

American University Washington College of Law

From the Selected Works of Kenneth Anderson

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Drones II

Kenneth Anderson



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

**Subcommittee Hearing:
“Drones II”**

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

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

[Note to readers of this SSRN version of the testimony. Footnotes 1 and 2 were in the original document. I have taken the liberty of annotating this version with additional footnotes not submitted to the subcommittee. The hearing was called with very little notice, and so both my testimony and that of other witnesses was necessarily put together in haste. Annotation in the footnotes seems like the best way of filling in gaps and clarifying matters in various places.]

Honorable Chairman and Members:

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

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

policy chapter in a Brookings Institution volume, “Targeted Killing in US Counterterrorism Strategy and Law,” are also downloadable at SSRN.com.)²

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

6. Harold Koh, Legal Adviser to the State Department, delivered an important speech on international law at the American Society for International Law on March 25, 2010, in which, for the first time, a senior lawyer – indeed, the most senior lawyer on international law – delivered a defense of the lawfulness of the US use of drone warfare.³
7. As someone who has been a sharp critic of the silence of the administration’s senior lawyers on this crucial topic (indeed, in my earlier testimony before this Subcommittee, on March 23), I welcome and applaud the Legal Adviser’s forthright and robust statement. Although relatively short and, as the Legal Adviser noted, an authoritative and considered statement of US legal views rather than a formal legal opinion, it went a long way to assuaging concerns I had expressed on whether the administration’s lawyers would stand with the political leadership on so important an issue.
8. The Legal Adviser’s statement was noteworthy on several grounds. They include particularly the unmistakable and repeated distinction drawn between “armed conflict” in a strict legal sense and “self defense” as a separate basis for the use of force by the United States. In addition, the statement defended the development of such technologies and the efforts by the United States to develop technologically more sophisticated means of targeting and reducing collateral damage. It stated that there was no obligation to provide targets with “process” prior to striking. And it specifically stated that whether in armed conflict or self-defense, such operations did not violate the US domestic ban on “assassination.”⁴

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

³ Harold Koh, Legal Adviser to Department of State, “International Law and the Obama Administration,” March 25, 2010, speech delivered to the American Society of International Law, full text at <http://www.state.gov/s/l/releases/remarks/139119.htm>. The speech covers many topics besides drone warfare and self defense.

⁴ As journalist Adam Serwer correctly noted, in addition, though the speech is silent on the topic, nothing in this statement precludes the targeting of an American citizen who otherwise meets the criteria for being targeted as a matter of participation in armed conflict or legitimate self defense, whether by the US military or the CIA, without warning or judicial process. Indeed, it can be read as an indirect defense of precisely that proposition. See Adam Serwer post, April 12, 2010, <http://progressiverealist.org/blogpost/did-harold-koh-also-provide-legal-justification-targeted-killings-americans-suspected-terror>. I discuss the issue at *Volokh Conspiracy* legal academic blog, at <http://volokh.com/2010/04/14/is-harold-kohs-defense-of-drones-also-the-defense-of-targeting-a-us-citizen/>.

9. The comprehensiveness of this defense of drone warfare, on both armed conflict and self-defense grounds, is impressive and persuasive, and is a major statement of the US view of international law on this topic.
10. The fact that this statement was delivered by the Legal Adviser to the State Department sends an important signal that this is not simply the view of DOD, or the CIA, or any intelligence agency – but the view of the United States, expressed as its “*opinio juris*,” its considered view of its own obligations under international law, to the rest of the world.

11. The Distinction Between “Armed Conflict” and “Self-Defense”

12. As I testified on March 23, the fundamental question of drone warfare is not really the technological platform, but instead where and who operates it.⁵ On a traditional battlefield in the hands of the military, drones are simply another air support platform; issues surrounding use, targeting, and collateral damage are no different than for any other weapons system. The debate arises on two axes, one related to self-defense, and the other related to the role of the CIA.
13. Is it lawful to use drones in uses of force that do not constitute “armed conflict” with a non-state actor (Al Qaeda and similar groups) in a technical legal sense, because where the drone strike might take place is far away from the current places of hostilities? That question was answered firmly in the affirmative by the Legal Adviser’s statement; such strikes can be justified, even though separate and distinct from “armed conflict,” as lawful self-defense.
14. Such self-defense operations are not governed by the full panoply of treaty laws that attach to armed conflict – neither the full range of armed conflict law that applies conflicts between states, nor the limited Common Article 3 rules that apply to conflict with a non-state actor.⁶ Strikes outside of armed conflict can be

⁵ In order to understand the range of quite different academic views, see the testimony of the other witnesses as well as the transcript of the hearing. The witnesses were William Banks (Syracuse University Law School), Mary Ellen O’Connell (Notre Dame Law School), David Glazier (Loyola Los Angeles Law School), and myself; and written submissions from the ACLU and Michael Lewis (Ohio Northern University). My congratulations to the hearing organizers for succeeding on short notice in getting a quite representative range of views.

⁶ To be more precise, in my understanding there is not technically speaking “armed conflict” as such. As scholar Marko Milanovic points out at the European Journal of International Law blog, “[International armed conflicts] and [Non-international armed conflicts] are separate legal categories ... an ‘armed conflict’ exists when there is an IAC or a NIAC, not the other way around.” Marko Milanovic, EJILTalk!, May 7, 2010, at <http://www.ejiltalk.org/what-exactly-internationalizes-an-internal-armed-conflict/>. Even though increasingly the substantive rules of international armed conflict have been applied as a matter of custom to non-international armed conflict, the threshold for showing when one or the other is underway remains distinct under treaty and custom. Any fighting between state militaries constitutes an international armed conflict for purposes of the Geneva Conventions and *jus in bello* under Geneva Conventions, Common Article 2. The reference to conflict not of an international character in Geneva Conventions, Common Article 3, contains no similar treaty threshold, but under customary law requires that there be

undertaken under the doctrine of self-defense – and although lacking all the technical rules that only make sense in overt, army-against-army fighting, such self-defense operations must still adhere to fundamental customary law including, as the Legal Adviser noted, the principles of distinction and proportionality that are also foundations of the technical law of armed conflict. In other words, to say that these operations are not governed by treaty law applicable to overt warfare is not to say that they lack legal standards. On the contrary, they must adhere to the customary standards of necessity, distinction, and proportionality.

15. The Legal Adviser’s statement reaffirms and reinvigorates the traditional US view of self-defense, and I find little if anything in his statement that is inconsistent with – indeed, in my view it is a clear reaffirmation – of a speech in 1989 by then Legal Adviser Abraham Sofaer on the topic of transnational terrorism and self-defense.⁷

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

17. As I noted in my March 23 testimony, if one crucial issue about drone warfare is where it takes place – leading to the importance of the armed conflict/self-defense distinction – a second crucial issue is who is lawfully empowered to carry it out. In other words, the fault line in the argument over drone warfare is much less the weapon system than who uses it and where. In the hands of the military on the ordinary battlefield, it is not very different from other air platforms. The question, of course, is off the ordinary battlefield and in the hands of the CIA.

18. The lawfulness of the CIA’s operations under US domestic law is not at issue. The agency has been tasked by direct orders of the President, under the authority of a complex statute that provides for oversight and accountability within and

sustained, intense, systematic fighting between organized forces, at a minimum. Why does this difference in threshold matter? As I explain in my published articles, in the simplest terms, if you do not have an armed conflict, because the fighting does not meet one of the two definitional forms of armed conflict, then you do not have combatants to target. If you do not have combatants to target, then either you have a justification for targeting them under the broader rules of self-defense law, or you possibly have a problem with general human rights law, i.e., questions of extrajudicial execution. All branches of the US government have characterized the conflict with Al Qaeda – however apparently peculiar a rubric – as conflict not of an international character, because of the non-state actor nature of Al Qaeda. As a consequence, the armed conflict cannot be as a matter of law governed under Common Article 2, because Al Qaeda is not a state. If governed under Common Article 3, as all branches of the US government have accepted for now many years, then there is only a conflict insofar as fighting achieves a required customary level of sustained intensity. The further question is whether, for purposes of making that determination, one can aggregate all the fighting wherever it takes place as a single non-international armed conflict. My own view is that the more legally proper approach, as well as the more useful policy mechanism, is to accept as the United States and other states have long done – and resort to the broader category of use of force under the international law of self-defense. Not all uses of force, in other words, must be lawfully a matter of either law enforcement or armed conflict. In this, however, I directly contravene Mary Ellen O’Connell and various other legal scholars; on the other hand, this is a reasonably close rendering of the State Department view.

⁷ Abraham D. Sofaer, Legal Adviser to the Department of State, “Solf Lecture: “Terrorism, the Law, and the National Defense,” *Military Law Review* (1989), Vol. 126, Issue 1, pp. 89-123.

- between the political branches.⁸ The fundamental challenges come from influential parts of the “international law community” – NGOs, international organizations, activists, academics, UN officials, and others – who view the use of targeted killing as unlawful under international law, or likely so, and particularly so by the CIA and outside of the technical scope of armed conflict.
19. Drone warfare becomes controversial, in other words, almost entirely when it is used by the CIA – and in places outside of the Afghanistan, or a narrow slice of cross border regions with Pakistan. Used as a weapon in counterinsurgency by the US military, it is just another weapon. Used as a weapon in counterterrorism, however, directed against Al Qaeda and Taliban leadership away from the active locales of hostilities, whether further afield in Pakistan or still further afield in Yemen, Somalia, or elsewhere, by the civilian CIA – that is where the sharp arguments mostly take place.
 20. The Legal Adviser nowhere mentions the CIA by name in his defense of drone operations. It is, of course, what is plainly intended when speaking of self-defense separate from armed conflict. One understands the hesitation of senior lawyers to name the CIA’s use of drones as lawful when the official position of the US government, despite everything, is still not to confirm or deny the CIA’s operations.
 21. In my view, the next step in this evolving legal process should be to affirm what the Legal Adviser’s statement says without naming the CIA. That process might involve the US government, in a no doubt difficult interagency consultation, in establishing new mechanisms for acknowledging operations that are widely known, widely discussed even by senior officials – if not operationally, then at least for the “hypothetical” of asserting their legality. In my view, it would be best to establish a formal category of unacknowledged but also obviously not covert operations by the CIA, with their own mechanisms of Congressional oversight and accountability.
 22. The Legal Adviser’s statement has announced the framework and done everything but say the words “CIA.” It is time to take the next step and say “the CIA.” The officers of the CIA who carry out these operations, whether planning or execution, merit the public acknowledgment that what they do is legal.
 23. Congress ought to make clear, through pronouncement and resolutions and, even better, through legislation, that any attempts to use international or foreign legal process to go after these officers in pursuit of their duties at the intelligence agencies would be regarded as a serious and unfriendly act toward the United States. It is crucial that the two political branches send a single message that the United States stands behind its self-defense operations as such.

⁸ See generally the US domestic law governing the CIA under USC Title 50.

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

25. The distinction between operations in armed conflict, as a technical legal status, and self-defense operations raises a legal issue that has been at the center of some of the criticism of CIA operations. Some commentators, including eminent laws of war scholars, have suggested that the activities of the CIA operating drones (including from locales in the United States) in the context of the armed conflict in AfPak constitutes unlawful combatancy by CIA personnel.⁹
26. The question is not an idle one, if the State Department's position of a distinction between these two grounds for using force is accepted. The legal rules applicable to participants are different as between these two statuses. In an armed conflict, the rules by which combatants must distinguish themselves in order to qualify for combatant immunity apply, and there is a question as to whether that applies to CIA personnel whose activity is part of the armed conflict underway in the Afghanistan or Pakistan theatres.
27. I do not propose to offer here a detailed or definitive answer to the complex question of when and who is required, for example, to wear uniforms and what those must be in order to meet the requirements of the law of armed conflict. My understanding of the DOD view with regards to its own special forces in the early stages of the Afghanistan war, for example, was that context mattered and that US special forces, while commingled with Northern Alliance fighters, could dress as those militia fighters did, and meet the requirements. Context matters, including personnel flying a drone from an office in the United States.¹⁰
28. In addition to the question of uniforms and marks identifying combatants, these questions also raise important questions for the United States, and DOD particularly, as to the lawful role of civilians in armed conflict. It is partly a question of the lawful role of civilians in support of US combatant forces, as well as when persons on the other side become lawful targets. The underlying question is the much-vexed topic in international law of war over what constitutes "direct participation in hostilities" (DPH).¹¹ The views that most matter on this are those of the DOD, and I believe it is premature to opine on them until DOD has expressed an official view.¹²

⁹ See, e.g., Gary Solis, "CIA Attacks Produce America's Own Unlawful Combatants," *Washington Post*, March 10, 2010, opinion.

¹⁰ See Hays Parks, "Special Forces Wear of Non-Standard Uniforms," *Chicago Journal of International Law* Vol. 4, No. 2, Fall 2003, at 493.

¹¹ In particular, the controversies surrounding the International Committee of the Red Cross, "Interpretive Guidance on the Notion of Direct Participation in Hostilities," June 2009.

¹² I assume that guidance as to the DOD view will be offered in the forthcoming revision of the laws of war manual. On reflection, however, I believe that the following can be said, at a minimum. So far as I am aware, it is compatible with DOD legal views on DPH.

29. Similarly controversial and important is what constitutes the “armed conflict” in AfPak – does it cover all of Pakistan, so that these questions of DPH by CIA personnel matter as a matter of armed conflict law? Or are parts of Pakistan outside of the active border zones of overt hostilities – such that CIA operations there take place instead under the rationale of “self-defense,” and so outside of the technical rules of armed conflict, including the formal rules for combatancy? I do not have definitive views on these questions, but I believe they are appropriate to put to the administration, DOD as well as DOS and the CIA, and to encourage the executive to express a view that it believes can serve as a long-run basis for US practice and legal policy.¹³

First, with respect to CIA participation in an armed conflict, taking the plainest case of AfPak, or fighting that has developed into a conventional war of some kind in Pakistan. The CIA can take part as civilians on the battlefield who have taken up arms as part of a party to a conflict, as noted in the Geneva Conventions; the participation of its agents is not unlawful nor does it render them “unlawful combatants.” Rather, by their DPH they make themselves lawful targets to the other side – if, however, the other side were legally entitled to take up arms in any sense. That is, if the enemy on the other side were a party – North Korea, for example – that would have belligerent rights, then its armed forces would be entitled to target civilian CIA taking DPH, and the “institution” perhaps as well. However, a terrorist organization – whether Al Qaeda or ETA or the IRA – has no right to target anyone, including armed forces that would otherwise be lawful to target in an armed conflict.

Touching the wearing of uniforms by the CIA, it is not formally bound – under the strict language of the Geneva Conventions – to the formal requirements imposed on resistance groups that are not the armed forces of a state or its affiliated forces. However, those rules essentially encapsulate more general rules against “perfidy” and commingling with non-combatants, and so they are important even if not formal requirements. That said, the wearing of uniforms or not in a CIA office at Langley presents no issues of perfidy or other violation of rules of war, and is not a binding requirement on these civilians taking DPH. I defer to DOD interpretations of when uniforms are required or not, or when and what kinds of non-standard uniforms are acceptable.

Second, with respect to CIA use of force outside of an armed conflict, in what Legal Adviser Koh termed “legitimate self-defense,” whether in covert operations or drone strikes, the CIA makes no claim of combatant privilege or concept drawn from the (inapplicable) law of armed conflict for its agents. They have no claim to lawful combatant status. Their acts almost certainly constitute a violation of local law, including laws against espionage. When the US military acts clandestinely, the pact with servicemembers is that even if it is a secret operation, military personnel will always be acknowledged, and POW status demanded. The CIA makes no such claim for its civilian operatives outside of armed conflict.

As to the general self-defense claim, as a matter of jus ad bellum international law, it indeed constitutes a violation of sovereignty; the view of the US has been for a very long time that legitimate self-defense, including against terrorists taking safe haven in a state unable or unwilling to control its territory, is a sufficient affirmative defense in international law. There is nothing novel about this claim; it does not arise with the Obama administration or the Bush administration, but goes back at least to the 1980s and almost certainly long before.

¹³ Even if one accepts, as I do, that the CIA’s role in an armed conflict in Pakistan, or in AfPak, is lawful under US and international law, there is a further important policy question as to whether it is a good policy idea for the CIA to be taking part in a conventional conflict, rather than confining itself to covert operations in much more extraordinary circumstances of self-defense as such. The most important justification for its role now in Pakistan is that it offers a fig leaf for the Pakistan government to say that the US military is not fighting in Pakistan. That might well be a sufficient policy reason, but the question should be debated and general policy lines drawn, even if exceptions might be made.

30. That said, I do not believe that the CIA's current participation either in the theatre of hostilities or elsewhere is unlawful or contrary to international law under the laws of war or otherwise.¹⁴ There might, however, be useful prophylactic measures that could be taken to make that evident.
31. I believe it is appropriate for Congress to ask that the administration undertake a process to formulate a view of the participation of CIA personnel in an armed conflict and what that means – a process that would likely be difficult because of issues of interagency review. However, in order to put the CIA's activities on the best long-run legal footing, I believe that Congress should urge the administration to undertake what might be an arduous process of consultation and formulation of views.

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

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

¹⁴ See footnote 12 for a brief discussion.

36. Finally, to be clear, the use of drones, or other use of force by civilian CIA agents in covert operations is not contrary to international law insofar as it is an exercise of lawful self-defense. The traditional view of the United States, as expressed in 1989 and reaffirmed today, is sovereignty and territorial integrity are very important in international law, but they cannot be used to shield transnational terrorists who have found safe haven.

37. Targeting US Citizens

38. Press accounts that the Obama administration had affirmatively placed the radical cleric, Anwar Al-Awlaki, currently presumed hiding in Yemen with Al Qaeda in the Arabian Peninsula (AQAP), on the kill-or-capture list and, thus, subject to a drone targeted killing attack, raised some excited discussion in the United States. The fundamental question was whether, under international law or US domestic law, the US government owed a targeted individual some form of judicial process before targeting him or her, or whether perhaps it was unlawful to target the person at all in favor of attempting to arrest and bring for trial under a law enforcement model of counterterrorism.

39. Commentators have correctly noted that that Legal Adviser's statement on drones covers not just targeted killing but, once seen in the context of a US citizen on the kill-or-capture list, is equally a statement that even a US citizen who has joined forces with transnational terrorists and is hiding abroad might be subject to targeted killing. The existing domestic law for making such a determination, the Legal Adviser's statement implies, is sufficient, and there is no obligation in US or international law to provide other process, such as judicial review, before a possible strike. Moreover, this is not an act of assassination, within the meaning of the US domestic prohibition, according to the Legal Adviser's statement. All of this seems to me correct as a matter of law and policy.¹⁵

40. It bears noting, however, that the Legal Adviser's distinction between armed conflict and self-defense is equally relevant here as in other contexts. That is, it is not necessary that, for example, Al-Awlaki, be a "combatant" to be subject to a strike by the CIA. The legal justification of self-defense is separately available as

¹⁵ In my view, journalist Adam Serwer is correct in making this analysis of the Legal Adviser's speech to ASIL, at Tapped, The American Prospect Blog, April 12, 2010, "Did Harold Koh Just Justify the Killing of an American Citizen?" My legal position is that American citizenship is no protection against targeting if one has joined forces with the enemy, though there is room for debate as to what constitutes doing that, or evidence of doing that; I have seen nothing publicly revealed that would undermine the President's determination, though of course I have no special possession of secret facts. I also believe that the role of courts in this matter is extremely limited, in dealing with someone who has fled abroad, is asserted by the President under procedures designed to inform Congress to be involved in activities to which, if a non-American, the United States would be justified in attacking on the basis of self-defense. I see little or no role for the courts in second-guessing the political branches in such a determination. However, I would also suggest that it would be a useful prophylactic measure – in this as with other things related to covert uses of force – for a strengthening of the oversight procedures so that it is clear that Congress is fully informed in a timely way.

- a basis to attack. The standard in that case is not “combatancy,” but the threat posed, immanence, and other traditional factors – including the US’s long embrace of “active self-defense,” meaning that a threat can be assessed on the basis of a pattern of activity already established in the past, without having to wait until a target is on the verge of acting.
41. Many of the critics of this policy in the United States seem not to appreciate that there is a distinction between the territorial United States, in which the CIA is not authorized to act, and extraterritorially.
 42. Critics also frequently raise the spectre that all this is license for the CIA to attack an American – or frankly anyone – in, for example, London or Paris. As stated in my March 23 testimony, however, what is justified in the ungoverned regions of Somalia or Yemen is a different matter applied to places under the rule of law such as our friends and allies. The United States is not going to undertake a targeted killing in London. The diplomatic fiction of the “sovereign equality” of states makes it difficult to say, as a matter of international law that, yes, Yemen is different from France, but of course that is true.¹⁶
 43. The willingness of the Obama administration to assert plainly that it has no trouble targeting an American citizen who has taken up the cause of violence against the United States and its citizens is a positive sign of resolve in counterterrorism by the administration. For one thing, it lessens at least slightly the incentive of terrorist groups to recruit Americans, which is likely to be no small matter over the long term. But as to the fundamental propriety of targeting an American without judicial process, extraterritorially?
 44. The policy is far from unprecedented. Suppose that an American scientist in the Cold War had decided to defect to the Soviet Union with vital nuclear secrets that went to the heart of the US strategic arsenal. US citizen, and not military, and not a combatant, because despite the existence of a Cold War, no actual military conflict was underway. The CIA finds that its best chance to remove the threat is a sniper attack on the US scientist in East Berlin as he attempts to enter the Soviet

¹⁶ This issue has not received enough discussion – why it is acceptable under some circumstances to do in Yemen or, for that matter, Iran what would not be acceptable in London. It is not strictly speaking a matter of international law because international law, by definition as it were, assumes the sovereign equality of states. But from a security and self-defense standpoint, that is far from true. The more accurate legal reason – a reason that is more than simply politics, diplomacy, or prudence, but a genuinely legal one – is not international law as such, but the more general comparative law notion of “comity.” Comity requires, however, some sense of similarity among states that is more than simply the formal equality of sovereignty; for the same reasons that we consider comparables in determining whether it is permissible to extradite someone to some jurisdiction, we consider the same issues in determining whether or not a targeted killing would be so much as a possibility. This is a matter of law in the comity, which assumes that the question should be asked which, under general international law, does not get asked – are ‘they’ enough like ‘us’? I discuss this point at more length in Kenneth Anderson, “Targeted Killing in US Counterinsurgency Strategy and Law,” in Benjamin Wittes, ed., *Legislating the War on Terror: An Agenda for Reform* (Brookings 2009), at chapter 10.

embassy. Far fetched? Not really. Not an armed conflict and not a “combatant” in a technical legal sense – a US citizen targeted without judicial process, abroad, and under rationales of self-defense. The same concepts apply today, with respect to transnational terrorists, including Americans who take up the cause with them.

45. A Role for Congress?

46. This testimony has highlighted several matters on which Congress could play an important and useful role, primarily in offering support to the policies undertaken by the administration. One of these is to encourage and provide opportunities for other senior lawyers in the intelligence and defense communities to affirm, amplify, and expand on what the Legal Adviser has said.
47. A second role for Congress – and a deeply important one – is to specifically name the CIA as under the protection, so to speak, of these legal views on self-defense. This is of great importance in order to make clear that line officers and legal officials of the CIA are not being put in the untenable position of being tasked to carry out policies for which they might later be accused of violations of international law. Congress needs to clarify its lawfulness, and frankly make clear that countries that seek to gainsay the US’s own considered legal view on this topic, including allies and NATO allies, such as unsupervised prosecutors in Spain or elsewhere, will discover that there are consequences.
48. Congress should also invite the administration to elaborate its views of CIA actions inside Pakistan, to state whether it thinks such activities are part of the ongoing armed conflict, are separate from it, and how such views interact with legal doctrines of DPH. This is a topic on which there needs to be a coordinated legal view among DOS, DOD, CIA, DNI, and perhaps others.
49. Congress should explicitly endorse the Obama administration’s view that American citizenship does not preclude one from being targeted extraterritorially under laws of armed conflict, self-defense or US domestic law.
50. Congress should be strongly supporting, through budget processes and otherwise, the development of more discrete and discriminating drone-and-missile technologies to reduce collateral damage to the minimum that technology can allow, as well as to improve targeting identification.¹⁷

¹⁷ Bearing in mind that improvements in targeting and discrimination, and miniaturization of drone and weapon involve incremental improvements. If progress is only made one small step at a time, and if point A is considered a violation of the laws of war, or criminal or something similar – perhaps subject to human rights civil litigation – the result will be that point B will be similarly a violation, as well C, D, E ... Z. This will be so even if Z is a radical reduction in collateral damage. This is a terrible set of incentives from the standpoint of making war less destructive, and Congress should act to prevent them for taking hold.

51. Congress should invite the CIA to share what it believes it can regarding collateral damage involved in drone strikes.¹⁸
52. If, as some commentators have suggested, the use of force threshold is gradually shifting toward smaller and more discrete uses of force by US actors, made possible by evolving drone technologies, then Congress should revisit the rules regarding oversight, review, and accountability to ensure that they take account of emerging realities about the use of force as perhaps a substitute – and highly desirable substitute – for large scale overt war.
53. Congress should make clear that it rejects utterly the argument made popular in the press in recent months that drone warfare is somehow dishonorable or that it somehow reduces the disincentives for the US to use violence, or that it makes violence too easy for the United States because its forces are not at risk, with the barely concealed implication that if American servicemen and women are not actively at risk of getting killed, because drones make it possible to take the fight to the enemy without having to fight through whole countries on the ground to get there – that drone warfare, that is, is somehow illegitimate, dishonorable, unlawful, or an enabler of the US to let loose its unrestrained propensity to use violence. It is none of those things, and Congress should say so.¹⁹

54. Conclusion

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

Kenneth Anderson
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¹⁸ It is highly evident, from interviews and off-the-record statements from senior intelligence officials from Director Panetta on down, that the CIA believes that the collateral damage is far less than what various organizations are reporting. If that is so, it should do far more to make that information available. For that matter, the CIA should consider private discussions to share such data with the International Committee of the Red Cross, on a private basis.

¹⁹ This idea, introduced so far as I can tell by Peter W. Singer in his influential book, *Wired for War*, and popularized by journalist Jane Mayer in an influential article in *The New Yorker* (October 26, 2009), is in my view wrong as a matter of how the intelligence agencies and US military actually operate, in fact, and in any case implies a moral view of the “efficient” risk of US service personnel lives that I should think Members of Congress would find repugnant at best. It is dismaying, however, how many organizations and writers seem to find it a satisfying meme.

Kenneth Anderson Biography

Kenneth Anderson is a professor of law at Washington College of Law, American University, where he has taught since 1996. He is also a visiting fellow and member of the Hoover Institution Task Force on National Security and Law, Stanford University. Prior to joining the American University faculty, Mr. Anderson was general counsel to the Open Society Institute-Soros Foundations in New York City, and prior to that the director of the Human Rights Watch Arms Division. He is a 1986 graduate of Harvard Law School and 1983 graduate of the University of California, Los Angeles; he clerked in 1986-87 for Justice Joseph R. Grodin of the California Supreme Court. He is a member of the editorial board of the *Journal of Terrorism and Political Violence*, past Treasurer and Executive Committee member of the Lieber Society of the American Society of International Law, and a blogger at *Opinio Juris* international law blog and the *Volokh Conspiracy* law blog. He is the author of numerous articles on international law and laws of war, and served as legal editor of *Crimes of War* (1998 Norton).