U.S. House of Representatives

Subcommittee on National Security and Foreign Affairs

Subcommittee Hearing:
"Rise of the Drones: Unmanned Systems and the Future of War"

Tuesday, March 23, 2010, 2:00 pm
2154 Rayburn House Office Building

Written Testimony Submitted By
Kenneth Anderson
March 18, 2010

Honorable Chairman and Members:

Introduction

1. My thanks to the Subcommittee, the Chairman and Members for inviting me to offer this testimony. 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. I have attached a brief biography as an appendix to this statement.

2. I have been invited to testify regarding the use and future of unmanned battlefield systems, and particularly unmanned aerial vehicles (UAVs) commonly referred to as "drones," in current and future US armed conflicts and uses of force. I focus my remarks on the legal policy implications of these systems, set in the framework of technological and strategic evolution.

3. The basic conclusions of my testimony are six:

   - First, the United States government urgently needs publicly to declare the legal rationale behind its use of drones, and defend that legal rationale in the international community, which is increasingly convinced that parts, if not all, of its use is a violation of international law.
   - Second, the legal rationale offered by the United States government needs to take account, not only of the use of drones on traditional battlefields by the US military, but also of the Obama administration's signature use of drones by the CIA in operations outside of traditionally conceived zones of armed conflict, whether in Pakistan, or further afield, in Somalia or Yemen or beyond. This legal rationale must be certain to protect, in plain and unmistakable language, the lawfulness of the CIA's participation in drone-related uses of force as it takes

place today, and to protect officials and personnel from moves, in the United States or abroad, to treat them as engaged in unlawful activity. It must also be broad enough to encompass the use of drones (under the statutory arrangements long set forth in United States domestic law) by covert civilian agents of the CIA, in operations in the future, involving future presidents, future conflicts, and future reasons for using force that have no relationship to the current situation.

- Third, the proper legal rationale for the use of force in drone operations in special, sometimes covert, operations outside of traditional zones of armed conflict is the customary international law doctrine of self-defense, rather than the narrower law of armed conflict.
- Fourth, Congress has vital roles to play here, mostly in asserting the legality of the use of drones. These include: *(i)* Plain assertion of the legality of the programs as currently used by the Obama administration, as a signal to courts in the US as well as the international community and other interested actors, that the two political branches are united on an issue of vital national security and foreign policy. *(ii)* Congressional oversight mechanisms should also be strengthened in ensuring Congress's meaningful knowledge and ability to make its views known. *(iii)* Congress also should consider legislation to clarify once and for all that that covert use of force is lawful under US law and international law of self-defense, and undertake legislation to make clear the legal protection of individual officers. *(iv)* Congress should also strongly encourage the administration to put a public position on the record. In my view, that public justification ought to be something (self-defense, in my view) that will ensure the availability of targeted killing for future administrations outside the context of conflict with Al Qaeda – and protect against its legal erosion by acquiescing or agreeing to interpretations of international law that would accept, even by implication, that targeted killing by the civilian CIA using drones is per se an unlawful act of extrajudicial execution.

The Multiple Strategic Uses of Drones and Their Legal Rationales

4. Seen through the lens of legal policy, drones as a mechanism for using force are evolving in several different strategic and technological directions, with different legal implications for their regulation and lawful use. From my conversations and research with various actors involved in drone warfare, the situation is a little bit like the blind men and the elephant – each sees only the part, including the legal regulation, that pertains to a particular kind of use, and assumes that it covers the whole. The whole, however, is more complicated and heterogeneous. They range from traditional tactical battlefield uses in overt war to covert strikes against non-state terrorist actors hidden in failed states, ungoverned, or hostile states in the world providing safe haven to terrorist groups. They include use by uniformed military in ordinary battle but also use by the covert civilian service.

5. Although well-known, perhaps it bears re-stating the when this discussion refers to drones and unmanned vehicle systems, the system is not "unmanned" in the sense that human beings are not in the decision or control loop. Rather, "unmanned" here refers solely to "remote-piloted," in which the pilot and weapons controllers are not

physically on board the aircraft. ("Autonomous" firing systems, in which machines might make decisions about the firing of weapons, raise entirely separate issues not covered by this discussion because they are not at issue in current debates over UAVs.)

6. *Drones on traditional battlefields.* The least legally complicated or controversial use of drones is on traditional battlefields, by the uniformed military, in ordinary and traditional roles of air power and air support. From the standpoint of military officers involved in such traditional operations in Afghanistan, for example, the use of drones is functionally identical to the use of missile fired from a standoff fighter plane that is many miles from the target and frequently over-the-horizon. Controllers of UAVs often have a much better idea of targeting than a pilot with limited input in the cockpit. From a legal standpoint, the use of a missile fired from a drone aircraft versus one fired from some remote platform with a human pilot makes no difference in battle as ordinarily understood. The legal rules for assessing the lawfulness of the target and anticipated collateral damage are identical.

7. *Drones used in Pakistan's border region.* Drones used as part of the on-going armed conflict in Afghanistan, in which the fighting has spilled over – by Taliban and Al Qaeda flight to safe havens, particularly – into neighboring areas of Pakistan likewise raise relatively few questions about their use, on the assumption that the armed conflict has spilled, as is often the case of armed conflict, across an international boundary. There are no doubt important international and diplomatic questions raised about the use of force across the border – and that is presumably one of the major reasons why the US and Pakistan have both preferred the use of drones by the CIA with a rather shredded fig leaf, as it were, of deniability, rather than US military presence on the ground in Pakistan. The legal questions are important, but (unless one takes the view that the use of force by the CIA is always and per se illegal under international law, even when treated as part of the armed forces of a state in what is unquestionably an armed conflict) there is nothing legally special about UAVs that would distinguish them from other standoff weapons platforms.

8. *Drones used in Pakistan outside of the border region.* The use of drones to target Al Qaeda and Taliban leadership *outside* of places in which it is factually plain that hostilities are underway begins to invoke the current legal debates over drone warfare. From a strategic standpoint, of course, the essence of much fighting against a raiding enemy is to deny it safe haven; as safe havens in the border regions are denied, then the enemy moves to deeper cover. The strategic rationale for targeting these leaders (certainly in the view of the Obama administration) is overwhelming. Within the United States, and even more without, arguments are underway as to whether Pakistan beyond the border regions into which overt fighting has spilled can justify reach to the law of armed conflict as a basis and justification for drone strikes.

9. *Drones used against Al Qaeda affiliates outside of AfPak – Somalia, Yemen or beyond.* The President, in several major addresses, has stressed that the United States will take the fight to the enemy, and pointedly included places that are outside of any

traditionally conceived zone of hostilities in Iraq or AfPak – Somalia and Yemen have each been specifically mentioned. And indeed, the US has undertaken uses of force in those places, either by means of drones or else by human agents. The Obama administration has made clear – entirely correctly, in my view – that it will deny safe haven to terrorists. As the president said in an address at West Point in fall 2009, we "cannot tolerate a safe-haven for terrorists whose location is known, and whose intentions are clear."[1] In this, the President follows the long-standing, traditional view of the US government endorsing, as then-State Department Legal Advisor Abraham Sofaer put it in a speech in 1989, the "right of a State to strike terrorists within the territory of another State where terrorists are using that territory as a location from which to launch terrorist attacks and where the State involved has failed to respond effectively to a demand that the attacks be stopped."[2]

10. The United States might assert in these cases that the armed conflict goes where the combatants go, in the case particularly of an armed conflict (with non-state actors) that is already acknowledged to be underway. In that case, those that it targets are, in its view, combats that can lawfully be targeted, subject to the usual armed conflict rules of collateral damage. One says this without knowing for certain whether this is, in fact, the US view – although the Obama administration is under pressure for failing to articulate a public legal view, this was equally the case for the preceding two administrations. In any case, however, that view is sharply contested as a legal matter. The three main contending legal views at this point are as follows:

    - One legal view (the traditional view and that presumably taken by the Obama administration, except that we do not know for certain, given its reticence) is that we are in an armed conflict. Wherever the enemy goes, we are entitled to follow and attack him as a combatant. Geography and location – important for diplomatic reasons and raising questions about the territorial integrity of states, true – are irrelevant to the question of whether it is lawful to target under the laws of war; the war goes where the combatant goes. We must do so consistent with the laws of war and attention to collateral damage, and other legal and diplomatic concerns would of course constrain us if, for example, the targets fled to London or Istanbul. But the fundamental right to attack a combatant, other things being equal, surely cannot be at issue.
    - A second legal view directly contradicts the first, and says that the legal rights of armed conflict are limited to a particular theatre of hostilities, not to wherever combatants might flee throughout the world. This creates a peculiar question as to how, lawfully, hostilities against a non-state actor might ever get underway. But the general legal policy response is that if there is no geographic constraint consisting of a "theatre" of hostilities, then the very special legal regime of the laws of armed conflict might suddenly, and without any warning, apply – and overturn – ordinary laws of human rights that prohibit extrajudicial execution, and certainly do not allow attacks subject merely to collateral damage rules, with

[1] Pres. Obama West Point speech.
[2] Abraham D. Sofaer, State Department Legal Adviser, [].

complete surprise and no order to it. Armed conflict is defined by its theatres of hostilities, on this view, as a mechanism for limiting the scope of war and, importantly, the reach of the laws of armed conflict insofar as the displace (with a lower standard of protection) ordinary human rights law. Again, this leaves a deep concern that this view, in effect, empowers the fleeing side, which can flee to some place where, to some extent, it is protected against attack.

- A third legal view (to which I subscribe) says that armed conflict under the laws of war, both treaty law of the Geneva Conventions and customary law, indeed accepts that non-international armed conflict is defined, and therefore limited by, the presence of persistent, sustained, intense hostilities. In that sense, then, an armed conflict to which the laws of war apply exists only in particular places where those conditions are met. That is not the end of the legal story, however. Armed conflict as defined under the Geneva Conventions (common articles 2 and 3) is not the only international law basis for governing the use of force. The international law of self-defense is a broader basis for the use of force in, paradoxically, more limited ways that do not rise to the sustained levels of fighting that legally define hostilities.
- Why is self-defense the appropriate legal doctrine for attacks taking place away from active hostilities? From a strategic perspective, a large reason for ordering a limited, pinprick, covert strike is in order to avoid, if possible, an escalation of the fighting to the level of overt intensity that would invoke the laws of war – the intent of the use of force is to *avoid* a wider war. Given that application of the laws of war, in other words, requires a certain level of sustained and intense hostilities, that is not always a good thing. It is often bad and precisely what covert action seeks to avoid. The legal basis for such an attack is not armed conflict as a formal legal matter – the fighting with a non-state actor does not rise to the sustained levels required under the law's threshold definition – but instead the law of self-defense.
- Is self-defense law simply a standardless license wantonly to kill? This invocation of self-defense law should not be construed as meaning that it is without limits or constraining standards. On the contrary, it is not standardless, even though it does not take on all the detailed provisions of the laws of war governing "overt" warfare, including the details of prison camp life and so on. It must conform to the customary law standards of necessity and proportionality – necessity in determining whom to target, and proportionality in considering collateral damage. The standards in those cases should essentially conform to military standards under the law of war, and in some cases the standards should be still higher.

11. The United States government seems, to judge by its lack of public statements, remarkably indifferent to the increasingly vehement and pronounced rejection of the first view, in particular, that the US can simply follow combatants anywhere and attack them. The issue is not simply collateral damage in places where no one had any reason to think there was a war underway; prominent voices in the international legal community question, at a minimum, the lawfulness of even attacking what they

regard as merely alleged terrorists. In the view of important voices in international law, the practice outside of a traditional battlefield is a violation of international human rights law guarantees against extrajudicial execution and, at bottom, is just simple murder. On this view, the US has a human rights obligation to seek to arrest and then charge under some law; it cannot simply launch missiles at those it says are its terrorist enemies. It shows increasing impatience with US government silence on this issue, and with the apparent – but quite undeclared – presumption that the armed conflict goes wherever the combatants go.

12. Thus, for example, the UN special rapporteur on extrajudicial execution, NYU law professor Philip Alston, has asked in increasingly strong terms that, at a minimum, the US government explain its legal rationales for targeted killing using drones. The American Civil Liberties Union in February 2010 filed an extensive FOIA request (since re-filed as a lawsuit), seeking information on the legal rationales (but including requests for many operational facts) for all parts of the drones programs, carefully delineating military battlefield programs and CIA programs outside of the ordinary theatres of hostilities. Others have gone much further than simply requests that the US declare its legal views and have condemned them as extrajudicial execution – as Amnesty International did with respect to one of the earliest uses of force by drones, the 2002 Yemen attack on Al Qaeda members. The addition of US citizens to the kill-or-capture list, under the authorization of the President, has raised the stakes still further. The stakes, in this case, are highly unlikely to involve President Obama or Vice-President Biden or senior Obama officials. They are far more likely to involve lower level agency counsel, at the CIA or NSC, who create the target lists and make determinations of lawful engagement in any particular circumstance. It is they who would most likely be investigated, indicted, or prosecuted in a foreign court as, the US should take careful note, has already happened to Israeli officials in connection with operations against Hamas. The reticence of the US government on this matter is frankly hard to justify, at this point; this is not a criticism per se of the Obama administration, because the George W. Bush and Clinton administrations were equally unforthcoming. But this is the Obama administration, and public silence on the legal legitimacy of targeted killings especially in places and ways that are not obviously by the military in obvious battlespaces is increasingly problematic.

13. *Drones used in future circumstances by future presidents against new non-state terrorists.* A government official with whom I once spoke about drones as used by the CIA to launch pinpoint attacks on targets in far-away places described them, in strategic terms, as the "lightest of the light cavalry." He noted that if terrorism, understood strategically, is a "raiding strategy" launched largely against "logistical" rather than "combat" targets – treating civilian and political will as a "logistical target" in this strategic sense – then how should we see drone attacks conducted in places like Somalia or Yemen or beyond? We should understand them, he said, as a "counter-raiding" strategy, aimed not at logistical targets, but instead at combat targets, the terrorists themselves. Although I do not regard this use of "combat" as a legal term – because, as suggested above, the proper legal frame for these strikes is

self-defense rather than "armed conflict" full-on – as a strategic description, this is apt.

14. This blunt description suggests, however, that it is a profound mistake to think that the importance of drones lies principally on the traditional battlefield, as a tactical support weapon, or even in the "spillover" areas of hostilities. In those situations, it is perhaps cheaper than the alternatives of manned systems, but is mostly a substitute for accepted and existing military capabilities. Drone attacks become genuinely special as a form of strategic, yet paradoxically discrete, air power outside of overt, ordinary, traditional hostilities – the farthest project of discrete force by the lightest of the light cavalry. As these capabilities develop in several different technological direction – on the one hand, smaller vehicles, more contained and limited kinetic weaponry, and improved sensors and, on the other hand, large-scale drone aircraft capable of going after infrastructure targets as the Israelis have done with their Heron UAVs – it is highly likely that they will become a weapon of choice for future presidents, future administrations, in future conflicts and circumstances of self-defense and vital national security of the United States. Not all the enemies of the United States, including transnational terrorists and non-state actors, will be Al Qaeda or the authors of 9/11. Future presidents will need these technologies and strategies – and will need to know that they have sound, publicly and firmly asserted legal defenses of their use, including both their use and their limits in law.

The Role of the CIA

15. The foregoing is intended to make clear that, first, "drone warfare" is really a set of heterogeneous activities, technologies, strategies, and actors. What the military does with drones in Afghanistan is different on many metrics from what the CIA does. The legal rationales offered to sustain the policy therefore need to take account of these differences as well.

16. The reality, however, is that the controversy centers on the use of drones that goes further "outwards" on the axes of (i) geographical and tactical remoteness of their use from a "traditional" armed conflict, (ii) the actor – uniformed military or civilian agency, (iii) covert or overt, or, in today's increasingly peculiar circumstances, "clandestine" – not covert, but not publicly acknowledged, either, (iv) relation to an existing overt war, or response to a new threat, thus raising the many controversies of "preventive" uses of force.

17. As a practical matter today, this simply means that what we are here discussing, ostensibly about "drones" and UAVs, is really, a millimeter below the surface, as much or more a discussion of the appropriate and lawful role of the CIA. We should be completely plain about this. Yes, there are issues related to the military use of drones on the battlefield. But the fundamental argument is over the expansion of drones beyond being a substitute weapon on traditional battlefields by the uniformed military to be a strategic tool used far from AfPak, by civilian agents of the CIA, even

perhaps – as Graham Allison and John Deutch urged in an op-ed last year – once again genuinely *covert*.

18. If I might respectfully suggest to the Subcommittee, then, the most fundamental question at issue here is not drones per se, but the technological development of drones forcing a discussion on the proper role of the CIA.

19. The lawfulness under US domestic law of the CIA to use force, in accordance with US statutes dating back to the founding of the CIA is not at issue. Use of force is not mentioned as such, but there is no question as to its lawfulness under US domestic law, provided that the steps required by the statute are taken. Congress has never seen fit overtly to name the use of force as such in the statutory language, preferring to use softer euphemisms and generalities. My view is that the time has come for Congress explicitly to revise the CIA statute to declare the so-called "Fifth Function" explicitly. I believe it is time to make that shift. Why?

20. Although unquestionably lawful under US domestic law, and viewed by the United States as lawful under international law as a matter of international law of self-defense, the international law position is beginning to come under pressure as parts of the international law community come to see human rights law, the laws of armed conflict, and other international law, as outlawing these kind of drone uses of force, particularly done covertly by civilian agents of a government on the territory of another. I emphasize that state practice and the views of states have long accepted the legitimacy (even without pronouncing on the legality of such) of such interventions, or at a minimum acquiesced in them, at least if they remain exceptional.

21. But that acquiescence by states as a matter of international law has largely concerned the issue of the territorial integrity of states set against an intervention aimed, for example, at attacking a terrorist in a safe haven. The practice today is contested increasingly on grounds of human rights – it is a prohibited act of extrajudicial execution, it is claimed, for the United States, for example, to launch its 2002 Yemen missile strike; it should have attempted, at a minimum, to detain and capture, offer surrender, before striking. And once having detained, it should then charge and try suspects on criminal grounds. That goes to a claim of unlawful targeting; in addition, of course, the concerns about unlawful collateral damage. The United States government, its agencies, officials, and counsel, in my view, have very little idea of the groundswell of an international campaign developing to de-legitimate the practice of drone warfare, starting with its conduct by the CIA.

22. Beyond this, as the CIA's central role in the Pakistan missions is on the front pages many days, important voices in the international law community are going further to attack not just the legal bases of drone warfare as such, but the fundamental premise of "intelligence" uses of force by the CIA. The view of much of the international law community is that all uses of force must be either law enforcement seeking to arrest a person, or else uniformed military of a state, engaged in armed conflict under its legal definitions in the laws of war. On that view, there is simply no legal space for the

CIA to undertake uses of force as it is doing in Pakistan or anywhere else. Armed conflict can only lawfully be undertaken by lawful combatants, and, on this view, officials of the CIA are not lawful combatants. Consider the following statement of a leading international law scholar at Notre Dame, Mary Ellen O'Connell:

> "Members of the CIA are not lawful combatants and their participation in killing persons – even in an armed conflict – is a crime."

23. This view was reinforced by a recent op-ed in the Washington Post by the eminent Georgetown and former West Point scholar of the laws of war, Gary Solis. Consider that Professor Solis said flatly that the CIA agents engaged in drone warfare are America's very own "unlawful combatants" – no less so, he said, than those they target:

> "In our current armed conflicts, there are two U.S. drone offensives. One is conducted by our armed forces, the other by the CIA. Every day, CIA agents and CIA contractors arm and pilot armed unmanned drones over combat zones in Afghanistan and Pakistan, including Pakistani tribal areas, to search out and kill Taliban and al-Qaeda fighters. In terms of international armed conflict, those CIA agents are, unlike their military counterparts but like the fighters they target, unlawful combatants. No less than their insurgent targets, they are fighters without uniforms or insignia, directly participating in hostilities, employing armed force contrary to the laws and customs of war. Even if they are sitting in Langley, the CIA pilots are civilians violating the requirement of distinction, a core concept of armed conflict, as they directly participate in hostilities."

24. My view differs from that of either Professor O'Connell or Professor Solis. In my view, the use of force by civilian CIA agents makes them combatants in the armed conflict underway in AfPak, because they are taking direct part in hostilities under traditional standards. In uses of force outside of AfPak, insofar as they are engaged in lawful exercises of the customary sovereign right of self-defense against a non-state actor, they are not combatants, but they are not thereby unlawful, nor is their use of force unlawful under international law. I have stated the basis for that legal conclusion in other places, and want to make a somewhat different observation here.

25. Professor Solis concludes by stating that the "prosecution of CIA personnel is certainly not suggested." I have trouble understanding why not, if one accepts the legal view of unlawful combatancy by the CIA. He has stated a case of legal equivalance between terrorist unlawful combatants and CIA unlawful combatants; why prosecution does not follow is unclear. Indeed, Professor O'Connell – saying aloud what others in the world of international law outside the United States, in my experience, think about this matter but do not quite so bluntly say – CIA participation in killing persons "is a crime." Professor Solis concludes by wondering whether

26. Drone warfare, therefore, raises questions on its own – but an underappreciated question is one that drone warfare *forces onto* the table – whether the United States government agrees, or does not agree, with its critics that the use of force by the CIA is unlawful combatancy, and a crime under international law. And if it disagrees as it presumably must, on what basis does it justify its lawfulness? Professor Solis suggests that senior officials of the CIA have understood that question; the inexplicable silence by the legal officials of the Obama administration as to how they would defend the international lawfulness of these policies suggests, to the contrary, that they do not. I would respectfully urge that Congress ought to insist on the appearance by the relevant legal counsel to agencies in the administration to state for the record why and on what basis these practices are lawful. Even as solely a practical matter, the silence of the administration's lawyers threatens to undermine the legitimacy, as a practical, moral, legal, and political matter, of targeted killing by the CIA using drones, in the future.

The Lack of Public Legal Justification from the Administration

27. The United States government is in a peculiar mismatch with respected to drone targeted killing, particularly as done by the CIA outside of immediate hostilities. On the one hand, senior leaders from the President and Vice-President on down, positively gush over the program and its successes. In today's newspapers – Thursday, March 11, 2010 – CIA director Panetta was on the front pages in what was clearly a carefully conceived effort to bolster the perception of the program in the public mind, defending its many successes. He is right to do so. The program, in my view, has been a stunning success. However, the CIA director's touting of its success is somewhat beside the point in current circumstances. The public, so far as I can tell, does not doubt the success of the program – it does precisely what the President said he would do, take the fight to the terrorists. The question is not its success – it is its *lawfulness*. And its lawfulness not as a single thing focused around drones, but instead the lawfulness of particular parts, conducted by particular actors.

28. As much as CIA director Panetta needs to put those successes to the public, he needs another public discussion entirely – one in which he puts his general counsel on stage to articulate why this form of killing people is not just effective, but legal. The utter failure of the administration's lawyers, anywhere across the administration, to do that is breathtaking. This reticence extends beyond the general counsel of the agency directly involved, the CIA; the principal US government lawyer on international law, the State Department Legal Adviser, has likewise expressed no formal view as to the correct legal view of targeted killing using drones by the CIA in a variety of settings. The mismatch can perhaps be best imagined by thinking of President Obama and Vice-President Biden and CIA director Panetta, standing in a press conference saying the glowing things they have said about these programs and celebrating their success – taking the fight to the enemy, denying them safe haven, going even into places like

Yemen or Somalia if necessary. Imagine, however, that their senior lawyers are standing beside them as they celebrate the ramping up of drone strikes month after month, far in excess of the Bush years – turning to the lawyers, all they can say is, "We have not yet reached a legal conclusion on this matter." Would the President and Vice-President have reason to believe they had been well-served by their lawyers? Lawyers, we all know, cannot be mere yes-men, and these issues are complicated and difficult – but we are more than a year into the Obama presidency, and these programs have emerged as expanding centerpieces of its on-offense counterterrorism policy, as well they should – and yet the lawyers publicly say nothing.

29. It is no doubt unfair to say that the lawyers have not reached conclusions. In some cases, that might be true, but most likely conclusions have been reached – but not shared with the public. This seems to me a profound mistake, on legal grounds and political grounds. There are ways to articulate the legal basis of these policies without having to reveal operational matters, and the legitimacy of these programs over the long term is distinctly at issue.

30. Congress could serve a useful function in pressing the administration to articulate publicly its rationale. Moreover, if Congress believes – as certainly I believe it should – that it ought to move legislatively to provide greater personal legal protections, against legal action both domestic and abroad, for CIA and other national security officers, then a crucial component of that is the public articulation of the basis on which the United States government will tell the rest of the world that its actions are lawful. That is not possible to do if all the relevant legal analysis is hidden away in a confidential OLC opinion.

"Reducing US Disincentives to Use Violence"

31. Many other issues could be considered in this discussion. The levels of collateral damage, for example – and whether they are high or low, to the extent they are known, on the basis of the realistic alternatives to targeted killing. Critics of drone-incurred collateral damage, after all, sometimes seem to imply that the alternative is no use of force at all – whereas a more realistic comparison might be the effects of a Pakistani army artillery barrage.

32. We could consider the evolution of technology and its likely effects on targeting decisions, collateral damage, ability to identify a target and get close enough to kill him and only him. I would urge Congress, in particular, to press forward research and development of these technologies, in part with funding, but also with assurances that those who develop these advances in far more discrete uses of force will not find themselves also at legal risk, domestically or abroad, down the road. The best is very firmly the enemy of the good – particularly when technology in these areas develops incrementally, one small step at a time.

33. I propose to close this written submission on a much more general note, however. It has become something of a trope in these discussions that the very availability of drones somehow makes it too easy for the US to kill, resort to violence and force. For example, I spoke before a group of US law students at one of our finest law schools some months ago, and was told by a student – in a group of students highly unlikely, it seemed to me, to enlist in the armed forces or join the CIA – that the problem with drones was that they "reduced the disincentives for the US to use force below their efficient level." I inquired as to how one would know the efficient level of the United States use of force and what would serve to induce it, and was told that the problem was that US personnel were not at personal risk – not enough US servicemen and women were at personal risk – from getting killed on the battlefield to deter the United States from needless violence. I was grateful, as I hope those reading this testimony would be, that one young woman spoke up, visibly upset, and said that it was hardly for privileged law students to sit and play God about efficient incentives and disincentives to violence – and she hoped that the United States would legally kill its enemies at least risk to its personnel.

34. I share that young woman's sentiment, of course. Drones are a major step forward toward much more discriminating uses of violence in war and self-defense – a step forward in humanitarian weapons technology. That development needs strong encouragement. But more fundamentally, I would hope that Congress would send strong signals, not just that it regards this technology as a humanitarian step forward, and not even the obvious message that the US intends to protect its serving men and women while it undertakes lawful uses of force and sees no contradiction with its legal duties in so doing.

35. The additional message that Congress should send is that targeted killing using drones has evolved as fast and far as it has since 9/11 because the United States confronts an enemy that has chosen to hide itself among civilians. What we call drone warfare is, as much as anything else, an attempt to counter, through technology, tactics by our enemies that rely upon systematic violations of the laws of war. The next time that someone raises the proposition that American "disincentives to violence" are reduced by drones, let them be reminded that, far more, drones represent an attempt to address an unlawful equilibrium in which one side takes obligations under the laws of war seriously, while the other side does not. That is the fundamental disequilibrium at work here, and drones the most measured and discrete response available – consistent with the policy that, as President Obama and all his administration have correctly said, the United States must take the fight to its enemies.

36. I thank the Subcommittee for its kind invitation to appear and offer testimony, and will endeavor to answer any questions you might have to the best of my ability.

Kenneth Anderson
Professor of Law
Washington College of Law, American University
Member, Task Force on National Security and Law

The Hoover Institution, Stanford University

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, currently 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).