

THE NON-COUNTERTERRORIST DRONE LOOPHOLE: DID CLAPPER ADMIT WE TARGETED IRANIAN SCIENTISTS?

One of the most interesting exchanges in yesterday's Threat Assessment



ment hearing occurred between Ron Wyden and James Clapper—with David Petraeus, whom Wyden calls out, observing silently (the exchange starts at 1:01).

Wyden: Let me wrap up with you Director Clapper on an issue that I've asked about before at this open hearing. General Petraeus knows about this, this is a question about the use of force and a speech that was given by Mr. Koh, Harold Koh of the State Department, a lawyer. Let me note at the beginning it's a matter of public record that the intelligence community sometimes takes direct action against terrorists and this direct action sometimes involves the use of lethal force. And as you know Director [sic] Koh gave a speech outlining our policy with respect to various terrorist groups, talked about detention, talked about the use of unmanned drones and noted that under US

law, the use of force against terrorist groups is permitted by Congressional authorization, while under international law it is permitted by America's right to self defense. But in spite of having asked about this on a number of occasions, and General Petraeus, you know that I, too, share the Chair's view with respect to your working with us here on this committee and your being forthright, I've not been able to get an answer to this specific question. And I would like to know whether that speech that Mr. Koh gave contained unstated exceptions for intelligence agencies?

Clapper: With respect to counterterrorism, it does not. So it applies to all components of the government involved in counterterrorism be it military or non-military.

Wyden: Are there other exceptions other than counterterrorist activities?

Clapper: I believe his speech dealt with counterterrorism.

Wyden: So you believe that his speech, the text of the speech—cause this would be important—applies to all agencies. It applies to the intelligence community, his entire speech, the overall thrust of the speech applies to all of the intelligence community.

Clapper: With respect to counterterrorism, yes.

Now, it seems clear that Wyden is referring to the portion of Koh's speech that deals with drone strikes, which is reproduced in full below the line.

And my impression is that Wyden—who emphasizes targeting terrorists when he asks the question—was asking whether there was an exception to the principles of distinction and

proportionality for the CIA when they used drones. Or, to put it more plainly, Wyden seemed to be asking whether the CIA could use drones to target civilians.

My **guess** is that Petraeus has refused to answer that question not to hide a CIA exception for the use of drones with civilian terrorists (say, with Anwar al-Awlaki) but rather to hide the CIA involvement in targeting of civilians in other contexts.

That's the implication of Clapper's response: "with the respect to counterterrorism, yes." And Wyden's expression as he delivers the question, "Are there other exceptions other than counterterrorist activities?" is worth watching.

There may be further confusion stemming from the language of Koh's speech. While he was, in this section, specifically addressing "the Law of 9/11," he does claim that his comments apply to "all of our operations involving the use of force." Clapper's caveat seems to belie that claim.

Koh's language also addressed the use of force generally, not just those dealing with drones. We do use drones for missions outside of counterterrorism—including in drug operations, so Clapper's caveat might suggest the CIA can target civilians in such context.

But if I had to guess, I'd say this had to deal with non-drone use of lethal force, possibly the assassinations of Iranian nuclear scientists. Was Clapper suggesting CIA targeted civilian nuclear scientists?

And while we may not have attached the bombs to Iranian civilian scientists' cars (though our surrogates did), remember the suggestions that our drone surveillance of Iran was involved in those assassinations.

In the same way, in all of our operations involving the use of force, including those in

the armed conflict with al-Qaeda, the Taliban and associated forces, the Obama Administration is committed by word and deed to conducting ourselves in accordance with all applicable law. With respect to the subject of targeting, which has been much commented upon in the media and international legal circles, there are obviously limits to what I can say publicly. What I can say is that it is the considered view of this Administration—and it has certainly been my experience during my time as Legal Adviser—that U.S. targeting practices, including lethal operations conducted with the use of unmanned aerial vehicles, comply with all applicable law, including the laws of war.

The United States agrees that it must conform its actions to all applicable law. As I have explained, as a matter of international law, the United States is in an armed conflict with al-Qaeda, as well as the Taliban and associated forces, in response to the horrific 9/11 attacks, and may use force consistent with its inherent right to self-defense under international law. As a matter of domestic law, Congress authorized the use of all necessary and appropriate force through the 2001 Authorization for Use of Military Force (AUMF). These domestic and international legal authorities continue to this day.

As recent events have shown, al-Qaeda has not abandoned its intent to attack the United States, and indeed continues to attack us. Thus, in this ongoing armed conflict, the United States has the authority under international law, and the responsibility to its citizens, to use force, including lethal force, to defend itself, including by targeting persons such as high-level al-Qaeda leaders who are planning attacks. As you know, this is a conflict with an organized terrorist enemy that does not have conventional forces, but that plans and executes its attacks against us and our allies while hiding among civilian populations. That behavior simultaneously makes the application of international law more difficult and more

critical for the protection of innocent civilians. Of course, whether a particular individual will be targeted in a particular location will depend upon considerations specific to each case, including those related to the imminence of the threat, the sovereignty of the other states involved, and the willingness and ability of those states to suppress the threat the target poses. In particular, this Administration has carefully reviewed the rules governing targeting operations to ensure that these operations are conducted consistently with law of war principles, including:

- First, the principle of *distinction*, which requires that attacks be limited to military objectives and that civilians or civilian objects shall not be the object of the attack; and
- Second, the principle of *proportionality*, which prohibits attacks that may be expected to cause incidental loss of civilian life, injury to civilians, damage to civilian objects, or a combination thereof, that would be excessive in relation to the concrete and direct military advantage anticipated.

In U.S. operations against al-Qaeda and its associated forces— including lethal operations conducted with the use of unmanned aerial vehicles— great care is taken to adhere to these principles in both planning and execution, to ensure that only legitimate objectives are targeted and that collateral damage is kept to a

minimum.

Recently, a number of legal objections have been raised against U.S. targeting practices. While today is obviously not the occasion for a detailed legal opinion responding to each of these objections, let me briefly address four:

First, some have suggested that the very act of targeting a particular leader of an enemy force in an armed conflict must violate the laws of war. But individuals who are part of such an armed group are belligerents and, therefore, lawful targets under international law. During World War II, for example, American aviators tracked and shot down the airplane carrying the architect of the Japanese attack on Pearl Harbor, who was also the leader of enemy forces in the Battle of Midway. This was a lawful operation then, and would be if conducted today. Indeed, targeting particular individuals serves to narrow the focus when force is employed and to avoid broader harm to civilians and civilian objects.

Second, some have challenged the very use of advanced weapons systems, such as unmanned aerial vehicles, for lethal operations. But the rules that govern targeting do not turn on the type of weapon system used, and there is no prohibition under the laws of war on the use of technologically advanced weapons systems in armed conflict—such as pilotless aircraft or so-called smart bombs—so long as they are employed in conformity with applicable laws of war. Indeed, using such advanced technologies can ensure both that the best intelligence is available for planning operations, and that civilian casualties are minimized in carrying out such operations.

Third, some have argued that the use of lethal force against specific individuals fails to provide adequate process and thus constitutes unlawful extrajudicial killing. But a state that is engaged in an armed conflict or in legitimate self-defense is not required to provide targets with legal process before the state may use

lethal force. Our procedures and practices for identifying lawful targets are extremely robust, and advanced technologies have helped to make our targeting even more precise. In my experience, the principles of distinction and proportionality that the United States applies are not just recited at meetings. They are implemented rigorously throughout the planning and execution of lethal operations to ensure that such operations are conducted in accordance with all applicable law.

Fourth and finally, some have argued that our targeting practices violate domestic law, in particular, the long-standing domestic ban on assassinations. But under domestic law, the use of lawful weapons systems—consistent with the applicable laws of war—for precision targeting of specific high-level belligerent leaders when acting in self-defense or during an armed conflict is not unlawful, and hence does not constitute “assassination.”

In sum, let me repeat: as in the area of detention operations, this Administration is committed to ensuring that the targeting practices that I have described are lawful.