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, 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.

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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).