

Drone Strikes and Targeted Killings: Domestic and International Perspectives

Moderator: Professor Harold Koh, Yale Law School

Panelists: Elisa Massimino, President and CEO, Human Rights First
Professor Sarah H. Cleveland, Columbia Law School
Daniel Cahen, Legal Advisor, International Committee of the Red Cross

Does the 2001 law authorizing the use of military force against those responsible for the September 11 attacks allow the United States to use drones against a member of a terrorist group that did not exist on September 11, 2001 (e.g., Al-Shabaab) in a country with no connection to the September 11 attacks and with which the United States is not at war (e.g., Somalia)? Would it make a difference if the target were a United States citizen or if the target were in a car with three civilians? These are some of the difficult questions discussed during the panel.

The panel moderator, Professor Harold Koh, began by raising, and then answering, five “Frequently Asked Questions” targeted to set the stage for further discussion.

First, what is targeting killing, and how does it differ from assassination?

Professor Koh explained that targeted killing is intentional killing by a government or its agents of a combatant who is not in custody, either out of self-defense or because the target is a combatant in an armed conflict. Assassination is murder for religious, ideological, political or emotional gain, and is prohibited by an Executive Order signed by President Ronald Reagan.

Second, what determines whether a drone strike is lawful?

The lawfulness of a drone strike, as Professor Koh explained, breaks down into three issues:

- whether the government's action is consistent with domestic law and international law—an issue which, in turn, is based on both the law of going to war (*jus ad bellum*) and the law of conducting a war (*jus in bello*);
- whether the rights of the targeted person have been adequately considered under domestic and international law; and
- whether the sovereignty of the country where the killing occurred was adequately considered.

Third, what are the relevant bodies of law? As Professor Koh explained, the relevant international law consists of various treaties, including Article 24 of the United Nations (“U.N.”) Charter, which contains the general proscription against incursions on sovereignty, Article 51 of the U.N. Charter, which addresses self-defense, and international humanitarian treaties such as the Geneva Conventions of 1949. There also are three bodies of relevant domestic law: (a) the Constitution; (b) statutory law, such as the 2001 Authorization for the Use of Military Force (often

referred to as the "AUMF");¹ and (c) executive branch policy guidance. Although the executive's policy guidance is classified, various officials have outlined the broad terms in a series of public speeches.

Fourth, how does this legal framework of domestic and international law apply to the use of drones inside and outside established theaters of armed conflict?

Professor Koh explained that this is a key distinction. The United States is in an armed conflict, under the AUMF, with the Taliban, Al-Qaeda and their associated forces. Drone strikes in Afghanistan and adjacent regions can fall within the law of armed conflict, but the United States has gone further and also asserted, under self-defense principles, the right to use force against senior members of terrorist groups with whom there is no armed conflict.

Fifth, what additional considerations come into play when an American citizen is being targeted?

As Professor Koh explained, the administration has disclaimed the right to target U.S. citizens in the United States, but, outside the United States, the Justice Department has determined that, under certain limited conditions, targeting a U.S. citizen would be lawful. As a result of a Freedom of Information Act suit brought by *The New York Times*, an opinion on this subject from the Office of Legal Counsel is shortly to be made public, at least in part.

Having set the stage with a basic background primer, Professor Koh then asked Professor Sarah Cleveland to address the primary areas of legal disagreement.

Professor Cleveland noted that there are two broad frameworks—the law of armed conflict and the law of self-defense—and pointed to several areas of disagreement.

First, there are difficulties in figuring out the scope of an armed conflict. She asked, "Can you use force, for example, in Yemen or Somalia based on the existence of an armed conflict in Afghanistan?"

Second, there are difficulties in distinguishing belligerents and civilians in an armed conflict. For example, Professor Cleveland asked, "If there's a car with four people in it and one of the individuals is the person being targeted, how do you think of the other three people in the car?"

Third, the administration's policy guidance is to use lethal force outside the theater of armed conflict only against persons who pose a continuing imminent threat to U.S. persons, and, as Professor Cleveland explained, the terms "continuing" and "imminent" are subject to debate. A 19th century case called *Caroline*, in which the British forces came into the United States to attack a ship and send it over Niagara Falls, is understood as establishing that it is permissible to enter another country to use force in self-defense where the threat is "instant, overwhelming, and leaving no choice of means, and no moment for deliberation." The administration,

¹ A copy of the AUMF is available at <http://www.law.cornell.edu/background/warpower/sj23.pdf>.

however, has publicly stated that imminence in the terrorism context must be more flexible because terrorist threats are secret and because there may be only limited windows of time in which to target terrorists.²

Fourth, Professor Cleveland said there is disagreement about when capture is required. The administration's stated policy is to capture, rather than kill, where "feasible," but it has not given a detailed explanation of what the administration deems feasible.

Fifth, Professor Cleveland raised the concept of "signature strikes," in which the United States targets people not based on knowing who they are, but based on a pattern of behavior. The public knows little about these strikes and about how these strikes fit within the administration's policy guidance.

Finally, Professor Cleveland raised the question of whether the AUMF authorizes drone strikes outside of those aimed at Al-Qaeda or the Taliban. The text of the AUMF refers to the organizations or persons who "planned, authorized, committed, or aided the terrorist attacks that occurred on September 11, 2001, or harbored such organizations or persons." How does this apply to groups such as Al-Qaeda in the Arabian Peninsula or Al-Shabaab, neither of which existed on September 11, 2001? Professor Cleveland said that the administration has claimed that these groups have joined with Al-Qaeda in the fight against the United States and thus should be treated as "co-belligerents."

Professor Koh then turned the discussion to Daniel Cahen to focus on how force may be used — *i.e.*, assuming one has resolved the various issues raised by Professor Cleveland and has concluded that the use of lethal force is lawful. Specifically, Professor Koh asked: How does the United States address civilian casualties, and should victims' families be compensated? He also asked how the United States should address the detention of terrorist suspects.

Mr. Cahen began with some basic background. Under the law of armed conflict, only combatants can be targeted, but there are certain circumstances in which civilians can be lawful collateral damage, including where there is an expectation that an attack with a lawful objective will not result in loss of life or property disproportionate to the expected concrete and direct military advantage. This is "extremely hard to measure in practice," Mr. Cahen said, in part because drone strikes are often in remote locations that are dangerous to access.

Estimates of civilian losses are as high as 30,000, but the true number is difficult to assess, partly because the distinction between combatant and civilian is the subject of debate, Mr. Cahen said. The administration considers people with "sustaining functions" who "help out" terrorist groups to be combatants who can be lawfully targeted, but Mr. Cahen's organization, the International Committee of the Red Cross, believes only those with "more fighting roles" should be considered targetable combatants.

² A speech on this issue from September 2011 by John O. Brennan, the then-Assistant to the President for Homeland Security and Counterterrorism, is available at <http://www.whitehouse.gov/the-press-office/2011/09/16/remarks-john-o-brennan-strengthening-our-security-adhering-our-values-an>.

As for the question of accountability, Mr. Cahen said that international and humanitarian law imposes a duty to investigate potential war crimes, but not a general duty to investigate (or compensate victims) every time an attack results in death or lawful collateral damage.

Professor Koh then asked Elisa Massimino: What should the role of courts and Congress be regarding drone strikes?

Ms. Massimino began by saying that she is strongly in favor of targeted killing—as strange as that might sound from a human rights lawyer—because the alternative is not an absence of killing but rather indiscriminate killing. Drone strikes, she added, offer the promise of increased accuracy, which is a good thing from a human rights perspective.

To answer Professor Koh's question, Ms. Massimino said that, although she favors an increased role for federal courts in various areas—including the terrorism trials that are currently happening in Guantanamo Bay, Cuba—she is not in favor of federal court oversight of drone strikes and targeted killing. There are proposals advocating a special court to sanction targeted killings in advance, but those raise separation-of-powers issues and questions as to whether those courts would be improperly rendering advisory opinions. Moreover, she added, the process would appear to be designed to lend a “patina of legitimacy” to executions based on arguments from only one side, and judges, Ms. Massimino said, would be unlikely to want to be involved.

Where the courts should have a larger role, Ms. Massimino said, is to ensure that there is transparency about what our government is doing. On the policy question of what our government should be doing, Ms. Massimino emphasized that there are at least 25 countries with drone technologies and that U.S. policy could shape the way those countries use drone technology going forward.

Professor Koh noted that the next obvious question was: What are the alternatives to drone strikes? He said there are at least four: (1) do nothing, which “seems to be anathema”; (2) a prevention strategy, which involves “winning over the Arab street”; (3) capturing and trying targets in federal court; and (4) capturing and trying targets in military commissions. Professor Koh then turned to questions from the audience.

The first questioner asked: What have been the benefits and detriments of having what the questioner termed a “national security state”?

Professor Koh answered that the question, in some sense, is impossible to answer, but that it is clear there has been a “massive skewing” of government resources towards defense and intelligence. This has produced U.S. intelligence capabilities that are the envy of the world.

Professor Cleveland responded that, as a result of the national security state, courts have been more reluctant over time to oversee the national security activities of the government. She said that the judiciary should be more mindful that it is a co-equal branch that plays an important role in balancing security against individual rights.

Another questioner asked: What difference does it make, from a legal perspective, as to whether a target is a U.S. citizen or not, given that the Due Process Clause of the Constitution refers to persons, not citizens?

Professor Koh answered that several courts have ruled that aliens who have never entered the United States do not have due process rights, thus appearing to recognize the distinction. Professor Cleveland added that, while she agreed with Professor Koh that courts have made such a distinction, she found it to be an “awkward” one. If a person is lawfully the target of lethal force, it should not make a difference if that person is a U.S. citizen or not.

The final audience questioner said that he generally understood that participants in war should do whatever is necessary to win the war and that shortening the war can reduce casualties overall. He asked about specific examples where one side has used force apparently directed at civilians — when England bombed Cologne and when the United States firebombed Tokyo. He then raised a final, unrelated issue, of whether it would be appropriate to use drones in Somalia to attack terrorists who have kidnapped hundreds of innocent schoolchildren, notwithstanding that we are not at war with Somalia.

Professor Koh said that, along the lines of the bombing examples, the United States used nuclear weapons in World War II, which led to the U.N. Charter and the Geneva Conventions.

As for the example of the kidnapped schoolchildren, Professor Koh said its lawfulness would depend on whether the kidnappers were considered “co-belligerents” with Al-Qaeda or the Taliban — a question he could not answer. Mr. Cahen added that, if the host government consented, however, there might be lawful grounds to target the kidnappers.

