

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?"

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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.

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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

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/1/2006/98861.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 Qaeda 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?

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 Yemen⁶) 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 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.

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.

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.