run-up to the latter's shooting at Fort Hood.[17] To the contrary, surely this pattern of behavior supports an inference—at least to *some* extent—that this is a person who is continually plotting attacks of this nature. And surely it is also relevant that the possible target has not merely failed to renounce participation in such attacks but is also continuing to release videos calling for them.

Whether a pattern of this sort would adequately and *on its own* support a finding that an individual is continually involved in plotting major attacks would likely depend on how recent the pattern was, and how extensive. But there is nothing especially remarkable about the government's position that for senior operational figures, recent past leadership conduct of an operational nature can serve as probative evidence of a figure's current role.

While the precise contours of the administration's thinking on the subject will remain unclear as long as it refuses to release the underlying legal memoranda, there is good reason to believe that this narrower reading of the White Paper's "imminence" language—and not the more expansive readings—accurately reflects the administration's thinking.[18] I urge the committee to seek clarification on this point from the administration and would certainly hope that the administration would be willing, if asked by this committee, to clarify its views on what "imminent" does and does not mean.

Unless and until the broader readings of the White Paper's imminence language are confirmed to reflect administration thinking, there is no reason to believe that

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following of and meetings with Al-Aulaqi to discuss jihad and martyrdom missions, the defendant's subsequent training at an Al Qaeda in the Arabian Peninsula ("AQAP") camp, Al-Aulaqi's introduction of defendant to AQAP bombmaker, Al-Aulaqi's instructions to defendant about the need to attack a U.S. airliner over U.S. soil, and Al-Aulaqi's arranging for a martyrdom video by defendant).

[16] *See* Thomas Joscelyn, "Awlaki's Emails to Terror Plotter Show Operational Role," THE LONG WAR JOURNAL (Mar. 2, 2011) (noting correspondence between Al-Aulaqi and Rajib Karim, discussing the latter's knowledge of British airport technologies, baggage handlers, and security personnel; and inquiring about the possibility of getting a "package or person" on a U.S.-bound aircraft).

[17] *See generally* "Anwar Awlaki E-Mail Exchange with Fort Hood Shooter Nidal Hassan," INTELWIRE (July 19, 2012).

[18] *See* Benjamin Wittes, "Are People Overreading the White Paper on Imminence?" LAWFARE (Feb. 12, 2013), *see also* Benjamin Wittes, "More on Overreading Imminence," LAWFARE (Feb. 13, 2013).

the government has adopted a concept of imminence so expansive as to widen the narrow conception of the category the administration has declared the lawful authority to target. Nor is there any evidence to suggest that the government is, in fact, targeting Americans based on nothing more than a distant pattern of past acts.

The Criticism the Administration Has Faced

Finally, I wish to note the major objections to the administration's position and address each briefly. Nearly all criticism of the administration's position with respect to the targeted killings of Americans overseas partakes of one or more of these arguments, some of which suggest policy steps or legal changes well worth discussion and debate. None, however, offers a persuasive reason to doubt the legality of the Al-Aulaqi strike or to doubt the integrity of the administration's underlying legal theory. And some of them, as I will explain, fly directly in the face of enactments by the Congress.

First, some critics doubt the fundamental premise that the United States is engaged in an armed conflict that legally supports targeting the enemy with lethal force or that this armed conflict extends to the places in which, and the groups against whom, the United States is engaged in lethal-force operations. Some of these organizations and scholars deny that the United States can be engaged in a geographically non-specific armed conflict in locations remote from the hot battlefields of Afghanistan and—depending on the scholar—Pakistan. Others object to the premise that a single non-international armed conflict can authorize lethal operations against a variety of non-state actors in disparate locations around the world. The ACLU and the Center for Constitutional Rights, for example, arguing against the legality of the Al-Aulaqi strike and the separate strike that killed his son, contended that "[t]he killings of Anwar Al-Aulaqi, Samir Khan, and Abdulrahman Al-Aulaqi took place outside the context of any armed conflict."[19] More broadly, international law scholar Kevin Jon Heller has argued that,

> The actual organization of "al-Qa'ida and its associated forces" fatally undermines the White Paper. If those terrorist groups do not form a single organized armed group, there can be no single NIAC [non-international armed conflict] between the US and "al-Qa'ida and its associated forces." And if there is no single NIAC between the United States and "al-Qa'ida and its associated forces," the US cannot—by its own standards—justify

[19] Brief of Petitioner in Opposition to Defendant's Motion to Dismiss at 4, *Al-Aulaqi v. Panetta*, No. 12-cv-01192 (D.D.C., Feb. 5, 2013).

> targeting anyone who is a "senior operational commander" in one of those groups simply by citing the existence of the hostilities between the US and al-Qai'da in Afghanistan. On the contrary, in order to lawfully target a "senior operational commander" in a terrorist group that does not qualify as part of al-Qaida in Afghanistan, the US *would*, in fact, have to show . . . that there is a separate NIAC between the US and that group where that group is located.[20]

This view has currency among European allies, among advocacy groups, and in the legal academy. Unfortunately for its proponents, it has no currency among the three branches of government of the United States. The courts and the executive branch have both taken the opposite view, and this body passed a broad authorization for the use of force and despite many opportunities, has never revisited that document to impose limitations by geography or to preclude force on the basis of co-belligerency—much less to clarify that the AUMF does not, any longer, authorize the use of military force at all. Congress has been repeatedly briefed on U.S. targeting decisions, including those involving U.S. persons.[21] It was therefore surely empowered to either use the power of the purse to prohibit such action or to modify the AUMF in a way that undermined the President's legal reasoning. Not only has it taken neither of these steps, but Congress has also funded the relevant programs. Moreover, as I noted above, Congress's recent reaffirmation of the AUMF in the 2012 NDAA with respect to detention, once again contains no geographical limitation.

There is, in other words, a consensus among the branches of government on the point that the United States *is* engaged in an armed conflict that involves co-belligerent forces and follows the enemy to the new territorial ground it stakes out;

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[20] Kevin Jon Heller, "The DOJ White Paper's Fatal International Law Flaw—Organization," OPINIO JURIS (Feb. 5, 2013).

[21] As Senator Dianne Feinstein, chair of the Senate Intelligence Committee, has said:

> The committee has devoted significant time and attention to targeted killings by drones. The committee receives notifications with key details of each strike shortly after it occurs, and the committee holds regular briefings and hearings on these operations—reviewing the strikes, examining their effectiveness as a counterterrorism tool, verifying the care taken to avoid deaths to non-combatants and understanding the intelligence collection and analysis that underpins these operations. In addition, the committee staff has held 35 monthly, in-depth oversight meetings with government officials to review strike records (including video footage) and question every aspect of the program.

Senator Diane Feinstein, "Feinstein Statement on Intelligence Committee Oversight of Targeted Killings" (Feb. 13, 2013).

it is a consensus to which the Congress is institutionally a party. It is a consensus that rejects the particular view of the law advanced by numerous critics. And it is a consensus on which the executive branch is entitled to rely in formulating its legal views.

Second, a mounting chorus of critics has insisted that judicial review must be a feature of the legal framework that authorizes the targeting of any American nationals. The *New York Times*, for example, has editorialized that "[g]oing forward, [President Obama] should submit decisions like [the Al-Aulaqi] one to review by Congress and the courts. If necessary, Congress could create a special court to handle this sort of sensitive discussion, like the one it created to review wiretapping."[22]

The question of whether targeting judgments might benefit from some form of judicial review—either prospectively or after-the-fact—is an enormously complicated one that two of my co-panelists today are addressing directly. Scholars have put together several thoughtful proposals for review mechanisms,[23] and I don't rule out the idea of some form of judicial review—though I tend to disfavor it. But critically, none of these or other proposals to change the rules to include judicial review undermines the integrity of the administration's view of *current* law, which simply does not provide for judicial involvement in targeting decisions. Whether some as-yet-unwritten statutory framework might usefully provide for judicial involvement presents a difficult question. But it's hard to fault Attorney General Holder for failing to bring the Anwar Al-Aulaqi case for prospective review before a court that does not exist.

Finally, the administration has been criticized, mainly from the political Right, for having applied a constitutional analysis at all in a wartime context to which it supposedly has no application. As former Office of Legal Counsel official John Yoo put it in a recent essay,

> [I]nstead of relying on the traditional authority to kill the enemy, the leaked memo reveals how a legal fog threatens to envelop U.S. soldiers and agents on the front lines. The administration has replaced the clarity of the rules of

[22] Editorial, "To Kill an American," N.Y. TIMES (Feb. 5, 2013).

[23] *See, e.g.*, Jennifer C. Daskal, "The Geography of the Battlefield: A Framework for Detention and Targeting Outside the 'Hot' Conflict Zone," 161 U. PENN. L. REV. (forthcoming 2013); Neal K. Katyal, "Who Will Mind the Drones?" N.Y. TIMES, Feb. 20, 2013; Steve Vladeck, "Why a "Drone Court" Won't Work—But (Nominal) Damages Might..." LAWFARE (Feb. 10, 2013).

> war with the vague legal balancing tests that govern policemen on the beat. . . .
>
> The memo shows that for the first time in the history of American arms, presidential advisers will weigh the due-process rights of enemy combatants on the battlefield against the government's interests, judge an individual's "imminent" threat of violence, and ponder whether capture is feasible before deciding to strike. . . .
>
> The memo even suggests that American al Qaeda leaders such as Anwar al-Awlaki (killed in a 2011 drone strike in Yemen) enjoy due-process rights. But in doing so, it dissipates the rights of the law-abiding at home.[24]

This point would have considerable merit if, in fact, the administration has broadly concluded that Americans who join the enemy overseas have constitutional rights that require balancing against other interests in traditional, day-to-day combat operations. Because the underlying legal memoranda remain classified, we cannot know for sure precisely what the administration has done on this score.

But neither the White Paper nor Holder's speech on the subject supports the notion that the administration has done more than assume for purposes of argument that Al-Aulaqi had constitutional rights in the context of the targeting decision. The White Paper, for example, says that if the target is "a U.S. citizen who *may* have rights under the Due Process Clause" (emphasis added), those rights would not be violated by a strike that met the administration's conditions.[25] It goes on to say that the Justice Department "*assumes* that the rights afforded by the Fifth Amendment's Due Process Clause . . . attach to a U.S. citizen even while he is abroad" (emphasis added) and proceeds to analyze the question under that assumption.[26] There are similar hedges in the Fourth Amendment analysis. The White Paper takes pains, in fact, in its opening paragraph, to insist that it "does not attempt to determine the minimum requirements necessary to render such an operation lawful" nor "what might be required to render a lethal operation against a U.S. citizen lawful in other circumstances"—like on a traditional battlefield or against a lower-level figure.[27]

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[24] John Yoo, "The Real Problem With Obama's Drone Memo," WALL ST. J., Feb. 7, 2013.

[25] White Paper at 2.

[26] *Id.* at 5.

[27] *Id.* at 1.

Similarly, in Holder's major statement on the subject, he carefully included the words "at least" in the following statement:

> an operation using lethal force in a foreign country, targeted against a U.S. citizen who is a senior operational leader of al Qaeda or associated forces, and who is actively engaged in planning to kill Americans, would be lawful *at least* in the following circumstances: First, the U.S. government has determined, after a thorough and careful review, that the individual poses an imminent threat of violent attack against the United States; second, capture is not feasible; and third, the operation would be conducted in a manner consistent with applicable law of war principles (emphasis added).

Moreover, he added,

> these circumstances are sufficient under the Constitution for the United States to use lethal force against a U.S. citizen abroad—but it is important to note that the legal requirements I have described may not apply in every situation—such as operations that take place on traditional battlefields.[28]

These caveats suggest that the administration was attempting to think through and address all of the possible legal objections that might plausibly arise to the targeting of Al-Aulaqi. One of those potential objections was a claim that his targeting would violate his constitutional rights. So the administration appears to have asked itself whether—assuming without deciding that such rights apply in this situation—the Constitution would be offended by targeting Al-Aulaqi under the circumstances presented. It did not address the lower-level operative or the circumstances of the battlefield, because it did not confront them and—admirably, in my view—chose to address only the specific legal questions that the Al-Aulaqi case forced it to confront. Al-Aulaqi was a senior operational figure of an enemy armed force that is constantly plotting and devoted to attacking the United States, against which Congress has authorized the use of force, whose capture the intelligence community did not consider feasible and who was assessed to present an imminent threat. So the Office of Legal Counsel addressed only the question of whether it would violate any law to target such a person—leaving other, harder questions for another day. Whether the administration has in fact concluded—or merely assumed for purposes of its analysis—that the Bill of Rights in fact restrains the targeting of an American overseas strikes me as a ripe and important question for this committee in conducting oversight of the executive branch on this matter.

[28] Holder, Northwestern Address.

Conclusion

In summary, notwithstanding the shrill rhetoric of its many critics, the Obama administration has taken a measured and serious position concerning the targeting of Americans overseas. It is a position that reserves the right to target in the most extreme cases, while leaving open the question of what the minimum threshold must be in order for a citizen's targeting to be deemed lawful in less dire circumstances. To put it bluntly, the administration has claimed no more than the authority to target a set of people which, to date, is known to contain exactly one member. A government that asserts the power to kill its citizens is a frightening thing. More frightening still, however, is the government that forswears the power to target citizens in that menacing set and thus leaves such citizens unchecked.

Thank you for this opportunity to share my views on this important subject.

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Mr. GOODLATTE. Thank you, Mr. Wittes.

Mr. Vladeck, welcome.

TESTIMONY OF STEPHEN I. VLADECK, PROFESSOR OF LAW, ASSOCIATE DEAN FOR SCHOLARSHIP, AMERICAN UNIVERSITY WASHINGTON COLLEGE OF LAW

Mr. VLADECK. Thank you, Mr. Chairman, Members of the Committee. It is a pleasure to be back before you again.

I want to start from where Mr. Wittes left off, which is that I do think, although we might disagree about the actual cir-

cumstances, we would all agree that there are some circumstances where the Government is allowed to use lethal force, even against its own citizens. That is not to say that this is a good thing. It is not to say that it is something we should be happy or proud about. But it is something, I think, that is an important starting point for this conversation.

So, in that regard, the question really isn't whether the Government has the power to use this kind of force, it is when. And that is why I think so much of the statements you have heard already today, so much of the focus among commentators, has been on this judicial review question.

Not as a sideshow, not because judicial review is somehow a proxy for the larger conversation, but because the real concern is, are these operations being carried out in a manner that actually passes legal scrutiny? Put another way, how can we be sure, given the pervasive secrecy that surrounds these operations, that the circumstances, the criteria, whatever the law that we believe to exist is, has actually been satisfied in an individual case?

And indeed, in this regard, Mr. Chairman, the white paper is curiously silent. It suggests that ex ante judicial review would not be really workable for reasons that my friend and colleague Professor Chesney has alluded to. And I actually don't disagree that there are concerns that would arise from ex ante review.

But what I would like to do in my remarks today and what I do in more detail in my written testimony is explain how Congress could, in fact, provide a far clearer, far less problematic remedy that would allow these issues, these questions to be resolved by judges by creating a cause of action for damages after the fact. Indeed, to my mind, the only answer to the hard questions raised by targeted killings are for Congress to allow courts to intervene, not beforehand, but afterwards, just as courts do when our law enforcement officers use lethal force in those exceptional circumstances where they feel compelled to do so.

So let me briefly explain how this could work using the various examples that this Committee is well familiar with to illuminate. First, with regard to creating a cause of action, as this Committee knows, when Congress enacted the Foreign Intelligence Surveillance Act in 1978, one of the provisions it included was an express cause of action. Even for a secret surveillance program, even where most of these determinations are made behind closed doors and ex parte, Section 1810 of Title 50 provides a cause of action for damages. It provides even for attorneys fees, although I wouldn't get that excited at that point in the proposal.

And so, we have this model in FISA for Congress providing retrospective damages even for presumably secret governmental operations.

There would still be other potential procedural obstacles that would get in the way. So, for example, the state secrets privilege that the Obama administration has followed its predecessors in routinely invoking in these kinds of cases. But as this Committee knows, there have been various proposals floated in Congress in the last 4 or 5 years to curtail the state secrets privilege. For example, the State Secrets Protection Act that was proposed in 2009.

Whether you follow the model of the State Secrets Protection Act or not, it certainly would be easy for Congress by statute to provide procedures pursuant to which these issues could be resolved while protecting governmental secrecy. One could model those procedures after the Classified Information Procedures Act, which this Congress passed to apply to criminal prosecutions involving classified information.

One could also look, Mr. Chairman, to the Guantanamo habeas cases where the courts have actually fashioned an ad hoc form of the Classified Information Procedures Act to allow for those disputes to be resolved even with classified evidence. And the model for that is not to allow the individual litigants to always see the evidence, but to have security-cleared counsel who, so far as we know, have to date not disclosed a single item of classified information as part of the Guantanamo hearings.

You also have questions about official or sovereign immunity. But Congress in 1988 in the Westfall Act provided a way around that for certain tort claims against the Federal Government, whereby the statute Congress immunizes Federal officers and substitutes the Federal Government as the defendant any time an operation that falls within the scope of the cause of the action is carried out within the scope of that officer's employment. This could certainly be followed here.

Now this begs the harder question, what exactly would courts be reviewing on the merits? And I think, Mr. Chairman, we could have four or five hearings at the least to answer that question. Let me just start from the proposition, though, that this is a question courts are not completely incompetent at handling.

In the context of law enforcement operations, courts routinely look backwards after a lethal use of force to decide whether the officer reasonably feared for his life or for the life of third persons. Courts routinely look at the circumstances through hindsight, even though there are concerns about hindsight bias.

And so, I think if we could reach some consensus, Mr. Chairman, on how to actually resolve these claims on what the law should be going forward, it would not be that hard to empower courts with the benefit of hindsight to entertain these kinds of claims.

Now in his concurrence in the famous decision in the Steel Seizure case, Justice Frankfurter suggested that the accretion of dangerous power does not come in a day. It does come, however, slowly from the generative force of unchecked disregard of the restrictions that fence in even the most disinterested assertion of authority.

It seems to me, Mr. Chairman, that targeted killing operations by the executive branch present the legislature with two realistic choices. Congress could accept with minimal scrutiny or oversight the executive branch's claims that these operations are, in fact, carried out lawfully and with every relevant procedural safeguard to maximize their accuracy and, thereby, open the door to the unchecked disregard of which Justice Frankfurter warned.

Or Congress could require the Government to defend these assertions in individual cases before a neutral magistrate invested with the independence guaranteed by the Constitution's salary and tenure protections. So long as the Government's interest in secrecy are adequately protected in such proceedings and so long as these oper-

ations really are consistent with the Constitution and laws of the United States, what does the Government have to hide?

Now, in closing, Mr. Chairman, I just want to make one last point. As Mr. Wittes suggested, there has only been one reported case of an operation that specifically targeted a U.S. citizen. If the reports are to be believed, there are only three U.S. citizens who have, in fact, been killed in these operations.

But if one listens to Senator Graham, who, given his role on the Intelligence Committee, would know, there are as many as 4,700 casualties, 4,700 people who have been killed by American drone strikes. I am sure many of those strikes were legal. It is possible most of those strikes were legal. But I think it is important to keep in mind that as we talk about drones and accountability for the Government, we are not just talking about Anwar al-Awlaki.

Thank you, Mr. Chairman. I look forward to your questions.

[The prepared statement of Mr. Vladeck follows:]

DRONES AND THE WAR ON TERROR:
WHEN CAN THE U.S. TARGET ALLEGED AMERICAN TERRORISTS OVERSEAS?
Hearing Before the House Committee on the Judiciary
Wednesday, February 27, 2013

Written Testimony of Stephen I. Vladeck

Professor of Law and Associate Dean for Scholarship,
American University Washington College of Law

Mr. Chairman, Ranking Member Conyers, and distinguished members of the Committee: It is an honor to appear before this Committee again, and I thank you for inviting me to testify today on such an important and controversial subject—the federal government's power to lawfully use lethal force against its own citizens.

At the outset, let me note one significant point of agreement between me and my fellow witnesses—and, I imagine, between virtually everyone: There are at least some circumstances in which it is unquestionably legal for the government to use deadly force against its own citizens, whether within the United States or overseas. No one, I imagine, would have balked at the use of lethal force during World War II against Gaetano Territo—a U.S. citizen who was captured while fighting for the Italian Army against U.S. forces in Sicily—as part of an otherwise lawful military engagement.[1] To similar effect, I suspect most of us would endorse the ability of a law enforcement officer to use lethal force in self-defense against an armed felon, or in other situations in which a fleeing suspect poses a significant threat of death or serious physical injury to that officer or to others.[2] And we also must not forget that the government routinely uses lethal force against its own citizens whenever it imposes capital punishment.[3] To similar effect, there are certainly circumstances in which governmental uses of military force are *not* legal, whether the targets are citizens or not, and whether the force is used within or without the territorial United States. Thus, the important question really isn't *whether* the government may lawfully use lethal force against its own citizens. Instead, it's *when* such force may lawfully be used.

My fellow witnesses' statements already include a fair amount about the Justice Department "white paper" released earlier this month—and the various rationales it offers in suggesting a broad framework for answering that question. What I'd like to do in my testimony today is reflect on an issue the white paper raises, but does not meaningfully or adequately resolve: Even if we can reach some modicum of consensus on the specific set of circumstances in which the government may use lethal force against its own citizens overseas, how can we be sure, especially given the pervasive secrecy surrounding these operations, that those circumstances were *in fact* met in an individual case?

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1. *See In re* Territo, 156 F.2d 142 (9th Cir. 1946).

2. *See, e.g.*, Tennessee v. Garner, 471 U.S. 1 (1985).

3. Indeed, Florida was scheduled to execute Paul Augustus Howell last night for killing a state trooper in 1992. *See* http://www.wtsp.com/news/article/299834/19/Man-set-for-execution-loses-another-appeal.

To my mind, the only answer to that question is through judicial review—not *ex ante* through a special court modeled on the Foreign Intelligence Surveillance Act (FISA) Court, as many have suggested, or internally within the Executive Branch, as Neal Katyal proposed last week in a *New York Times* editorial,[4] but after the fact, through an entirely ordinary damages action before our ordinary district courts. While it's certainly true that a host of existing procedural barriers would make it difficult for such suits to succeed under current law, it's equally true, as I explain in more detail below, that virtually all of these barriers could be overcome by statute.

Thus, if this Committee is truly concerned with ensuring that targeted killing operations are carried out lawfully, it seems to me that codifying a cause of action along the lines I describe would be the optimal way to simultaneously assuage those concerns and still allow the government to effectively conduct these operations in the narrow and exceptional circumstances in which they are legally justified.

I. THE WHITE PAPER AND JUDICIAL REVIEW: WHY *EX ANTE* REVIEW WON'T WORK

In one of the more curious passages of the white paper, the Justice Department argues that courts are not in a position to review *any* aspect of targeted killing operations, even when the targets are American citizens. As the paper asserts on page 10,

> [U]nder the circumstances described in this paper, there exists no appropriate judicial forum to evaluate these constitutional considerations. It is well established that "[m]atters intimately related to foreign policy and national security are rarely proper subjects for judicial intervention," because such matters "frequently turn on standards that defy the judicial application," or "involve the exercise of a discretion demonstrably committed to the executive or legislature." Were a court to intervene here, it might be required inappropriately to issue an *ex ante* command to the President and officials responsible for operations with respect to their specific tactical judgment to mount a potential lethal operation against a senior operational leader of al-Qa'ida or its associated forces. And judicial enforcement of such orders

4. *See* Neal K. Katyal, *Who Will Mind the Drones?*, N.Y. TIMES, Feb. 21, 2013, at A27.

> would require the Court to supervise inherently predictive judgments by the President and his national security advisors as to when and how to use force against a member of an enemy force against which Congress has authorized the use of force.

This reasoning strikes me as unpersuasive in at least two respects:

First, it hardly follows that *any* and *all* questions that courts might review with respect to drone strikes raise the concerns flagged by the white paper. For example, if courts are reviewing whether the target is a belligerent who can be targeted under international law as part of the non-international armed conflict between the United States and al Qaeda and its affiliates, this is a question that the federal courts have *routinely* been called to answer in the Guantánamo habeas cases.[5] The same is true for the question of whether the government's use of force falls within the parameters of the September 2001 Authorization for the Use of Military Force (AUMF)[6]—which courts have interpreted to incorporate the laws of war.[7] And while reasonable minds may differ with respect to *how* the courts have answered these questions in individual cases,[8] no one can dispute *that* the courts have done so—and in a manner that has given rise to a comprehensive body of jurisprudence concerning "membership" that Ben Wittes and Bobby Chesney have carefully documented.[9]

Second, even if there are *other* issues raised by targeted killing operations that courts would struggle to assess *ex ante*, such as (1) whether the target *does* present an "imminent"[10] threat to the United States and/or U.S. persons overseas;

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5. *See, e.g.*, al-Bihani v. Obama, 590 F.3d 866, 870–75 (D.C. Cir. 2010).

6. Pub. L. No. 107-40, 115 Stat. 224.

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

8. *See, e.g.*, Stephen I. Vladeck, *The D.C. Circuit After* Boumediene, 41 SETON HALL L. REV. 1451 (2011).

9. *See* BENJAMIN WITTES ET AL., THE EMERGING LAW OF DETENTION 2.0: THE GUANTÁNAMO HABEAS CASES AS LAWMAKING 24–38 (2011), http://www.brookings.edu/research/reports/2011/05/guantanamo-wittes.

10. To the extent that imminence is relevant, it's important to keep in mind that it will mean different things under different bodies of law. Thus, what is "imminent" for purposes of the international law of self-defense may well differ from what is "imminent" as a matter of domestic constitutional or statutory law, which itself may depend upon whether the target is or is not a U.S. citizen. My point here is not to embrace any particular definition or application *of* "imminence," but

and (2) whether it is infeasible to incapacitate the target (including by capturing him) in the relevant time frame with any lesser degree of force, the fact that these questions are often best resolved in hindsight is not an argument against judicial review as such (as the white paper would have it); rather, it is an argument against *ex ante* review.

Indeed, I actually *agree* with the white paper that *ex ante* review would be problematic—albeit for different legal and policy reasons.

For starters, it is difficult to see how such *ex ante* review could satisfy the requirement that the Supreme Court has read into Article III of the Constitution that "the dispute sought to be adjudicated will be presented in an adversary context and in a form historically viewed as capable of judicial resolution."[11] That is to say, "adversity" is one of the cornerstones of an Article III case or controversy, and it would be noticeably lacking in an *ex ante* drone court set up along the lines many have proposed, with *ex parte* government applications to a secret court for "warrants" authorizing targeted killing operations.

The standard response to this concern is the observation that the same is true of the FISA court—that, in most of its cases, the Foreign Intelligence Surveillance Court operates *ex parte* and *in camera,* ruling on a government's warrant application without any adversarial process whatsoever. And time and again, courts have turned away challenges to the FISA process based upon the same argument—that the FISC violates Article III as so constituted.[12]

But insofar as the FISC operates *ex parte*, courts have consistently upheld its procedures against any Article III challenge by analogy to the power of Article III judges to issue search warrants. This process, in turn, has been defended entirely by reference to the Fourth Amendment, which the Supreme Court has interpreted to require a "prior judicial judgment" (in most cases, anyway) that the government has probable cause to justify a search—that is, as a necessary compromise between effective law enforcement and individual rights.[13] As David Barron and Marty Lederman have explained, the basic idea is "that the court is adjudicating a

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rather to stress that, under *any* definition, it will be far easier to assess whether it is satisfied after the fact.

11. Flast v. Cohen, 392 U.S. 83, 101 (1968).

12. *See, e.g., In re* Sealed Case, 310 F.3d 717, 732 n.19 (FISA Ct. Rev. 2002) (per curiam).

13. *See, e.g.,* United States v. U.S. Dist. Ct. (*Keith*), 407 U.S. 297, 317–18 (1972).

proceeding in which the target of the surveillance is the party adverse to the government, just as Article III courts resolve warrant applications proceedings in the context of conventional criminal prosecutions without occasioning constitutional concerns about the judicial power."[14] And part of why those constitutional concerns don't arise in the context of search warrants is because the subject of the warrant will usually have an opportunity to attack the warrant—and, thus, the search—collaterally, whether in a motion to suppress in a criminal prosecution or a civil suit for damages, both of which would be after-the-fact. (To that end, FISA itself creates a cause of action for damages for "aggrieved persons."[15])

To be sure, it's already a bit of a stretch to argue that FISA warrants are obtained in contemplation of future criminal (or civil) proceedings (which is part of why Laurence Silberman testified against FISA's constitutionality in 1978, and why the 1978 OLC opinion on the issue didn't rest on this understanding in arguing *for* FISA's constitutionality). It's even more of a stretch to make this argument in the context of the FISA Amendments Act of 2008 (the merits of which have yet to be reached by any court).

But the critical point for present purposes is that this fiction is the one on which every court to reach the issue has relied. In contrast, there is no real argument that a "drone warrant" would be in contemplation of future judicial proceedings–indeed, the entire justification for a "drone court" is to pretermit the need for any subsequent judicial intervention. In such a context, any such judicial process would present a serious constitutional question not raised by FISA, especially the more that the substantive issues under review deviate from questions typically asked by courts at the ancillary search-warrant stage of a criminal investigation.

Nor could these concerns be sidestepped by having a non-Article III federal court hear such ex parte applications. Although the Supreme Court has upheld non-Article III federal courts for cases "arising in the land or naval forces," it has consistently understood that authority to encompass only those criminal prosecutions that may constitutionally be pursued through court-martial or military

14. David J. Barron & Martin S. Lederman, *The Commander in Chief at the Lowest Ebb—A Constitutional History*, 121 HARV. L. REV. 941, 1106 n.663 (2008).

15. *See* 50 U.S.C. § 1810 (authorizing actual damages, punitive damages, and attorney's fees for victims of unlawful surveillance under FISA).

commission.[16] The idea that Congress could create a non-Article III federal court to hear entirely civil claims arising out of military action is not only novel, but difficult to square with what little the Court has said in this field.

In my view, the adversity issue is the deepest legal flaw in "drone court" proposals. But the idea of an *ex ante* judicial process for signing off on targeted killing operations may also raise some serious practical concerns insofar as such review could directly interfere with the Executive's ability to carry out ongoing military operations.

First, and most significantly, even though I am not a particularly strong defender of unilateral (and indefeasible) presidential war powers, I do think that, if the Constitution protects any such authority on the part of the President, it includes at least some discretion when it comes to the "defensive" war power, *i.e.*, the President's power to use military force to defend U.S. persons and territory, whether as part of an ongoing international or non-international armed conflict or not.[17] And although the Constitution certainly constrains *how* the President may use that power, it's a different issue altogether to suggest that the Constitution might forbid him for acting at all without prior judicial approval—especially in cases where the President otherwise *would* have the power to use lethal force.

This ties together with the related point of just how difficult it would be to actually have meaningful *ex ante* review in a context in which time is so often of the essence. If, as I have to think is true, many of the opportunities for these kinds of operations are fleeting—and often open and close within a short window—then a requirement of judicial review in all cases might actually prevent the government from otherwise carrying out authority that, in at least some cases, most would agree it has. This possibility is exactly why FISA itself was enacted with a pair of emergency provisions (one for specific emergencies;[18] one for the beginning of a declared war[19]), and comparable emergency exceptions in this context would almost necessarily swallow the rule. Indeed, the narrower a definition of imminence that we accept, the more this becomes a problem, since the time frame in which the government could simultaneously demonstrate that a target (1) poses such a threat to the United States; and (2) cannot be captured through less lethal measures will

16. *See, e.g.*, McElroy v. United States *ex rel.* Guagliardo, 361 U.S. 281 (1960).

17. *See, e.g.*, The Prize Cases, 67 U.S. (2 Black) 635, 668 (1863).

18. *See* 50 U.S.C. § 1805.

19. *See* 50 U.S.C. § 1811.

necessarily be a vanishing one. Even if judicial review were possible in that context, it's hard to imagine that it would produce wise, just, or remotely reliable decisions.

That brings me to perhaps the biggest problem we should all have with a "drone court"–the extent to which, even if one *could* design a legally and practically workable regime in which such a tribunals could operate, its existence would put irresistible pressure on federal judges to sign off even on those cases in which they have doubts.

As a purely practical matter, it would be next to impossible meaningfully to assess imminence, the existence of less lethal alternatives, or the true nature of a threat that an individual suspect poses in advance of a targeted killing operation. Indeed, it would be akin to asking law enforcement officers to obtain judicial review before they use lethal force in defense of themselves or third persons—when the entire legal question turns on what was actually true in the moment, as opposed to what might have been predicted to be true *ex ante*. At its core, this is why the analogy to search warrants utterly breaks down—and why it would hardly be surprising if judges in those circumstances approved a far greater percentage of applications than they might have on a complete after-the-fact record. Judges, after all, are humans.

In the process, the result would be that such *ex ante* review would do little other than to add the vestiges of legitimacy to operations the legality of which might have otherwise been questioned *ex post*. Put another way, *ex ante* review in this context would most likely lead to a more expansive legal framework within which the targeted killing program could operate, one sanctioned by judges asked to decide these cases behind closed doors; without the benefit of adversary parties, briefing, or presentation of the facts; and with the very real possibility that the wrong decision could directly lead to the deaths of countless Americans. Thus, even if it were legally and practically possible, a drone court would be a very dangerous idea.

II. HOW A DAMAGES REGIME COULD WORK

At first blush, it may seem like many of these issues would be equally salient in the context of after-the-fact damages suits. But as long as such a regime was designed carefully and conscientiously, I believe that virtually all of these concerns could be mitigated.

For starters, retrospective review doesn't raise anywhere near the same concerns with regard to adversity or judicial competence. With respect to adversity, presumably those who are targeted in an individual strike could be represented as plaintiffs in a post-hoc proceeding, whether through their next friend or their heirs. And as long as they could state a viable claim for relief, it's difficult to see any pure Article III problem with such a suit for retrospective relief.

As for competence, judges routinely review whether government officers acted in lawful self-defense under exigent circumstances (this is exactly what the Supreme Court's 1985 decision in *Tennessee* v. *Garner*[20] contemplates, after all). And if the Guantánamo litigation of the past five years has shown nothing else, it demonstrates that judges are also more than competent to resolve not just whether individual terrorism suspects are who the government says they are (and thus members of al Qaeda or one of its affiliates), but to do so using highly classified information in a manner that balances—albeit not always ideally—the government's interest in secrecy with the detainee's ability to contest the evidence against him.[21] Just as Guantánamo detainees are represented in their habeas proceedings by security-cleared counsel who must comply with court-imposed protective orders and security procedures,[22] so too, the subjects of targeted killing operations could have their estates represented by security-cleared counsel, who would be in a far better position to challenge the government's evidence and to offer potentially exculpatory evidence / arguments of their own. And although the Guantánamo procedures have been developed by courts on an *ad hoc* basis (a process that has itself been criticized by some jurists),[23] Congress might also look to provisions it enacted in 1996 in creating the little-known Alien Terrorist Removal Court, especially 8 U.S.C. § 1534,[24] as a model for such proceedings

More to the point, it should also follow that courts would be far more able as a practical matter to review the relevant questions in these cases after the fact. Although the pure membership question can probably be decided in the abstract, it should stand to reason that the imminence and infeasibility-of-capture issues will

20. 471 U.S. 1 (1985).

21. *See, e.g.*, Latif v. Obama, 677 F.3d 1175 (D.C. Cir. 2012).

22. *See In re* Guantanamo Bay Detainee Continued Access to Counsel, No. 12-398, 2012 WL 4039707 (D.D.C. Sept. 6, 2012).

23. *See, e.g.*, al-Bihani v. Obama, 590 F.3d 866, 881–82 (D.C. Cir. 2010) (Brown, J., concurring).

24. *See* 8 U.S.C. § 1534 (prescribing procedures for *in camera* review of classified evidence in alien terrorist removal proceedings).

be much easier to assess in hindsight—removed from the pressures of the moment and with the benefit of the dispassionate distance that judicial review provides. To similar effect, whether the government used excessive force in relation to the object of the attack is also something that can only reasonably be assessed post hoc.

In addition to the substantive questions, it will also be much easier for courts to review the government's own internal procedures after they are employed, especially if the government itself is already conducting after-action reviews that could be made part of the (classified) record in such cases. Indeed, the government's own analysis could, in many cases, go a long way toward proving the lawfulness *vel non* of an individual strike.

As I mentioned before, there would still be a host of legal doctrines that would likely get in the way of such suits. Just to name a few, there is the present (albeit, in my view, unjustified) hostility to judicially inferred causes of actions under *Bivens*; the state secrets privilege; and sovereign and official immunity doctrines. But I am a firm believer that, except where the President himself is concerned (where there's a stronger argument that immunity is constitutionally grounded),[25] each of these concerns can be overcome by statute—as at least some of them arguably have been in the context of the express damages actions provided for under FISA.[26] So long as Congress creates an express cause of action for nominal damages, and so long as the statute both (1) expressly overrides state secrets and immunity doctrines; and (2) replaces them with carefully considered procedures for balancing the secrecy concerns that would arise in many—if not most—of these cases, these legal issues would be vitiated. Moreover, any concerns about exposing to liability government officers who acted in good faith and within the scope of their employment can be ameliorated by following the model of the Westfall Act, and substituting the United States as the proper defendant in any suit arising out of such an operation.[27]

Perhaps counterintuitively, I also believe that after-the-fact judicial review wouldn't raise anywhere near the same prudential concerns as those noted above. Leaving aside how much less pressure judges would be under in such cases, it's also generally true that damages regimes don't have nearly the same validating effect on government action that *ex ante* approval does. Otherwise, one would expect to have

25. *See, e.g.*, Nixon v. Fitzgerald, 457 U.S. 731 (1982).

26. *See* 50 U.S.C. § 1810.

27. *See* 28 *id.* § 2679(d).

seen a dramatic upsurge in lethal actions by law enforcement officers after each judicial decision refusing to impose individual liability arising out of a prior use of deadly force. So far as I know, no such evidence exists.

Of course, damages actions aren't a perfect solution here. It's obvious, but should be said anyway, that in a case in which the government *does* act unlawfully, no amount of damages will make the victim (or his heirs) whole. It's also inevitable that, like much of the Guantánamo litigation, most of these suits would be resolved under extraordinary secrecy, and so there would be far less public accountability for targeted killings than, ideally, we might want. Some might also object to this proposal as being unnecessary—that, given existing criminal laws and executive orders, there is already a sufficiently clear prohibition on unlawful strikes to render any such damages regime unnecessarily superfluous.

At least as to this last objection, it bears emphasizing that the existing laws depend entirely upon the beneficence of the Executive Branch, since they assume both that the government will (1) willfully disclose details of unlawful operations rather than cover them up; and (2) prosecute its own in cases in which they cross the line. Given both prior practice and unconfirmed contemporary reports of targeted killing operations that appear to raise serious legality issues, such as "signature strikes," it doesn't seem too much of a stretch to doubt that these remedies will prove sufficient.

In addition, there are two enormous upsides to damages actions that, in my mind, make them a least-worst solution—even if they are deeply, fundamentally flawed:

First, if nothing else, the specter of damages, even nominal damages, should have a deterrent effect on future government officers, such that, if a targeted killing operation ever was carried out in a way that violated the relevant legal rules, there would be liability—and, as importantly, precedent—such that the next government official in a similar context might think twice, and might make sure that he's that much more convinced that the individual in question is who the government claims, and that there's no alternative to the use of lethal force.

Second, at least where the targets of such force are U.S. citizens, I believe that there is a non-frivolous argument that the Constitution may even compel at

least some form of judicial process.[28] Compared to the alternatives, nominal damages actions litigated under carefully circumscribed rules of secrecy may be the only way to balance all of the relevant private, government, and legal interests at stake in such cases.

* * *

In his concurrence in the Supreme Court's famous decision in the *Steel Seizure* case, Justice Frankfurter suggested that "The accretion of dangerous power does not come in a day. It does come, however slowly, from the generative force of unchecked disregard of the restrictions that fence in even the most disinterested assertion of authority."[29] It seems to me, Mr. Chairman, that targeted killing operations by the Executive Branch present the legislature with two realistic choices: Congress could accept with minimal scrutiny the Executive Branch's claims that these operations are carried out lawfully and with every relevant procedural safeguard to maximize their accuracy—and thereby open the door to the "unchecked disregard" of which Justice Frankfurter warned. Or Congress could require the government to *defend* those assertions in individual cases before a neutral magistrate invested with the independence guaranteed by the Constitution's salary and tenure protections. So long as the government's interests in secrecy are adequately protected in such proceedings, and so long as these operations really *are* consistent with the Constitution and laws of the United States, what does the government have to hide?

Thank you again for the opportunity to testify before the Committee today. I look forward to your questions.

28. *See, e.g.*, Webster v. Doe, 486 U.S. 592, 603 (1988) (noting the "'serious constitutional question' that would arise if a federal statute were construed to deny any judicial forum for a colorable constitutional claim").

29. Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579, 594 (1952) (Frankfurter, J., concurring).

Mr. GOODLATTE. Thank you, Mr. Vladeck.

Thank you all for very good testimony. I will begin the questioning with you, Mr. Bellinger.

The Administration's white paper tries to establish that where an American citizen who is a "senior operational leader of an al-

Qaeda—or an al-Qaeda leader or an associate force of al-Qaeda poses an imminent threat, the capture is—and capture is not feasible," the U.S. can target and kill him. According to the white paper, imminent threat and the feasibility of capture are not well defined.

Do you see any problems with the lack of specifics in these definitions?

Mr. BELLINGER. Well, thanks, Mr. Chairman.

Of course, the white paper is a summary, a 15-page summary of what apparently is a much longer legal opinion. And as you have explained, most Members of Congress have not seen the entire legal opinion.

Having been both an executive branch lawyer and I have also been counsel to a Senate Committee, I understand the state of play. I do think the Administration, while perhaps not providing the very opinion that was provided to the President, needs to be as forthcoming as possible on these very issues about imminence. I agree with the point in the white paper that imminence cannot mean that a terrorist is about to push the button tomorrow, and that is the only time that you can target him.

When we are dealing with terrorism, when we are dealing with nuclear weapons programs, there has to be a longer lead time. The Administration has tried to explain that, both in the white paper and in Attorney General Holder's speech, but that is a very controversial concept that I think has been troubling both to Americans and for me, as a former State Department official, has been extremely troubling to our allies.

Well, at what point is the U.S. saying that they are going to target someone if this concept of imminence is really redefined to be a very, very broad concept? So——

Mr. GOODLATTE. Well, let me take it a step further. It is not just killing, but it is also other actions taken by the Government. And the Congress has already required that the military get court approval before targeting an American citizen for surveillance.

Mr. BELLINGER. Right.

Mr. GOODLATTE. Which has less consequences than killing them, even in a foreign country. So why shouldn't that requirement extend to a targeted killing?

Mr. BELLINGER. Well, you know, this is, in fact, one of the great ironies at the broad conceptual level. Why is it that to conduct electronic surveillance of an American, the executive branch has to go to a court, but to actually kill an American, they don't?

The reason is about 30 years ago or so, Congress got concerned about electronic surveillance of Americans and said we want to set very specific parameters before the executive branch does that. Congress could do that in this case, and I think that is something this Committee ought to think about.

Now, to a certain extent, I do believe, as you have heard from my colleagues, that this may be a solution in search of a problem. The United States is not out regularly killing Americans. That said——

Mr. GOODLATTE. No, but it is good for the Congress to check and make sure that they are not, too, right?

Mr. BELLINGER. That is right. And so, even if only one American has been killed, if Congress, on behalf of the American people, is concerned about the Government targeting people, I think Congress could reasonably pass a statute that says not to require judicial review—because I really think that is too difficult, particularly in a war, in an armed conflict—but to specify the circumstances that the executive branch has to satisfy before they target an American and then to require some notice in reporting back to Congress. That is the check and balance.

Mr. GOODLATTE. Since my time is limited, let me go on to Mr. Chesney and Mr. Wittes. First of all, Mr. Chesney, does the white paper provide enough information about why the Administration believes it has authority to kill U.S. citizens abroad?

Again, I am not talking about Anwar al-Awlaki. I think the evidence is pretty solid he is a bad guy, and he got the end he deserved. I would note for Mr. Wittes' analogy to hostage taking, that you have collateral damage that you have got to pay attention to there. And in this case, his 16-year-old son, also a United States citizen and not a senior operational leader of al-Qaeda, was killed in the same attack.

So I would like you to tell how we can refine making that distinction and protect the rights of law-abiding U.S. citizens. I am not saying his son is or is not. But I think that is a legitimate question when we know that he also faced the same demise.

So, Mr. Chesney?

Mr. CHESNEY. Mr. Chairman, as Mr. Bellinger said, it is quite possible that in some of the documents that the Committee has not yet been able to see and that certainly we haven't seen, that there is a much more expansive explanation as to the foundations of affirmative authority to target that the Administration is claiming. That said, there is a fair amount of detail even in the white paper. The core claim, of course, is the 2001 Authorization for Use of Military Force is pertinent here. Al-Qaeda membership is woven into the conditions that are specified both in Attorney General Holder's speech and in the white paper.

The more interesting question, though, of course, is what about threats that are of similar magnitude, similar threats to American lives that don't necessarily arise with an al-Qaeda nexus? As Mr. Bellinger pointed out in his opening remarks, a dozen years removed from the 2001 AUMF, the nature of the threat environment the United States faces has evolved considerably, and it is increasingly the case that it is not enough simply to say, well, the threat is al-Qaeda or to gesture in the direction of associated forces. At a certain point, we have to ask whether there's a need for a clearer statement from Congress as to what range of situations the Administration ought to be in bringing to bear the armed conflict model.

Now that said, the white paper is also careful to identify a distinct head of authority, and that is Article II authority, indeed, the duty of the President to defend the Nation when faced with threats to American lives.

Mr. GOODLATTE. Right. Let me interrupt you because I do—my time has expired, and I do want to get Mr. Wittes with an opportunity to respond to the same question.

Mr. WITTES. So I just want to respond briefly to your point about the hostage situation. Number one, you know, collateral death is a distinct possibility in a hostage situation, and it is one of the background principles I think that makes the analogy so precise is the possibility that you may actually accidentally kill some of the hostages.

Number two, I think the collateral deaths of U.S.——

Mr. GOODLATTE. Right. But that is also a case where the imminence of the danger to those hostages is very, very real.

Mr. WITTES. Correct. I mean, you have the possibility of imminent danger to the hostages——

Mr. GOODLATTE. You don't necessarily have that with somebody driving around Yemen in an automobile or however this particular drone attack was taking place.

Mr. WITTES. Right. But you do have the possibility of imminent death to people on the airplanes that he is allegedly putting Umar Farouk Abdulmutallab on.

Mr. GOODLATTE. Look, I am not defending Mr. al-Awlaki in any way, shape, or form. I want to know what we can do to protect U.S. citizens from having that occur.

Mr. WITTES. Right.

Mr. GOODLATTE. Mr. Vladeck? Go ahead. Go ahead.

Mr. WITTES. Can I just respond to that? I mean, I think the answer to that has to be rigorous procedures. Now whether those rigorous procedures are—you want rigorous procedures both on the side of making sure the target is the person who you think he is and making sure that you, in fact, have identified rigorously the person who, in fact, is a lawful target.

And you also want rigorous procedures that will in a fashion consistent with the laws of war minimize collateral damage——

Mr. GOODLATTE. Okay. I am going to interrupt because I want him to say a few words, and then I want to turn to my colleague. And I have exceeded my time.

Mr. VLADECK. Mr. Chairman, very briefly, the only thing I would add to what has already been said by my colleagues is I think it is very important, especially for the purposes of this conversation, to keep in mind that we are dealing with different scenarios and different categories of cases. And so, the answer to your question I believe is going to change depending on whether the justification for the strike is classic self-defense, where there is, in fact, a clear imminent threat to U.S. persons or U.S. interests.

Mr. GOODLATTE. Hostage situation.

Mr. VLADECK. Hostage situation. Or a targeted killing operation that takes place not as part of self-defense, but as part of the broader non-international armed conflict between the United States and al-Qaeda in those parts of the world where there are active combat operations.

And respectfully, sir, I do believe we are going to have very different answers to your questions based on which category we are talking about.

Mr. GOODLATTE. Sure. The Chair now recognizes the Ranking Member of the Constitution Subcommittee and the gentleman from New York, Mr. Nadler, for 5 minutes.

Mr. NADLER. I thank the Chairman.

My first question I must give credit to David Cole and the March 4th issue of the Nation. I am just going to read the question he posed.

Imagine that Russian President Vladimir Putin had used remote controlled drones armed with missiles to kill thousands of "enemies" throughout Asia and Eastern Europe. Imagine further that Putin refused to acknowledge any of the killings and simply asserted in general terms that he had the right to kill anyone he secretly determined was a leader of the Chechen rebels or associated forces, even if they posed no immediate threat of attack on Russia.

How would the State Department treat such a practice in its annual reports on human rights compliance? Anyone? Maybe we can start with Mr. Bellinger?

Mr. BELLINGER. Thank you, Mr. Nadler.

In fact, as I alluded to in my opening remarks and at greater length went into my written remarks, I mean, this is a real problem. It could happen this year where the poor State Department spokesman is going to have to stand up after Russia or China has used a drone against a dissident in the next country, and the State Department will have to explain why that was a bad drone strike in comparison to the United States that, of course, only conducts good and lawful drone strikes.

And so, that is extremely important for our Government, both Congress, but primarily the executive branch, to lay down as precisely clear rules for the use of drones——

Mr. NADLER. That is fine, but isn't it the case that if Russia or China or someone were doing what Mr. Cole posits, that we would condemn that out of hand? That we wouldn't say, well, you know, this drone strike was okay and that one wasn't? That we would say——

Mr. BELLINGER. If Russia or China were being attacked by a terrorist group that was indisputably posing imminent——

Mr. NADLER. Well, the Chechens attacked them at one point.

Mr. BELLINGER. And if Chechens were in another country posing imminent threats to Russia, and the country that they were in was unwilling or unable to prevent that threat, I think we would have to acknowledge Russia's right to defend itself.

Mr. NADLER. Okay. Let me continue. First of all, one comment on something Mr. Bellinger said. He said we need due process, but not judicial process. I don't understand, and I am not asking a question, I am just saying. I don't understand how a unilateral determination by an executive branch official without any judicial involvement can be considered due process in any form.

Let me ask Mr. Wittes the following question. You said and the white paper says that we can attack a senior operational terrorist posing an imminent threat consistent with the laws of war. My question is the following.

I don't understand why we need a senior operational terrorist, why he can't be just an ordinary terrorist. I don't understand why he has to be posing an imminent threat. I think the analysis is completely different.

Either this person is an enemy combatant, or he is not. If he is not an enemy combatant, he is subject to normal criminal law, and

we ought to have normal due process and take him to court and so forth. If he is an enemy combatant, he doesn't need due process.

The question is how do you determine whether he is an enemy combatant, and who determines whether he is an enemy combatant? Whether he is senior or not, I don't care, frankly, from this point of view. But under the laws of war, if he is an enemy combatant, he is a legitimate target.

But who can determine that under what standards, and what precedents do we have, and on what grounds, and how can the executive determine that without any kind of other determination? Let me ask Mr. Wittes and Mr. Vladeck.

Mr. WITTES. Well, I would just say, as a matter of law, you have just taken a position that is far more permissive with respect to targeting than the Obama administration's position.

Mr. NADLER. No, because I have said it has got to be—you have got to determine properly he is an enemy combatant.

Mr. WITTES. I understand. You have raised—you have suggested a narrower process to determine a broader category, right? The Obama administration has taken the view that it generally will not specifically or that it does not assert generally the right to target any U.S. national overseas who may fit in a law of war category of belligerency. It will target people only when they are an imminent threat and a senior operational leader whose capture is unfeasible.

So you are taking a view that is potentially much more permissive and inclusive of more possible targets, but with a concern about the lack of process on the judicial side. I would just say—I mean, I think it is a very legitimate question what processes this body wants to impose for making those determinations.

My only point is that there is nothing particularly extreme about the substantive position, there is nothing extreme at all about the substantive position the Administration has taken about whom it may target. And under current law, which is the law under which it confronted the Anwar al-Awlaki case, which is really the case that gave rise to these memos in the first place, there is no basis for judicial process at all. There is no forum in which to take these questions.

Mr. VLADECK. Congressman, all I would say is I share your concerns about the view that due process is not a requirement of judicial process. I was surprised to hear the Attorney General say that last year in his speech at Northwestern.

The only thing I think that it is worth bearing in mind is due process is not necessarily a requirement of pre-deprivation judicial process.

Mr. NADLER. Of what?

Mr. VLADECK. Of pre-deprivation, right? In other words, there are circumstances where the Supreme Court has said the Government is allowed to act, and then we will review after the fact whether they acted with sufficient procedural safeguards.

And so, I share your view. I think the point is that that is not necessarily—the cash-out of your view is not that there should be pre-deprivation judicial process, but rather that there is a requirement that, at some point, some neutral magistrate is reviewing

whether the Government's decision was made with adequate safeguards.

Mr. NADLER. Could I just ask Mr. Vladeck to comment on the question that I posed? Under laws generally, if someone is not an enemy combatant, you cannot target him in any way without due process and a determination. If he is an enemy combatant, well, there are consequences that flow from that.

How do we determine? I mean, if someone is wearing a uniform at Normandy in 1944, it is pretty safe to assume he is an enemy combatant, but—the wrong uniform, that is. But in the absence of that, how do we determine and under what safeguards should we determine who is an enemy combatant or not?

Mr. VLADECK. So all I will say briefly, if I may, is that Article 5 of the third Geneva Convention creates a requirement that when there is doubt about the status of a belligerent, there is supposed to be a hearing. It doesn't have to be a judicial hearing. It could be an administrative hearing.

But there is some requirement that at some point—it doesn't have to be before you capture them. It does not have to be before you act. But that at some point, as soon as is reasonably possible, you are ensuring that, in fact, the procedural safeguards that you have implemented have produced the right person. And that is what led to the Supreme Court's Hamdi decision in 2004, saying that, indeed, we need more due process, especially where U.S. citizens are concerned.

Mr. GOODLATTE. The gentleman's time has expired.

Mr. NADLER. Thank you.

Mr. GOODLATTE. I thank the gentleman from New York and the witnesses.

I recognize myself for 5 minutes, and I would make the point this. As I listened to the testimony here and we have gone into this decision-making process, I go back and reflect on the Constitution and the commander-in-chief. And even though there is a little political tension over this issue, I don't want to disempower our commander-in-chief from protecting our Americans, wherever we might be. And neither do I want to delay his decision to act.

And so, we are confronted with this question if we are going to review the decision, either we give carte blanche authority to the President of the United States as commander-in-chief to kill an American citizen abroad under the definitions that come out of the executive branch, or we define those conditions here by this Congress. And then we ask for a review. Prospective concerns me too much because that delays the response. Retrospective then goes either to Congress, or it goes to the judicial branch of Government.

So which—that is the question that is before us, the definitions. And I will say for me, it has got to be a retrospective, not prospective, and I would prefer that we review it here in Congress by some form rather than handing over warfighting to the judicial branch. That has always concerned me.

On the other hand, the politicization of it here in this Congress, that is the balance. So there is the question that is before me, and I would just ask each of the witnesses to just go down the line and weigh judicial or congressional review. The definitions I don't think

we want to try to address today precisely. But what would be your preference, Mr. Vladeck?

Mr. VLADECK. Both. I mean, I don't know why you couldn't have both processes operating side by side, where individual victims of strikes that they believe are unlawful have recourse to the courts and where this body has its normal oversight function. I don't know why they need to be mutually exclusive at all.

I think they serve different purposes, and I think they vindicate different interests. So I am not sure why it has to be either/or.

Mr. GOODLATTE. And then with regard to security?

Mr. VLADECK. Well, you know, I think the Guantanamo habeas cases are a very good example for all of us. These are cases where the Government's arguments all along were concerns about classified information being disclosed to the public, to the media, et cetera. And even though there have been some five or six dozen habeas cases since the Supreme Court's 2008 Boumediene decision, I am unfamiliar with any single instance where any item of classified information was disclosed through those proceedings inappropriately.

Mr. GOODLATTE. I would agree with that, Mr. Vladeck.

Mr. Wittes?

Mr. WITTES. So I am sort of instinctively opposed to prospective judicial review of these questions. I do think the Congress, in the form of the Intelligence Committee and Senator Feinstein, has issued a fairly substantial statement about what the Senate Intelligence Committee at least has done in the way of reviewing these strikes, which seems fairly substantial. So I do think some of that is already going on.

In addition, I have to say I find Professor Vladeck's written statement on the attractiveness of post hoc review judicially to be a very intriguing document. And I think that has a lot to recommend it, and I commend it to the Committee.

And I also think that Professor Chesney, who has in his written statement attempted to narrow the categories of prospective review, which, as I say, I sort of viscerally oppose, but narrow it down to its finest levels where it would be least intrusive is a model that has a lot to recommend it as well.

So I mean, I think there is—I largely agree with Professor Vladeck that there is opportunities in both spheres.

Mr. GOODLATTE. But would it be your opinion that prospective review would delay an operation perhaps?

Mr. WITTES. I fear very much that it could. I also fear that the temptation on the part of the executive branch would be to throw lots of things to whatever judicial tribunal that was created in order to get cover for things, and you would end up with a very substantial and unanticipated dialogue between whatever tribunal you created and the executive in much, actually, the way that FISA has done in many ways attractively in that context. I think in the targeting context, it would be less attractive.

Mr. GOODLATTE. Mr. Chesney?

Mr. CHESNEY. I certainly agree that congressional oversight should be granular and serious. There should be as much transparency as possible there. I think that is critical, and I think that is common ground for almost everybody here.

I think the hard question is the role, if any, for the judiciary. As Mr. Wittes just said, I endeavor in my remarks to show that I do come down in the remarks in favor of prospective, rather than post hoc. But I do so only with respect to a very narrow set of issues, issues that I don't think should be reviewed by the judiciary post hoc or after the fact include the issues that are most time sensitive.

Decisions whether the particular person who is in your sights for this fleeting moment is, in fact, who you think it is, whether capture is feasible. Those sorts of features I don't think are fit subjects for judicial review.

What I do think could be properly reviewed by the judiciary, and I think in advance in order to give the executive branch certainty is better, would include mainly the alleged membership of the individual in the organization in question and their role within the organization. And I say this only on the assumption that we are in a situation where it is not exigent to determine that right now. There has to be an exigent opt-out.

Mr. GOODLATTE. Thank you.

And Mr. Bellinger?

Mr. BELLINGER. I think I come out where you seemed to be coming out in the beginning of your comments. I mean, first, I think you really have to decide is this a problem that is coming up so frequently that Congress needs to intervene? We have only had one example.

That said, it is a very serious example. So if we get over that hurdle, I think Congress could quite reasonably legislate, one, the criteria of who should be targeted. And much of it is in the white paper, but you might put in even more specific criteria. And then the procedures that would be required for targeting inside the executive branch.

I would not require either prospective or a retrospective judicial review. I think the check and balance in our constitutional system is for reporting to Congress, if possible beforehand in a classified setting.

There appeared to have been a very long lead time with the targeting of Mr. al-Awlaki. The executive branch could have gone and told the Intelligence Committees we are targeting this person. If Congress says, "We completely disagree. We think this guy is just exercising his First Amendment right," the executive should take that into account.

Certainly after the fact, if the executive branch has targeted Americans, I see no reason why the executive can't come and report that to Congress. And again, if Congress after the fact says, "This is not the authority that we gave to you, we have got real concerns about it," that, to me, is the check and balance.

Last point. Remember, as you said, we are talking about an armed conflict situation. And so, tying the President's hands one way or another before or after with judicial review in an armed conflict decision as commander-in-chief I think is a very serious problem. I would not do that.

Mr. GOODLATTE. Thank you, Mr. Bellinger. And your point, prospective, if possible, and retrospective, if necessary, I see as an alternative.

I thank the witnesses, and I see that my time has expired.

And I would yield to the true gentlemen from Virginia, Mr. Scott.

Mr. SCOTT. Thank you, Mr. Chairman.

Mr. Vladeck, the determination has to be made that the target is a senior operational leader of al-Qaeda, imminent threat, capture not feasible, consistent with the laws of war, but did I miss it in the white paper where they talk about the standard that is used, whether it is beyond a reasonable doubt or moral certainty or preponderance of the evidence?

Or there is a standard not clearly erroneous. Where is the standard?

Mr. VLADECK. If you missed it, Congressman, I missed it as well. I mean, I don't think the white paper goes out of its way to say what the particular burden is, partially I think because the white paper disfavors judicial review, which is where that burden would presumably come into play.

Mr. SCOTT. What evidence can be—are there any rules of evidence as to what evidence can be considered?

Mr. VLADECK. There are no—certainly, there are no legislatively imposed rules of evidence that apply to these cases.

Mr. SCOTT. Can hearsay be considered to ascertain whether or not these factors are true?

Mr. VLADECK. All I will say is there may well be internal and classified executive branch rules that deal with this. Certainly, we don't know about any of them.

Mr. SCOTT. Well, we are talking about the rules that we are going to by. The internal stuff can change every day. Is there any prohibition against hearsay being considered?

Mr. VLADECK. No.

Mr. SCOTT. Why is hearsay not considered admissible in a court of law?

Mr. VLADECK. I mean, I think the short answer is it is generally believed to be inherently unreliable.

Mr. SCOTT. And that can be considered to put someone to death, best you can determine from the white paper?

Mr. VLADECK. Certainly, there is nothing in the white paper that suggested it couldn't be.

Mr. SCOTT. Now judicial review, we have had situations where you get the hostage situation, imminent, ongoing situation. Is there any problem with a prospective judicial review, if feasible, as there is in FISA and post hoc, if it's not feasible beforehand?

Mr. VLADECK. So I think, Congressman, there are two problems, one legal, one practical. Because I do think—I mean, I do think you could solve the concerns that Congressman King raised through an emergency exception.

But I think the legal concern is there is an Article III question about whether there is adversity in the judicial proceeding. The reason why this isn't usually an issue with regard FISA warrants, like search warrants in criminal cases, as I elaborated in my written testimony, is because those are seen as ancillary to the subsequent criminal proceedings.

In this context, without any subsequent proceeding, I think you would have a very serious problem if the Government had this ex parte application to a judge with no one representing the other side either at that point or afterwards.

Practically, Congressman, my concern is, you know, ex ante judicial review could very well turn into death warrants where basically judges feel enormous pressure in these circumstances to sort of defer to the Government, especially without adverse counsel, adverse parties, adverse presentation. Whereas, in the context of retrospective review, judges have the hindsight. Judges can actually see what happened.

So I think there is both legal and practical problems that would arise with ex ante review, separate from the emergency situation, which I think you could provide for by statute.

Mr. SCOTT. Well, how long are people on the list?

Mr. VLADECK. We don't know. I mean, certainly, as I think the last exchange suggested, it appears to be the case that Mr. al-Awlaki was targeted and on the list where he could have been targeted for some extended period of time.

Mr. SCOTT. So if you are on the list for some extended period of time, at some point during that time, someone could have wandered over to an independent review?

Mr. VLADECK. Well, as you know, Congressman, Mr. al-Awlaki's family did. I mean, there was a lawsuit brought on behalf of Mr. al-Awlaki in the D.C. Federal District Court before the operation that ended up terminating his life. That suit was dismissed by I believe it was Judge Bates on a series of procedural grounds that it wasn't justiciable, that the political question doctrine got in the way, et cetera.

So there was, indeed, an attempt to do exactly that.

Mr. SCOTT. Well, what recourse is there for someone who is on the list by mistake?

Mr. VLADECK. At least in al-Awlaki's case, the Government—I don't know how seriously to take this, but the Government certainly suggested that if he wanted to turn himself in, they would be obliging. So at least when it is public that the Government believes it has the authority to kill a particular person, presumably they could seek to turn themselves in and then contest it. But there is no procedure for that.

Mr. SCOTT. Is drone killing the only method for killing?

Mr. VLADECK. No. I mean, I think it is important to keep in mind that this conversation is not actually about drones as such. That it is about uses of any number of sources of military hardware to conduct targeted killings, whether through an unmanned aerial vehicle, a manned bomber, a Tomahawk missile fired from a Navy ship in the middle of, you know, a body——

Mr. SCOTT. Handgun?

Mr. VLADECK. Sure. So, no, it is not about drones, per se, although I think the technological utility of drones makes it easier and cheaper for the Government to conduct these operations than conventional pre-existing technologies might.

Mr. SCOTT. Is there any rationale for allowing—is there any rationale for killing them overseas? What if they are found in the United States, what happens?

Mr. VLADECK. Well, at least according to the white paper, one of the critical considerations is the feasibility, or lack thereof, of capture. I have to think that the Federal Government will never take

the position that it is infeasible to capture an individual who is within the territorial United States.

But I still think they could probably—if I back up a second, I think the Government could claim the authority in exceptional circumstances to use lethal force against a U.S. citizen in the U.S. Law enforcement officers do it all the time. So I think with regard to the white paper, that circumstance won't arise because you will never satisfy the infeasibility of capture prong. But that doesn't mean that the Government wouldn't claim such force in another context.

Mr. GOODLATTE. The gentleman's time has expired.

And the Chair will now recognize the gentleman from Arizona, Mr. Franks.

Mr. FRANKS. Well, thank you, Mr. Chairman.

Thank you, gentlemen, for being here.

I was struck by the Chairman of the Committee's juxtaposition between surveillance and the drone strikes, and I will have to go ahead and begin my comments by suggesting that as we look back not such a long time ago when the Administration eviscerated the Bush administration for waterboarding certain individuals under circumstances that perhaps were at least as compelling as some of those we are discussing today. And yet the drone strikes are something that they can move forward to.

And it just seems to me that there is more than a subtle difference between waterboarding and blowing someone into eternity. And the hypocrisy of the Administration is profound, in my opinion, on this front.

With that said, as I have come to expect and anticipate a certain cognitive dissonance and a certain unwillingness for this Administration to hold themselves constrained to the truth, their previous statements, their previous positions. So my thought today is for those of us that are committed to protecting the Constitution and protecting the constitutional way of life for Americans, that we have to then focus very narrowly on this phrase "due process," and that that has to be our definitional task.

Certainly, there are none of us, I believe, on this Committee that would say that we just need to do away with due process when we are talking about an American citizen. However, as the other gentleman mentioned earlier, with police officers and things of that nature, we have due process in this country. But if there is an imminent threat, and sometimes the degree of the imminence is taken into consideration, then the due process exists because of that conditionality.

So what I would like to do, if I could start with you, Mr. Bellinger, just simply see if we can find some consensus among the panel as to what critical elements should be in any congressional outline of due process here and whether there should be some significant punitive measures built into that kind of guideline to keep an Administration within the track of what befits our constitutional premise.

So, Mr. Bellinger?

Mr. BELLINGER. Well, thank you, sir.

And I can't resist, as someone who spent all 8 years in the Bush administration sometimes receiving the criticisms and slings and

arrows from people on the outside, to address your point about hypocrisy.

I have been supportive of the Obama administration's counterterrorism policies, including of the drone strikes. I would like to have seen some of them, now that they are in office, acknowledge that maybe some of these issues that they claimed we were making huge mistakes on before are actually more difficult than they acknowledge. And we see little of that acknowledgment.

Frankly, one of the reasons I am here today, as a Republican official, is to give the same kind of bipartisan support to this Administration that I would have liked to have seen some of them when we were in office giving to us on these difficult counterterrorism issues.

That said, with respect to due process, the question of due process, I think, does not mean judicial process. It can mean judicial process in some circumstances. But the Constitution never said judicial process. It says you can't be deprived of life or liberty without due process.

So what is the process that is due in a particular situation? In a situation where we have an armed conflict, i.e., a war, the process I think this Congress can appropriately say is to say that an American can only be killed who fits certain criteria. That it has to be a senior al-Qaeda leader who is planning attacks and that those are imminent attacks, and the executive branch has to have reviewed this and reached high confidence that the person reaches those criteria and, where possible, has notified Congress in advance, if that is possible, and certainly afterwards to have notified Congress after the fact.

So I think I would guess that at minimum, the panelists here would say we could at minimum agree on those criteria if Congress were going to legislate. And then the only add-on is, is there some judicial role or not?

Mr. FRANKS. Well, thank you, sir, and I appreciate your answers across the board.

Mr. Vladeck, could I ask you to take a shot at it?

Mr. VLADECK. Sure. I mean, I think—so I think we have to be careful, and perhaps I wasn't sufficiently clear in my responses to Congressman Nadler, that it is not that due process is by itself a requirement of judicial process. It is that the way to ensure that the Government has provided the process that is due is not simply to take the Government's word for it, but is to provide some modicum of review, independent external review that whatever process was due under those circumstances was, in fact, provided and it was not just asserted that it was provided.

So, to that end, Congressman, I think this court can look to the jurisprudence that the Supreme Court has articulated in these cases—the Hamdi case, for example—with regard to what kind of due process is due an American citizen, even one who takes up arms against the United States, in Hamdi's case as part of the Taliban.

I think there is a lot that we could learn from that example with regard to the balance that we should strike in those circumstances, and I think that if this Committee is serious about codifying those standards, there is plenty of precedent to base that on.

Mr. FRANKS. And would you suggest that there might be any punitive elements in those guidelines for a Government that fails to follow them? Not just in case—a prosecutor, sometimes his case collapses if he doesn't do Miranda rights, but shouldn't there be something more punitive than that in a case that has such profound constitutional foundations?

Mr. VLADECK. Well, Congressman, in my testimony, I suggest that you can provide a damages regime. Certainly, there would come a point where a Government officer might even be breaking various criminal laws if they are acting with gross negligence and intending to cause harm or they don't have the authority to use such force.

My view is that it would be a sufficiently significant step in this context to even provide and create civil remedies. That, by itself, would, I think, have an incredibly salutary effect on the Government's practice.

Going further than that I think would run into the question of who would prosecute that case? Would the Government really be interested in prosecuting its own officers and its own solders for crossing the line in that case?

Mr. FRANKS. I mean, we do that all the time.

Mr. VLADECK. Well, certainly, it is true in the military context. So the Uniform Code of Military Justice does provide for court martialing of our service members when they cross those lines. I think civil remedies might be sufficient for senior Government officers.

Mr. FRANKS. Thank you.

Thank you, Mr. Chairman.

Mr. GOODLATTE. I thank the gentleman for his good line of questioning.

And the Chair now recognizes the gentleman from Puerto Rico, Mr. Pierluisi, for 5 minutes.

Mr. PIERLUISI. Thank you, Chairman.

I thank the witnesses. I have a couple of questions based on your prior testimony and written submissions.

I have noticed that some of you, if not all, have asserted that the Obama administration is actually taking a very limited targeting authority with respect to American citizens. My first question for each of you then is do you believe that the Obama administration, consistent with Article II of the Constitution, could have asserted a broader or far broader targeting authority?

If the answer is yes, in what respects? Basically, I am interested in understanding whether you believe the Administration has gone to the outer limits of its Article II powers, and if not, in what specific ways it has not.

Mr. BELLINGER. Do you want——

Mr. PIERLUISI. Yes, each of you to comment on this.

Mr. BELLINGER. I think it is an excellent question. I think the Administration probably has not gone to the outer bounds of what its constitutional powers would be. Of course, none of us know really what those bounds are. There is just not a clear answer to this question.

The Administration, I think, has taken a very restrictive standard. The exchange with Mr. Nadler actually gave a particular ex-

ample. Instead of saying that the only Americans that could be targeted would be those who are senior operational al-Qaeda leaders who pose an imminent threat, the Administration could, I think, have said under the Constitution that any American who has taken up arms against the United States as part of an armed conflict could be targeted.

If this were a traditional war, in World War II, and there were a German American, we would never have said that the only German American who had taken up arms would be a person who was a senior leader who posed an imminent threat at the time. So I think certainly the President would have broader authority, and to the Administration's credit, they understand that this is a serious power they are asserting to kill an American, and they have taken in this case a fairly limited reading.

Mr. CHESNEY. Sir, I agree with that as well. I would add that it is noticeable that the Administration's formulation in the white paper and in the Attorney General's speech is al-Qaeda specific. It doesn't have to be if we are talking about the duties and authorities of the President to defend the Nation in a true case of imminent threat. If that threat came from some other extremist group or individual that happened not to have a nexus with al-Qaeda, that power would still be there.

Mr. WITTES. I would just add to that. You framed your question in terms of Article II, but the Administration could actually take a much more robust position under the AUMF itself. And the position would be suggested by the line of questioning that Congressman Nadler asked before.

The D.C. Circuit has said in the habeas context that it is enough to justify targeting—to justify detention to be part of or substantially supporting enemy forces. Now just focus on the "part of" component of that. You know, to follow your line of questioning, the Administration could take the view that an American who is part of enemy forces is is lawfully targetable under the laws of war and under the AUMF. It does not take that position.

It hasn't forsworn that position, to be clear. It said, what it has said is it has addressed a single very specific case, which is the case of Anwar al-Awlaki, who it found to be a senior al-Qaeda operational leader whose capture was not plausible, who posed an imminent threat and whose targeting would be lawful under the laws of war. And it asked a comprehensive question, which is, is it is lawful to target this guy?

And they limited their answer to that question, I think rightly and admirably, by the way. They limited their answer to that question so as not to take on bigger questions and more difficult questions than they needed to in that moment. They limited their answer to that question to those three, which are really four, circumstances.

That leaves a lot of ancillary questions, like what about the nonoperational senior leader who poses an imminent threat? What about the operational senior leader who doesn't pose an imminent threat? What about the U.S. citizen foot soldier? All of those questions are left open by that, and there is no claim of authority to target such people.

Mr. NADLER. Would the gentleman yield?

Mr. PIERLUISI. Yes.

Mr. GOODLATTE. Without objection, the gentleman is recognized for an additional minute so he can yield to the gentleman from New York.

Mr. NADLER. I thank the gentleman. I thank the Chairman.

I just want to clarify, since my comments have been quoted a number of times, that I was not suggesting that we ought to or that the Administration ought to broaden its targeting criteria. I was simply suggesting that none of this makes any sense until you have determined that someone is an enemy combatant. That seems to me that that is the first question that must be determined with some sort of due process or neutral process.

Mr. WITTES. Look, if I may, there are two baskets of questions here. One is the substantive criteria for targeting, and one is the procedural dimensions of how you determine whether somebody is in that substantive criteria or outside it. When you and I had the exchange earlier, you described a very broad criteria for targeting and suggested that your anxiety about U.S. targeting practices vis-?-vis citizens was on the procedural side whether people were or were not in that narrow basket—in that basket.

My argument is that what the Administration has done is actually exactly the opposite of that, which is it has defined a very narrow substantive basket, and it has no known procedural or at least no public procedural——

Mr. NADLER. My point was that however narrow or broad the basket, and I am not suggesting broadening it, you have to answer that question first—Are you an enemy combatant?—and have the procedural due process.

Mr. GOODLATTE. The time of the gentleman has——

Mr. WITTES. I think all of the members of the panel would agree with you about that.

Mr. NADLER. I thank the Chairman.

Mr. PIERLUISI. Mr. Chairman?

Mr. GOODLATTE. I thank the gentleman for that clarification.

The gentleman from Puerto Rico?

Mr. PIERLUISI. May I have just 30 seconds just to confirm one fact?

Mr. GOODLATTE. Without objection, the gentleman is recognized for 30 seconds.

Mr. PIERLUISI. Thank you so much.

This is based on Mr. Chesney's comment before. So the Obama administration's formulation requires that there be a link with al-Qaeda before you can do any targeting here. Is that correct? The way it is formulated right now, this policy requires a link to al-Qaeda. Is that right?

Mr. CHESNEY. The policy is formulated in a way that is careful to say that it is making an affirmative claim of authority to attack where there is that senior al-Qaeda link. But I don't think it is written in a way that suggests that they are denying they have authority otherwise.

But they do build al-Qaeda or associated forces of al-Qaeda, and of course, the "associated forces" phrase raises the question how broad is that?

Mr. GOODLATTE. The time of the gentleman has expired.

And the Chair now recognizes the gentleman from Texas, Mr. Poe, for 5 minutes.

Mr. POE. Thank you, Mr. Chairman.

Thank you, gentlemen.

I would like to get back to some basics, and I know this may trouble Mr. Nadler, but I probably agree with him on much. Don't make you nervous, Mr. Nadler.

But in the big scheme of things, when this all came to light, myself and Mr. Gowdy from South Carolina wrote a letter to Eric Holder back in December asking for specific constitutional authority and tracking it to the activities of drone strikes against Americans overseas. We didn't get an answer. We have sent a letter subsequent to that when we got more information on February 8th. We still haven't received an answer from Eric Holder.

And then, as the Chairman has pointed out, there is no one from Justice here. With their battery of lawyers, we hadn't got one that will stand here or sit here and tell us the constitutional authority for killing Americans overseas that fit this criteria.

I would like unanimous consent to introduce both of these letters into the record, Mr. Chairman.

Mr. GOODLATTE. Without objection, they will be made a part of the record.

[The information referred to follows:]

TED POE
2ND DISTRICT, TEXAS

COMMITTEES:
FOREIGN AFFAIRS
JUDICIARY
FOUNDER OF CONGRESSIONAL
VICTIM'S RIGHTS CAUCUS

Congress of the United States
House of Representatives

Washington, DC 20515–4302
December 19, 2012

The Honorable Eric H. Holder
Attorney General
U.S. Department of Justice
950 Pennsylvania Avenue, NW
Washington, DC 20530

Dear Attorney General Holder,

In the years since the September 11th attacks, the United States has conducted attacks using Unmanned Aerial Vehicles in many locations around the world. Some reports indicate that in Pakistan alone from June 2004 to September 2012, drone strikes have killed between 2,570 and 3,337 people including 474 to 884 civilians, and 176 children.

Clear answers have not yet been given to the American public by the Administration as to the specific legal justifications for the targeted use of drones abroad, especially when it comes to the targeted killings of Americans. It is important for the American public to fully understand the legal authority for these government actions. We request that you answer the following questions:

1. Is it your legal opinion that the President does not need congressional authorization under the War Powers Act to conduct drone strikes abroad?
2. Does your legal opinion change if their use is part of an operation that continues for more than 60 days?
3. Where is the legal authority for the President (or US intelligence agencies acting under his direction) to target and kill a US Citizen abroad?
4. If the President has the legal authority to target U.S. citizens located abroad, what limitations do you see on this power, if any? Specifically, in what instances is such action legally justified under American law and in what instances would it not be justified?

We appreciate your quick response on this important issue.

Sincerely,

TED POE
Member of Congress

Trey Gowdy
Member of Congress

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PRINTED ON RECYCLED PAPER

Congress of the United States
House of Representatives
Washington, DC 20515–4302

February 8, 2013

The Honorable Eric H. Holder
Attorney General
U.S. Department of Justice
950 Pennsylvania Avenue, NW
Washington, DC 20530

Dear Attorney General Holder,

We write to follow-up on our December 19, 2012 letter (copy attached) and to include additional questions based on the recently released Department of Justice (hereinafter "DOJ") White Paper entitled "Lawfulness of a Lethal Operation Directed Against a U.S. Citizen Who is a Senior Operational Leader of Al-Qa'ida or An Associated Force."

DOJ's legal analysis provides that a U.S. operation using lethal force in a foreign country against a U.S. Citizen who is a senior operational leader of al-Qa'ida or an associated force would be lawful if a "informed, high level official of the U.S. government has determined that the targeted individual poses an imminent threat of violent attack against the United States."

1. Specifically, which individuals would be classified as "informed, high level" officials having the authority to make this decision?

2. Who specifically makes the determination on whether their intelligence relied on to make this determination is reliable?

3. What groups are classified as an "associated force" of al-Qa'ida?

4. Who specifically determines whether the threat is imminent?

5. Who specifically determines whether capture is feasible?

DOJ's legal analysis continues by holding: "Were the target of a lethal operation a U.S. Citizen who may have rights under the Due Process Clause and the Fourth Amendment, that individual's citizenship would not immunize him from a lethal operation."

1. Does this statement mean that once an "informed high level official" of the U.S. Government determines a U.S. Citizen poses an imminent threat of a violent attack against the United States, that Citizen no longer possesses due process rights under the U.S. Constitution?

2. What if the determination is wrong, and the targeted individual was either not a member of al-Qa'ida or an associated force, or did not pose an imminent threat of violent attack against the United States? Is it in your legal opinion that Due Process rights would once again attach? Would their family have legal recourse? What recourse? And in what forum?

3. Is there legal justification in U.S. case law wherein Due Process rights for U.S. Citizens have been removed in a similar fashion by administration officials without a finding in court?

4. If the 4th, 5th, and 14th Amendments to the United States Constitution allow for the killing of a U.S. Citizen on foreign soil, is the analysis materially different for a U.S. Citizen on American soil who also meets the requirements set forth in the DOJ legal analysis?

5. If the 4th, 5th, 14th and (presumably 8th) Amendments allow for the killing of a U.S. Citizen on foreign soil who meets DOJ guidelines, would the analysis be different for enhanced interrogation techniques should capture be effectuated rather than killing?

We would appreciate a prompt response to these questions, as well as those raised in our December 19, 2012 letter.

Sincerely,

TED POE
Member of Congress (TX-02)

Trey Gowdy
Member of Congress (SC-04)

Mr. POE. My background is a judge. I believe in judicial review. I get troubled by prosecutors who want to do judicial things and then not tell us how they come to certain conclusions. I don't buy the argument there is not enough time to get some judicial review. Twenty-two years of experience, judges working with law enforcement can move pretty fast under all of the serious examples that you have talked about.

So I don't buy that we have to let prosecutors do judicial review. They work for the executive branch. That is just my constitutional perception on that whole issue.

So I think the points are, as you have said, who fits this criteria, and who makes the determination that that person fits the criteria? Senior-level executive branch person yet to be named, like a draft choice, that troubles me. Who is that person? We don't know. It is just a senior-level executive person. I don't think that is the authority of the executive branch.

And then who makes that determination and then that person is allowed to be on the kill list. Mr. Chesney, University of Texas, congratulations, by the way. Two daughters there.

Mr. CHESNEY. Hook 'em.

Mr. POE. Hook 'em. But let me ask you this, and you made the comment during your testimony that if there is a judicial review, it is a good idea maybe to review it when the person is put on the kill list.

I am troubled with the concept that they are put on the kill list, they are killed, and then we are supposed to have a review after that to see if it was lawful? I mean, that doesn't do the dead guy much when we find out, oh, we made a mistake here, you know?

And don't get me wrong. I don't like these people. I think they need to be—long arm of the law ought to deal with them about crimes against America. But I would ask for you to weigh in on this to help us improve this system that we are operating under because, as you pointed out, you have got to get judicial review to listen to a phone conversation with an American overseas, but you don't need judicial review to kill them overseas.

So do you think we need some kind of judicial review at the outset of putting this person on the kill list?

Mr. CHESNEY. Sir, I think it is a good idea, and I think it can be done, if done very carefully. And I think the key to doing it carefully so that it simultaneously addresses both the interests of the citizen and the imperative of protecting the country that rests on the President shoulders is to disaggregate the questions you might ask. We don't want judges interfering in extremely time-sensitive questions about should we pull the trigger right now in this instance? There is only this much time to do it.

But that is not actually the fact pattern presented by these specifically identified kill list scenarios. As we know, as the al-Awlaki case illustrates, there is a considerable period of time and there is a distinction between deciding is the person in the attackable category in general and whether or not some particular attack should be carried out. And there is a role for the judiciary if Congress wants to establish it, and I think they probably should, as to early stage determination, which isn't a time-sensitive determination in the same way.

Mr. POE. You know, we have been talking about one individual. What if the individual is not in one of the countries that we all suspect where al-Qaeda is? Because now they are everywhere. What if the individual is in one of our allies' country? What if they are in France? What if they are in Mexico? What if they are in Canada? Is the discretion with the White House, whoever it is, to get that person on the kill list, and all of a sudden, they end up in France, and we can go after them?

Mr. CHESNEY. Sir, I think there is a different set of rules that come into play in that scenario.

Mr. POE. All right.

Mr. CHESNEY. Now it connects up with the Administration's rationale that they emphasize capture must not be feasible. If you have someone in France, the United States, Mexico, England, any of these places, capture is almost certainly going to be feasible. And that alone may address it.

Mr. POE. I know my time is limited. In fact, I am out. But I would just like to ask, though, is that discretionary with the executive branch? Is that policy, or is that written law?

Mr. CHESNEY. I don't think—well, the whole problem here with the uncertainty is we don't have clear written law, right? It is uncertain. That said, I do think that the feasibility test may well be implicated by the Fifth Amendment and the Fourth Amendment.

Mr. POE. All right. Thank you.

Mr. WITTES. May I just add something to that?

Mr. POE. That is up to the Chairman.

Mr. GOODLATTE. Very briefly, Mr. Wittes.

Mr. WITTES. So, I mean, I do think when you are talking about potential lethal force operations in allied countries or countries other than Pakistan, Yemen, Somalia, Mali, you are talking about a situation where the other legal constraints on U.S. action, particularly sovereignty come into play.

And one of the things that causes those environments that we operate in to be relatively permissive is either the consent of the governments in question to do those operations, which presumably Canada and France are not going to give, or a finding—and this connects up with the point that Professor Chesney was making about the feasibility of capture—a finding that they are either unable or unwilling to manage the threat that the individual poses, which their law enforcement capacity would make very difficult to make.

Mr. POE. Thank you, Mr. Chairman.

Mr. GOODLATTE. Let me, if the gentleman will yield?

Mr. POE. Certainly.

Mr. GOODLATTE. I would yield an additional 30 seconds to make the point that we don't want to put ourselves in the position with this analogy drawn by Mr. Wittes that we are going to rely on the foreign government to protect the rights of the United States citizen, as opposed to our own government protecting those rights.

Mr. POE. Thank you, Mr. Chairman.

Mr. GOODLATTE. And I would now be pleased to yield to the gentlewoman from California, Ms. Lofgren, for 5 minutes.

Ms. LOFGREN. Thank you, Mr. Chairman.

I have just a few quick questions. I am, I will just be frank, troubled that the memorandums that allegedly provide the legal basis for this have not been shared. And I am just sort of wondering, and maybe you can't, any of you, answer it. But if you can, I would be interested. What conceivable reason there would be for the Obama administration to not share these memos and what the consequences are for not sharing these memos?

Anybody who can answer that, I would like to hear.

Mr. BELLINGER. Actually, it may surprise you, as a Republican official, but I will actually take a stab at defending the Administration on this, having spent 4 years as a White House lawyer.

This is the private legal advice that was given to the President of the United States. And just the way this Committee is allowed to rely on Mr. Ramer's advice and the President could not say we want to see the advice that Mr. Ramer is giving to you, to see what advice you are getting——

Mr. GOODLATTE. Would the gentlewoman yield on that on point? Because they have shared that advice with other Members of Congress.

Ms. LOFGREN. Yes.

Mr. GOODLATTE. And this is the Committee that has oversight responsibility.

Mr. BELLINGER. And let me just finish the point. What we are talking about is not sharing a particular document. The Administration, to the extent they have not made clear what their legal analysis is, absolutely they owe you a full explanation of their legal——

Ms. LOFGREN. Well, if I may, I mean, what you can and what you should do are sometimes different.

Mr. BELLINGER. Right.

Ms. LOFGREN. And it strikes me in this case that this is one of those cases, where if you take a look at the Authorization for Use of Military Force, which all of us voted for, for those of us who were here—there was only one no vote in the House—it says the President is authorized to use all necessary and appropriate force against those nations, organizations, or persons he determines planned, authorized, committed, or aided the terrorist attacks.

Now are we to believe that everybody on this list was responsible for the 9/11 attack? I mean, is that the rationale?

Mr. BELLINGER. No. You are exactly right. I think you have all four of us agree with you that the 2001 AUMF, which is only about 60 words long—I was involved in drafting it literally almost on the back of an envelope while the World Trade Center was still smoldering—is now very long in the tooth.

The good government solution, while extremely difficult and controversial, would be for Congress to work together with the executive branch to revise that AUMF. It is completely unclear about what it covers, who it covers, where it covers it.

Ms. LOFGREN. Well, if I may, I think it is not as unclear as you suggest. I mean, this was a limitation, and there were big arguments about it. As you are, I am sure, aware, there was a prior draft that was much more expansive, and it was narrowed so that we could get bipartisan consensus, and it was narrowed for an important reason.

And I guess I—yes, the executive has the ability to keep his legal advice confidential. That is a longstanding principle. But since it looks like at least questions are raised as to whether the executive is complying with the law, that if he feels he is, I think it would be a very positive thing for the Administration to share that legal theory with this Committee and with the American people, who I think have doubts that are substantial.

And if it can be cleared up, that would be a good government response, it seems to me. And if it can't be cleared up, then we have another serious type of problem that we have to deal with.

Mr. BELLINGER. I will agree with you about 99 percent of the way. To the extent that the Administration's legal theory remains unclear to Congress, anybody in Congress, I think Administration officials should be up here to explain it, either publicly or privately, to put down in writing what they can. I think the questions that you raise are absolutely fair.

Is it really clear that 4,000 people who are dead, that every single one of those fell within the AUMF, or did the President in some cases rely on his constitutional powers? These are really legitimate questions. The only thing I would say is that the President of the United States is allowed to receive a particular memo on a particular day and rely on that particular counsel.

Ms. LOFGREN. Well, I will just say—and I was not a huge fan of the Bush administration, as I think many of my colleagues know. But we actually did get access, this Committee did get access to their memorandum laying out their rationale. I thought it was poorly written and misadvised, but at least we were provided with the analysis that they were attempting to rely on. And I would expect no less from the current President.

I yield back.

Mr. GOODLATTE. I thank the gentlewoman.

And the Chair recognizes the gentleman from South Carolina, Mr. Gowdy, for 5 minutes.

Mr. GOWDY. Thank you, Mr. Chairman.

In a brief, but inspiring piece of bipartisanship, I want to express, along with my colleagues, my frustration, Mr. Chairman, at the DOJ's absence today. Some of my colleagues know I worked there. I have plenty of friends that remain. I respect their work.

I understand not responding to a letter from some guy from South Carolina. I don't really understand not responding to Judge Poe's letter. I really don't understand not respecting this Committee enough to send someone.

Because if they were here, and don't misunderstand me. I appreciate your presence. I am grateful that you came. But my questions were going to be directed to them for this reason. I don't need a DOJ memo to tell me that you can use lethal force to repel an imminent threat. I didn't need them to tell me that.

Police officers shoot folks all the time. Private citizens shoot folks who are invading their homes all the time. In fact, noncitizens can shoot a United States citizen without having to go to a judge beforehand. Now there is review afterward, both criminal and civil. But I didn't need the Department of Justice, Mr. Chairman, to tell me that.

I also did not need the Department of Justice in a memo to explain to me that in times of war you don't need a judge picking your targets for you. In a time of war, you can't have a judge weighing and balancing whether or not there is too much collateral damage in this building or this village.

What I really want to ask the Department of Justice, Mr. Chairman, is this. There are two references in this memo were the target of a lethal operation a U.S. citizen who may, who may have rights under the due process clause in the Fourth Amendment. That is on page 2, Mr. Chairman. And then on page 5, the department assumes that the rights afforded by the Fifth Amendment's due proc-

ess clause, as well as the Fourth Amendment, attach to a U.S. citizen even while he is abroad.

So if the Fifth Amendment attaches and the Fourth Amendment attaches, does a U.S. citizen traveling abroad enjoy the full panoply of constitutional protections? And if not, why not? Whichever law professor—I would pick the one that gave me a bad grade in con law, but he is not here. So whichever—— [Laughter.]

Mr. WITTES. I think I can take a crack at why the Administration——

Mr. GOWDY. Well, no, I mean, here is what I want. Does the Eighth Amendment apply?

Mr. WITTES. So I think the background behind which the memo that this white paper is based on is critical to this question.

Mr. GOWDY. I just—and I appreciate that. I just want to know does a U.S. citizen enjoy the full panoply of constitutional protections when they are traveling abroad? Because this memo said they may, or we are assuming. Does the Fourth Amendment apply?

Mr. WITTES. Well, so I think—I will let an actual professor of constitutional law answer.

Mr. GOWDY. Oh, I don't care. Anybody who knows. Does the—do I have to abide by Miranda?

Mr. WITTES. The Supreme Court said in Verdugo-Urquidez, it raises very serious, held that the Fourth Amendment does not apply abroad, and there are——

Mr. VLADECK. To noncitizens.

Mr. WITTES. To noncitizens. There are——

Mr. GOWDY. I am not talking about noncitizens. I am talking about citizens abroad, do they or do they not——

Mr. VLADECK. The short answer is yes, right? The short answer is——

Mr. GOWDY. Oh, so the Eighth Amendment applies?

Mr. VLADECK. Yes. Now the court——

Mr. GOWDY. And the Fifth Amendment applies?

Mr. VLADECK. Yes. But courts——

Mr. GOWDY. And the Sixth Amendment applies?

Mr. VLADECK. Courts have said, Congressman, that in that context the rights may vary in their scope.

Mr. GOWDY. Okay. Well, this is where I am headed. How is the analysis different if it is a U.S. citizen that meets the department's criteria that is in Charleston, South Carolina, instead of somewhere else? So if you have the same panoply of constitutional protections overseas as here, can you use the imminent threat argument to take out an American citizen on American soil? And if not, why not?

Mr. VLADECK. Congressman, I think this goes back to a point we were discussing before, which is the relevance of the feasibility of capture piece of this. And——

Mr. GOWDY. So that is the only thing we get to hang our hat on is the feasibility from some senior-level DOJ official who decides whether or not it is feasible or not to capture me.

Mr. VLADECK. Well, as I suggested, Congressman, I think that feasibility should be reviewable after the fact. But I think——

Mr. GOWDY. That is of little consolation if you are dead.

Mr. VLADECK. I think that——

Mr. GOWDY. Is there criminal review?

Mr. VLADECK. If the Government wants to bring—if the Government wants to indict one of its officers for violating a criminal statute, certainly.

Mr. GOWDY. So you think this memo would allow. Well, who would do it? Because that would be the executive branch, right? We have not had much success getting the executive branch to enforce laws against itself. I can just tell you in the 2 years I have been here, we are 0 for 3 or 4 on that.

Mr. VLADECK. Well, Congressman, certainly, there is precedent. If this Congress wanted to revisit, for example, the independent counsel statute, I think we could have a very interesting hearing on that front as well. But——

Mr. GOWDY. Well, I am out of time. But Mr. Chairman, I would love at some point for the Justice Department, if we are not taking too much of their time, to come and explain to us whether this analysis is equally applicable to American citizens on American soil. Because the feasibility of capture is little consolation to me if that is the only thing protecting us from this operation.

Mr. GOODLATTE. I thank the gentleman. And I would note that the invitation was extended, and it will stand open.

The Chair now recognizes the gentleman from Florida, Mr. Deutch, for 5 minutes.

Mr. DEUTCH. Thank you, Mr. Chairman.

Mr. Bellinger, you said earlier in your testimony and then in an exchange with Mr. Nadler, you spoke about the need to have clear international rules. Mr. Nadler raised the question of what would happen if action were taken by other countries. And I had to excuse myself to attend another meeting, and if you have elaborated, I apologize for asking again.

But this conversation that we are having about constitutional protections and how this drone program against al-Qaeda functions under our Constitution is obviously of the greatest import to this Committee. But the issue that you raise is a very good one. What are those international rules? Who sets them? What standards would be in place?

And is it—well, let me actually let you elaborate a bit, and then I will ask a follow-up question.

Mr. BELLINGER. No, I am delighted really that you asked that question. We know the Judiciary Committee, of course, is most concerned about the protection of Americans in this hearing.

But as has been alluded to, 3,000 to 4,000 of the people who are dead are non-Americans. And so, in those cases, they don't have constitutional rights. The rules that would apply to them would be international law. And both the Bush and the Obama administrations have tried hard to clarify that they are complying with international law. They are not using force in another country in violation of international law, or they are not killing people in assassinations or murders.

That said, no other country in the world has come out publicly and said they actually agree with our position. That is a very unsteady place for the United States to be. I was the general counsel of the State Department. I wanted the United States to appear around the world to be acting in accordance with international law,

and the Obama administration has asserted this, and I believe that they are.

But we are in a position where most other countries don't agree with this, are beginning to accuse us of violations of international law. And the Administration needs to work harder really to clarify those rules.

Mr. DEUTCH. What are the violations that—who is making those accusations, and what are they accusing us of?

Mr. BELLINGER. We have got—other countries have begun to raise concerns. There are lawsuits now both in Pakistan and in the UK. There is a lawsuit against the British foreign secretary, suggesting that the sharing of intelligence information by the British government with the American Government may actually constitute war crimes. That is making British intelligence officials nervous. That is being closely watched throughout Europe.

Mr. DEUTCH. What would those—in order to address these issues going forward, both because of potential actions that other nations may take that would put, as you described earlier, that will put our State Department spokesman in a most difficult situation to have to deplore those while standing up for the drone program that we utilize, what are the standards that would be put in place, though? And how—tell me what that regime looks like and where does it come from.

Mr. BELLINGER. These are great questions. I spent 4 years as legal adviser in thousands of conversations with European allies, some of whom are actually in this room today, representatives of different embassies, listening to the Bush administration try to explain why what it was doing, which appeared to be improper, was actually lawful.

And the Obama administration, which never expected to be in the same position of having allies around the world accusing it of illegal activity, frankly needs to go to the same effort now. And the rules would essentially be to say it is not to start with a treaty. This is too difficult to try to negotiate a 194 country treaty. But to agree on basic legal principles, such as a country can use lethal force against a terrorist in another country who is threatening an attack if that country is unwilling or unable to prevent that threat.

In most cases around the world, 190 countries, the countries are able to prevent that threat. They can go arrest the person. Their polices work. But in four or five countries—Yemen, Somalia, Pakistan—we want to get countries around the world to acknowledge the United States or any country's right under international law to use force to kill someone in another country who is posing a threat when it can't be addressed in another way.

I think we can get there, but it certainly makes other countries uncomfortable, and they are just not going to agree to our position unless we go out through some aggressive international legal diplomacy. I mean, really, it is a great line of questions.

Mr. DEUTCH. And the likely position that some would take that would point to this hearing and the debates in this country and say you are having a hard time—hard enough time coming to terms with this idea at the very earliest stages of the potential that drones will offer. You are having a hard enough time coming to terms with this under your own Constitution, and now we are

going to have a broader discussion internationally. You are going to suggest to us what we should and shouldn't do.

I am not sure that we are quite at the point where that conversation can take place.

Mr. BELLINGER. It is very difficult. The Bush administration spent a long time trying to explain to people why it was lawful just to detain people without trying them. Most other countries in the world said, "Wait a minute. You can't hold someone without trying them. That is a basic element of due process."

Well, this is actually much more aggressive. The Obama administration isn't just detaining them. They are killing them. And so, we need to work hard to explain, as a country that is committed to the rule of law, why to other countries who look to us for our example, why what we are doing is, in fact, legal. We can't—it is important to have this hearing here, but we need to go around the world and explain why it is legal under international rules.

Mr. DEUTCH. Thanks. I appreciate it, Mr. Bellinger.

Mr. GOODLATTE. I thank the gentleman. Good questions, and the time has expired.

The gentleman from Florida, Mr. DeSantis, is recognized for 5 minutes.

Mr. DESANTIS. Thank you, Mr. Chairman.

Thank you all for your testimony.

I guess I disagree a little bit with the characterization of this as very limited. I mean, it is limited in the sense, the DOJ analysis in the sense that they say all we are saying is that we have sufficient grounds in this instance. But they don't say that they can't go beyond that, and they don't say that there is going to be more restrictions otherwise.

Do you all agree with the fact that they base their analysis not simply on the AUMF, but basically said there is Article II authority and Article 51 authority, that if you didn't have the AUMF, the President would still have the ability to engage al-Qaeda leaders overseas?

Mr. CHESNEY. Well, I think the Administration would always take the position that it has the authority under Article 51 and Article II to defend the country against an imminent threat. That, of course, leaves open the question of what the substantive content of an imminent threat is.

But to the extent that tomorrow Hezbollah presents an imminent threat, though it is totally outside the AUMF, the Administration would certainly assert the authority, both as a matter of Article 51 and at a domestic level under Article II to counter that with lethal force.

Mr. DESANTIS. And perhaps even if it wasn't an imminent threat, such as the example of Libya, there was no congressional authorization for us to go and get engaged in Libya. So I am somebody who I really think the AUMF is important because I think that activates the President's war powers.

I think when you are dealing with these issues, whether you are going to treat it in a civil context or a law of war context, the fact that this Congress has authorized that, to me, means a lot. And so, I guess the logic of this analysis, although it only applies to senior al-Qaeda leaders, there is nothing preventing the Administration

from applying this in other contexts. I mean, you do have to make analyses that can apply to different facts.

And so, I guess my question, and we can just start with Mr. Bellinger. Libya, no AUMF for Libya. We went in. It was an international coalition. My question is if there was an American citizen who, say, traveled to Algeria, joined the pro-Gaddafi army, was somebody who was a major operational leader in bringing arms into Libya, that would fight not only the resistance, but American forces and our allies, based on how you read the memo, do you think that they would have been justified or do you think this provides justification to engage an American citizen in that instance?

Mr. BELLINGER. The answer is, under the memo, probably not. Because under your facts, the person would not be a senior operational al-Qaeda leader that was posing an imminent threat of violence to the United States.

Mr. DESANTIS. Right. But what my question is, is they limit it to that, but the logic of what they are saying, why is it so important—if the AUMF is not critical, the al-Qaeda versus somebody who is fighting Gaddafi. So is there a logical distinction between those two if you don't think the AUMF is critical?

Mr. BELLINGER. Well, this Administration, of course, at least has said that they are relying only on the AUMF. There are a lot of us who wonder 12 years later how it can possibly be that all of this use of force in a lot of different countries around the world against people who may have only been 10 years old in 2001 still falls under the AUMF.

So I think it is a good set of questions as to whether this Administration would rely on the President's constitutional authority to strike somebody who did not fall in the AUMF.

Mr. DESANTIS. And here is just where I am reading in the memo. In addition to the authority arising, in addition to the authority arising from the AUMF, the President's use of force against al-Qaeda and associated forces is lawful under other principles of U.S. and international law, including the President's constitutional responsibility to protect the Nation, the inherent right of national self-defense under U.N. Charter Article 51.

I obviously agree with that if it is a truly imminent threat. The question is in a situation like Libya, where it is very much an intervention of choice, probably didn't pose an imminent threat to the United States, how does this kind of framework apply in that instance with an American citizen?

Mr. VLADECK. But I mean, Congressman, even there, I think the question would be suppose that we had a regimen of fighters stationed at an Air Force base in Libya. Presumably, if an American citizen who goes to Algeria to take up arms on behalf of pro-Gaddafi forces is then involved in an attack on U.S. military forces who are involved, who are stationed there, then I think we wouldn't have to talk—that wouldn't be——

Mr. DESANTIS. Well, no, no. Right. But I agree with that. But not necessarily involved in an attack. Somebody who is across the border in Algeria, who is maybe doing logistics or something.

Mr. VLADECK. And so, that is right. We haven't talked a lot in this hearing about international law, but I think it is relevant. It would be very relevant at that point whether in fact what was true

in Libya was a non-international armed conflict or even an international armed conflict that would justify the assertion of military force. Because I think you would have both domestic law problems insofar as it was outside the scope of the AUMF or the war powers resolution and very serious international law problems if it was not part of a larger armed conflict.

Mr. WITTES. May I just add something to that? So I think one of the oddities of the white paper—and I would actually think it is a very ripe area for this Committee to follow up with the Administration about—is exactly what work the word "imminent" is doing. It is not clear to me from reading the white paper whether the word "imminent" is an attempt to get over domestic constitutional hurdles, whether it comes from sort of resort to force questions in international law, the way Steve was just referring to, or whether it is an attempt to get around domestic criminal prohibitions against—as a sort of affirmative defense in domestic criminal prohibitions against murder of Americans overseas, or whether it flows from some other need.

It is simply there as an apparently self-imposed constraint, and it is not exactly clear what legal problem it is designed to solve. And I think some of the questions that you are asking, the answers to them would be different depending on what work the word "imminent" is doing. And I sort of talk about this a little bit in my written statement, but I think it is an area that is very worth this Committee pushing the Administration for some clarification.

Mr. DESANTIS. Thank you. And thank you, Mr. Chairman.

Mr. GOODLATTE. Thank the gentleman.

The Chair recognizes the gentleman from Texas, Mr. Gohmert, for 5 minutes.

Mr. GOHMERT. Thank you, Mr. Chairman.

And this is an exceedingly important topic. We do appreciate your being here today. Obviously, the Justice Department's folks are busy doing something more important than having oversight. I wish that they didn't need it.

All of these issues are deeply troubling, and I, like my friend former Judge Ted Poe, big believer in due process. We are talking about imminent attack is one of the issues, and we have got a lot of people that brought up the issue of al-Awlaki being killed in Yemen. But I think it is good to look "what if" scenarios before those scenarios actually happen.

We know that al-Awlaki had led prayers for Muslim congressional staffers here on Capitol Hill. We know that he was probably not done in the United States.

Can you foresee a time when someone like al-Awlaki is on a hit list, finishes what he was doing in Yemen, and somehow gets back in the United States? If there was concern of imminent attack while he was in Yemen, could there be those same concerns? When would it then be possible for someone on the hit list, as al-Awlaki was, to be hit in the United States proper?

Mr. WITTES. Sir, I think the—sir, the al-Awlaki case will be someday the subject of a truly wonderful book. It is a very complicated and interesting history.

I think if Anwar al-Awlaki had made it back to the United States, I don't think there is dispute among anybody I have ever

spoken to that the proper way to handle him would have been for the FBI to arrest him and for him to be prosecuted in a U.S. Federal court.

Mr. GOHMERT. But my question was not about what was proper. My question was about the possibility of someone on the hit list being found back in the United States, like al-Amoudi.

Al-Amoudi was arrested in 2002 at Dulles International Airport. He was arrested, as you talk about, but he had been very close to the Clinton administration, had worked with the Bush administration, and yet we find out actually he was involved in supporting terrorism internationally. And so, he gets arrested, and now he is doing 23 years in prison.

I am asking what could be the prospect that someone get back in the country, and from a political standpoint, their arrest could potentially, like al-Awlaki, if he started talking about the people he worked with on Capitol Hill, the people that he had met with and worked with, it obviously would be very politically embarrassing.

What if you have hypothetically someone who has been working closely with a President. We know we had a member of a known terrorist organization meeting in the White House last year, even though Secretary Napolitano, sitting where you are, could not answer that she even knew that was happening when it was in the papers. By the time she gets over to the Senate, she then says, "Oh, we checked. He was vetted three times."

There are things that could end up, hypothetically, proving so politically embarrassing that if somebody gets back in the United States, someone might look for a way to see that they never testify. We are talking hypothetically, but I am wanting to know what are the possibilities that something like that could happen? So that is my question.

Mr. WITTES. Sir, nothing in the Administration's white paper and the Attorney General's speech would suggest that that would be lawful. And I would hope that any Administration, Republican or Democrat, faced with such a situation would behave like patriots and would proceed according to the law and the Constitution. And I would hope that this Committee, in the event that that did not happen, would consider it under its impeachment power.

Mr. GOHMERT. And then when no one from the Justice Department cared to participate, then what? We find them in contempt, and then it goes to the U.S. attorney and nothing happens, as it just happened last year.

Mr. WITTES. Sir?

Mr. GOHMERT. Any other comments from anybody else? I mean, this is a real issue because not everybody under political pressure acts like patriots.

Mr. CHESNEY. I can simply say that it is quite clear to me it would be unconstitutional to use lethal force against a person in that scenario precisely because capture would be feasible. He may still be part of an organization, may still be a senior leader in al-Qaeda, what have you. But——

Mr. GOHMERT. And what if your contention is there is imminent attack? It is planned. He helped set this situation up in Yemen, and we need to take him out.

Mr. CHESNEY. Still unconstitutional unless——

Mr. GOODLATTE. The time of the gentleman has expired.

Mr. GOHMERT. Thank you, Mr. Chairman.

Mr. GOODLATTE. I thank the gentleman.

And the Chair recognizes the gentleman from Florida, Mr. Garcia, for 5 minutes.

Mr. GARCIA. Real quickly—thank you, Mr. Chairman—what steps could the executive branch take to allow appropriate congressional oversight and an informed public debate? And that I leave it to all of you.

Mr. BELLINGER. Well, maybe we will just go down the line here. One, I think the Administration does need to be more open in their legal analysis. I do think it is disappointing that they did not sent a witness. We are happy to be the second string here to try to help you out.

But I, as a former Government official, think that it does—it is incumbent upon this Administration to put witnesses forward to explain and answer your questions. So that would be thing one.

Second, I do think that the executive branch could work with Congress to craft a narrowly tailored law that would specify the circumstances in which an American can be targeted and the notice process to Congress. So I think that would be the main thing that the executive branch could do would be to work with Congress on narrowly tailored legislation that does not tie the hands of the President.

I will go back on the judicial review point that we—in all these cases, we are talking about an armed conflict. And the gentlemen from Texas and South Carolina are no longer here, but we are talking about a situation where the President is dealing with a war, with an armed conflict. And it is really inappropriate to insert judicial review to tie the President's hands in a war.

No one would ever have suggested that before the President could order an attack against a German American who was a high-level German leader that one had to go to a judge beforehand or afterhand to allow that German American's family to come and have a judge perhaps tie the President's hands.

Mr. CHESNEY. Active participation and oversight efforts by this Committee and others obviously is critical, and I echo what has already been said on that point. I think—we were asked earlier how much consensus we had on the substantive and procedural issues that are driving all of this. I think it is fairly clear that we have consensus that it would be very useful for Congress to express itself, if it was willing to do so, as to what the substantive bounds of targeting an American ought to be. If there is an issue with the imminence standard or the feasibility of capture standard, this can be addressed.

I don't think we have consensus as to whether and to what extent a judicial role is either necessary as a constitutional matter or permissible. And I think I am probably the one who is most in favor of a permissible role, ex ante. Steve is the most in favor ex post, and I think other than that, we have an array of views here.

Mr. WITTES. I think one thing the Administration could do is to talk more and more and more about what the internal procedures it is using actually looks like. So starting with the President's speech at the National Archives in 2009, and particularly con-

tinuing through Harold Koh's speech at ASIL the following year, and in a series of speeches over the next 3 years really, the Administration talked a lot about the underlying legal regime, not at the level of granularity that a lot of people want, and I certainly would encourage them to be more granular on that score.

But to me, the biggest hole is actually not a legal hole. It is a procedural hole, and it goes to the question that Congressman Nadler and I were discussing before. Not the substantive content of who you can target. They have been pretty clear about that. It is what hurdles do you have to go through before you conclude that somebody is in that basket at all?

And on this question, they have said very, very little except to say repeatedly that there are rigorous internal checks. But I would like to see them, you know, talk more about what those internal systems look like. Almost everything we know about it is a result of press coverage and leaks. It is time for them to have something substantial to say on the subject.

Mr. VLADECK. I don't have much to add to my colleagues other than I think that the most interesting omission from the white paper is exactly what Mr. Wittes was suggesting, the lack of any sort of detailed explanation of the procedural process. If there are reasons why the specific facts and the intelligence that led us to discover those facts should be kept classified, that is one thing. But I don't know why the bureaucratic process that is undertaken by the executive branch in a hypothetical case is a matter of national security.

Mr. GARCIA. I think you can imagine the problem is that we argue about everything here, right? And so, the idea that we would put some kind of process forward. I fully understand your point, and I appreciate it. And as a lawyer, I think it is necessary.

But the idea that that process would be put forward to then be analyzed in a vacuum without the exigency of circumstances is I think something that would be a debate that I understand your wanting it, but I understand under the present climate, it is just almost impossible.

Mr. WITTES. I think there is a lot of merit to that point, and I also think there is an additional factor, which is not about this body, but it is about the FOIA litigation environment that the Administration is in. And one of the problems that, you know, within the bureaucracy people are constantly worried about is the incremental effects on FOIA litigation that every incremental disclosure has.

And I think that that is every time you consider saying X, you know that you are going to get a brief filed in the next day that says you have now confirmed X, we want 2X. and I think somehow we need to figure out whether there is some kind of safe harbor that we could create that doesn't actively discourage the Administration from making disclosures, particularly to this body——

Mr. GARCIA. Maybe that is where we should be working towards. I have listened to Johnson tapes where toward the end of the war, he got into this crazy habit of sitting with his Cabinet deciding where the bombs were going to land. It is just an insane process when you are engaged in war. I am sure I don't have to make that point to all of you.

Likewise, I think you have watched the insane process that we partake of here when we argue how many angels fit on a pinhead. So maybe you putting forward a process that you think would be acceptable. I just find that if the President would engage in that, I think what he would be doing is opening up an argument for my friends on the right, which would be to say look at all the due process these guys get, right? And then a point from our side, which would say that is not enough due process.

And then, of course, the whole point of this is missed, which is these are enemies of our country. We hope that when someone is elected from our side or the other side that they use this discretion of their office, which in this area tends to be pretty broad in wartime, with all the merit that we would expect someone who serves in that role.

But gentlemen, thank you for your thoughtful answers, and thank you for your fighting for these issues. It is important.

Mr. Chairman, I yield back the balance of my time. Thank you.

Mr. GOODLATTE. I thank the gentleman.

And the Chair is pleased to recognize the gentleman from Georgia, Mr. Collins, for 5 minutes.

Mr. COLLINS. Thank you, Mr. Chairman. I appreciate it.

I mean, as we come to sort of this timeframe, I think what is interesting is I agree with my gentleman from across the aisle. We do argue sometimes about things, the angels on the top of a pinhead. But the problem we have here today is we can't argue about anything because Justice chose not to show up. They forfeited. They came. They had an opportunity, and instead of engaging within the confines, they chose to take a pass. They chose not to come again.

It is interesting in your comments earlier about being in the Bush administration over to the Obama administration. It is amazing to me, as my grandmother used to tell me a long time ago, don't criticize somebody too hard. You might be in their position one day. It is amazing what has happened now. They are in that position.

And I think what has been said here on several occasions really highlights that. I believe honestly the Administration doesn't want a definition of imminent threat because at that point then they have to actually define what is imminent and when is it going to be applied and in what area is it going to be applied? You don't really want a feasibility of capture.

I would tend to disagree, although this esteemed panel has said, well, if they were in the United States that they could always fall back on feasibility and that would exempt them. I am not so sure that is actually true, not in our society today.

As we look at this, I do have the distinct concern is what is and how long this white paper depended on the AUMF. That was the basis of its whole determination. How long do you feel—in a sort of a short answer here, how long can this Administration or even follow-on Administration keep this argument? How long is this going to last? Especially when we have shut down the war in Iraq. We are getting ready to move out of Afghanistan.

And as someone who has served in Iraq in this area, I want to just in a brief answer—I have another question—how long can they continue to depend on this?

Mr. CHESNEY. Sir, a couple years ago, my colleague Mr. Bellinger wrote an op-ed in the Washington Post warning that the AUMF was growing stale. More recently, Mr. Wittes, myself, Professor Jack Goldsmith, and Professor Matt Waxman just this week published a paper arguing that the growing threat of threats beyond AUMF is making it more and more imperative that Congress look at this issue very seriously.

Mr. COLLINS. Well, I think the question also comes here, the determination of whether it be before the action is taken to the process of judicial review, if there is one, or standards review or opposed, which I have a question about that, which I will get to in a second. I think the issue that comes to my mind here is we don't really have this review right now. There is that veil of secrecy, if you would.

And I would say from this Administration, there is no one denying the Article II privilege. There is no one denying that there is—the ability is there. However, what we are having a real issue with here and I think the American people are having a real issue with is we have the secrecy going on. Explain at least in the sense when we are dealing with American lives overseas and you have a process that you say you have a process on, that is about like me going to my 14-year-old and saying, "Okay, what is your decision-making process?" "No problem, Dad. I've got a process." "What's your decision-making process?" "Just trust me." This is not what we can take.

I do have a question, though, about if we do it after the fact. Of course, I have a problem with the fact that they are dead. You know, that, to me, is sort of damages, as you put in your paper, never make you whole completely.

But my question is, and you brought this up, we wouldn't indict one of our own, and my colleague, I believe Mr. Gowdy from South Carolina, made this comment. We are not going to indict one of our own. And if we did, let us just play this out for a second. If we did decide who was at fault, my question for you is who would be at fault?

What we have seen many times is we are going to throw the lowest person under the bus. It is going to be the drone operator. He should have disobeyed—so explain to me, if you can, what is the process? Where would you stop in culpability, and would it stop at the President?

Mr. VLADECK. Congressman, I think it would depend on the decision-making process, which, as you mentioned——

Mr. COLLINS. Non-existent.

Mr. VLADECK. Or I doubt it is non-existent. We are certainly not privy to it. And so, I think it would very much depend on who actually was the one who made the decision that had the legal error in it. Who is the one who said, oh, in fact, even though this guy only was at this guest house, that is enough to decide that he is a senior operational leader of al-Qaeda. And I think that would be where the buck would stop.

But if I may just briefly, I think the Congress could write a statute where the damages piece of it wouldn't depend on who was actually at fault. The purpose of the Westfall Act is to say that when a Federal officer is acting within the scope of his employment, it is the Federal Government that is at fault writ large. We are not going to point the finger at one guy who is just doing his job.

Mr. COLLINS. Well, we also know how that plays out in the press as well, and we also know how it will play out in Administration politics on really, frankly, both sides. This is the concerning part, Mr. Chairman, as we come to at least my ending here is, again, I want to state it again. As has been said many times before, but I think it is the Administration today had a chance to do what this President has said overall, that he wants to have an open Administration which reflects the priorities of his Administration and his people. This is not happening. They took a forfeit today.

They took a forfeit, when they could have easily came. And if they said, no, I can't talk about that, but we can talk about this. Or they could get with this Committee on a classified level. There are ways to do this. But simply ignoring a sitting Committee and saying we have got other things we want to do? Maybe there is other issues more pressing.

But I think the American people, when they see this, this is a pressing issue. This is something that matters. Because in the end, you made a statement earlier today, Mr. Bellinger, that said, well, they say highlight it because we know of one incident. Do we really know we have one incident? Because we have not been able to see. That is the concern I have.

And Mr. Chairman, this is why this is important. This is why this Committee needs to have the oversight, and this needs to have the Administration actually show up to the game.

With that, I yield back.

Mr. GOODLATTE. I thank the gentleman for his very pertinent comments.

And I want to thank all the members of this panel for a very good exposition of the issues involved here. I, along with the gentleman from Georgia, the gentleman from New York, and others are very troubled by the fact that we have not had cooperation from the Administration in terms of producing important documents that we need to review to conduct our oversight properly or a witness on behalf of the Administration to testify to this.

So we will continue to work together in a bipartisan fashion to conduct the oversight that is necessary and to take the next steps that may be necessary. But in the meantime, we probably will have additional questions for each and every one of you. And so, in a moment, I will ask for unanimous consent to allow Members to submit written questions to you, and we would hope that you would answer those as promptly as you can.

This concludes today's hearing, and without objection, all Members will have 5 legislative days to submit additional written questions for the witnesses or additional materials for the record.

And the hearing is adjourned.

[Whereupon, at 12:29 p.m., the Committee was adjourned.]

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