QUESTIONS FOR THE RECORD
CAROLINE D. KRASS

Covert Action v. Traditional Military Activities

In an interview conducted shortly after the raid that killed Osama bin Laden, then-CIA Director Leon Panetta acknowledged that the operation was a CIA "covert operation," yet it was carried out by DOD personnel using DOD helicopters and other equipment and, because it was acknowledged, it was not "covert." By contrast, until recently, DOD's use of unmanned aerial vehicles to conduct targeted strikes outside of the "hot" battlefields of Afghanistan and Iraq was a secret.

When asked about the difference between "covert actions" conducted by CIA and clandestine military activities conducted by DOD in the prehearing questions provided by this Committee you wrote, "*the President selects which element is best suited for the particular mission based on his assessment of how best to further the national interest*." Historically speaking, however, Congress sought to impose a higher standard of oversight on "covert action," at least in part, because of the unique foreign policy implications of unacknowledged paramilitary operations.

- ***Has the distinction between covert action and clandestine military activities become a legal technicality left entirely to the discretion of the President?***

  ANSWER: No, the distinction between covert action and clandestine military activities is not a legal technicality left entirely to the discretion of the President. In Section 503(e) of the National Security Act, as amended, Congress defined the term "covert action" to mean "an activity or activities of the United States Government to influence political, economic, or military conditions abroad, where it is intended that the role of the United States Government will not be apparent or acknowledged publicly, but does not include . . . traditional . . . military activities or routine support to such activities." Any activities that fall within the statutory definition of covert action must comply with the congressional reporting requirements established by Section 503.

Unlike the term "covert action," Congress has not defined the term "clandestine military activities." As noted above, however, Section 503(e) of the National Security Act does except "traditional military activities" from the definition of "covert action." The legislative history of Section 503(e) provides helpful guidance on the meaning of "traditional military activities." According to the Conference Report for the Intelligence Authorization Act for Fiscal Year 1991, the Act that added for the first time a statutory definition of "covert action," "[a]ctivities that are not under the direction and control of a military commander should not be considered as 'traditional military activities.'" H.R. Conf. Rep. No. 102-166, at 30 (1991). Thus if the President chose to authorize a paramilitary operation to be conducted by military personnel who would not be under the direction and control of a military commander, the operation would have to be treated as a covert action, assuming the operation otherwise fit within the covert action definition.

- ***What types of paramilitary operations, if any, would be lawful only if carried out as a "covert action" pursuant to a Presidential finding?***

ANSWER: As indicated in my previous response, paramilitary operations that fall within the National Security Act's definition of covert action would be lawful only if carried out as a "covert action" pursuant to a Presidential finding.

Covert Action and the UN Charter and Geneva Conventions

In your answers to the Committee's pre-hearing questions about the UN Charter and the Geneva Conventions, you wrote, "*As a general matter, and including with respect to the use of force, the United States respects international law and complies with it to the extent possible in the execution of covert action activities*."

You also wrote that the U.N. Charter and the Geneva Conventions are NOT self-executing treaties, and therefore they are NOT legally binding upon actions carried out by the U.S. government, including covert actions.

- ***If, as you wrote in your answers to the Committee's pre-hearing questions, the U.S. respects international law and complies with it to the extent possible in the execution of covert action activities, how does the U.S. decide when to abide by international law and when it does not apply?***

  ANSWER: When reviewing covert action activities, the CIA General Counsel works with senior lawyers from the other departments and agencies, including those at the Justice, State, and Defense Departments, both to ensure that the proposed covert action activity does not violate U.S. domestic law and to identify any potential violations of international law. This review also considers whether there is a domestic legal requirement to follow provisions of international law in the execution of covert action activities—for example, if there are any relevant treaty provisions or principles of customary international law that have been implemented in a domestic statute. If there is such a domestic legal requirement, that requirement must be complied with.

  As the question indicates, I earlier stated that, as a general matter, the United States respects international law and complies with it to the extent possible in the execution of covert action activities. If confirmed, I would ensure that the Director is informed of the international law implications of proposed covert action activities to enable policy discussions regarding whether to recommend that the President nonetheless authorize the covert action activity.

- ***Should there be, and is there, special consideration when debating and approving a covert action, if that action would violate non-self-executing treaties or customary international law?***

  ANSWER: As I mentioned in my response to the prior question, if the CIA General Counsel, in consultation with senior lawyers from other departments and agencies participating in the review of the covert action activity, concludes that a covert action violates a non-self-executing treaty or customary international law, I believe it is his or her duty to ensure that the Director of the CIA is made aware of that conclusion so that robust policy discussions can occur when deciding whether to recommend that the President nonetheless authorize the covert action activity.

QUESTIONS FROM SENATOR WYDEN

1) On March 18, 2011, the Justice Department released a redacted version of a May 6, 2004, Office of Legal Counsel (OLC) opinion written by Assistant Attorney General Jack Goldsmith in response to a Freedom of Information Act action. As described in the public listing on the Justice Department's online FOIA reading room, this opinion was a "Memorandum Regarding Review of the Legality of the [President's Surveillance] Program."

- Did any of the redacted portions of the May 2004 OLC opinion address bulk telephony metadata collection?

  ANSWER: Unfortunately I am not at liberty to publicly disclose the currently redacted and deliberative content of the May 6, 2004 OLC opinion. However, in light of the declassification on December 20, 2013, of information relating to certain collection activities authorized by President George W. Bush, including programs involving the collection of telephony metadata in bulk, I believe that it would be appropriate for the May 6, 2004 OLC opinion to be reviewed to determine whether additional portions of the opinion can be declassified and are otherwise appropriate for public release.

- If so, did the OLC rely at that time on a statutory basis other than the Foreign Intelligence Surveillance Act for the authority to conduct bulk telephony metadata collection? If so, please describe this statutory basis.

  ANSWER: Because the review that I recommend above has not yet been completed, I cannot at this time provide additional information regarding the currently redacted and deliberative content of the May 6, 2004 OLC opinion.

- Has the OLC taken any action to withdraw this opinion?

  ANSWER: OLC generally does not reconsider the status of its prior opinions in the absence of a practical need by an element of the Executive Branch to know whether it can rely upon the advice in connection with its ongoing operations. My understanding is that any continuing NSA collection activities addressed in the May 6, 2004 opinion are being conducted pursuant to authorization by the Foreign Intelligence Surveillance Court, and thus do not rely on the advice in the opinion.

- In light of the recent declassification of information regarding various domestic surveillance programs, do you agree that the redactions of the May 2004 opinion should be reviewed, and that an updated version should be publicly released?

  ANSWER: Yes, I believe that it would be appropriate for the May 6, 2004 OLC opinion to be reviewed to determine whether additional portions of the opinion can be declassified and are otherwise appropriate for public release.

QUESTIONS FROM SENATOR UDALL

1) Other than the AUMF, are you aware of any existing authorities—legal, policy, or other authorities—that allow the President to use "all necessary and appropriate force" against "those nations, organizations, or persons" determined to plan authorize, commit or aide terrorist attacks against the United States?

ANSWER: Other than the Authorization for Use of Military Force, Pub. L. No. 107–40 (Sept. 18, 2001) (AUMF), the President has constitutional authority as Commander in Chief and Chief Executive and pursuant to his authority to conduct U.S. foreign relations to direct the use of force to further an important national interest, provided that the use of force is not sufficiently extensive in nature, scope, and duration to constitute a "war" requiring prior specific congressional approval under the Constitution's Declaration of War Clause. For example, the President may authorize the use of force in self-defense to protect against an imminent threat to U.S. national security, such as the threat posed by terrorist attacks against the United States.

2) Are you aware of any existing authorities—legal, policy, or other authorities—that allow the President to use "all necessary and appropriate force" against groups or individuals that haven't been designated "associated forces," e.g., affiliates or those who adhere to the beliefs of any terrorist organization that pose a significant threat to U.S. interests?

ANSWER: As stated in my previous answer, the President has constitutional authority to direct the use of force to further an important national interest, including addressing a significant threat to U.S. interests. For example, the President may authorize the use of force in self-defense to protect against an imminent threat to U.S. national security, such as the threat posed by terrorist attacks against the United States. As a policy matter, the President has determined that, outside areas of active hostilities, lethal force in counterterrorism operations will be used only to prevent or stop attacks against U.S. persons, and only when capture is not feasible and no other reasonable alternatives exist to effectively address the threat. *See Fact Sheet: U.S. Policy Standards and Procedures for the Use of Force in Counterterrorism Operations Outside the United States and Areas of Active Hostilities*, White House Press Office (May 23, 2013) ("Policy Standards"). Under these policy standards, which are either already in place or will be transitioned into place, the United States will use force against a target only if the target poses a continuing, imminent threat to U.S. persons. *Id*. At present, as the President explained in

his May 23, 2013 speech at the National Defense University (NDU), "[b]eyond the Afghan theater, we only target Al Qaeda and its associated forces."

3) Who determines whether such "nations, organizations or persons" are designated "associated forces"? Into which nations may the President or other authority send military forces to use "all necessary and appropriate force" against "those nations, organizations, or persons" determined to plan authorize, commit or aid terrorist attacks against the United States?

ANSWER: To qualify as an "associated force" of al Qaeda that fits within the AUMF passed by Congress in 2001, an entity must be (1) an organized, armed group that has entered the fight alongside al Qaeda, and (2) a co-belligerent with al Qaeda in hostilities against the United States or its coalition partners. An "associated force" does not include a terrorist group that merely embraces al Qaeda's ideology. Determining whether an entity qualifies as an "associated force" involves a case-by-case review through a coordinated interagency process, which involves not only senior lawyers from the relevant agencies and departments, but also senior intelligence, military, diplomatic, homeland security, and law enforcement professionals.

As the President explained in his May 23, 2013 NDU speech, the use of force abroad by the United States is constrained by consultations with our foreign partners and respect for state sovereignty and other international legal principles. Consistent with this statement, there are circumstances when the use of lethal force in another country is permissible, for example, when the country involved consents, or when another government is unable or unwilling to effectively take action against a threat to the country using force.

4) What is the process for identifying "associated forces"? Is this process in writing? What is the notification and approval process prior to action being taken against those "nations, organizations, or persons"?

ANSWER: As explained above, determining whether an entity qualifies as an "associated force" involves a case-by-case review through a coordinated interagency process, which involves intelligence, military, diplomatic, homeland security, and law enforcement professionals, as well senior lawyers from the relevant agencies and departments. That review includes evaluation of written intelligence assessments. As explained in the Policy Standards publicly released on May 23, 2013, decisions to use force—either for capture or otherwise—against individual terrorists outside the United States and areas of

active hostilities, are made at the most senior levels of the U.S. government, including the deputies and heads of key departments and agencies, as well as the senior lawyers of those departments and agencies.

5) Are operations against these forces dependent upon notification to the President before they are conducted under AUMF or any other authorities?

ANSWER: Although I am not familiar with the current practice, I would expect that the President would be notified of any determination that an entity qualifies as an associated force within the meaning of the AUMF.

6) Article II of the U.S. Constitution states that President shall "shall take Care that the Laws be faithfully executed." Article VI of the U.S. Constitution, known as the "Supremacy Clause," states that "this Constitution, and the Laws of the United States which shall be made in pursuance thereof; and all treaties made, or which shall be made, under the authority of the United States, shall be the supreme law of the land."

- If you learned of a covert action that, in your opinion, violated the Convention Against Torture or the Geneva Conventions, but did not necessarily violate a particular statute such as the Anti-Torture Act or the War Crimes Act, would you advise the Director of Central Intelligence that the action was unlawful?

  ANSWER: If I learned of a covert action that in my opinion violated the Convention Against Torture or the Geneva Conventions, but did not necessarily violate a particular U.S. statute, such as the Anti-Torture Act or the War Crimes Act, I would inform the DCIA of my view that the covert action would violate a treaty or treaties to which the United States is a party and would likely be considered unlawful by the international community, regardless of whether it was considered lawful under U.S. domestic law. I would also likely seek the advice of the Department of Justice, given the significance of the issue. If the Department of Justice agreed that the covert action would not be unlawful as a matter of U.S. domestic law, I would so advise the Director of the CIA. I would further advise the Director that he must ensure that the President and the rest of the National Security Council are aware of the international law issue raised by the covert action, specifically consider the ramifications to the United States should that covert action be revealed, and make an informed policy decision to proceed. Thereafter, the CIA should promptly and fully inform the Intelligence

Committees of the circumstances. If, on the other hand, the Department of Justice believed that the covert action would violate U.S. domestic law, I would advise the Director that the covert action must be terminated.

- If the Director of Central Intelligence decided to proceed with such an action against your advice, would you inform this committee?

  ANSWER: If I had advised the Director of the CIA that the covert action activity was illegal under U.S. domestic law, or that he must ensure policy-makers are aware of an international law issue before determining to proceed, and he disregarded my advice, yes, I would inform the intelligence committees.

7) How do you see the role of the General Counsel's office, if any, in determining whether information has been properly classified?

   ANSWER: Because I have not worked at the CIA, I do not have an informed view on the appropriate role of the General Counsel's office, if any, in determining whether information has been properly classified. As a general matter, Executive Order 13526 (2009) prescribes a uniform system for classifying and declassifying national security information. Lawyers often provide advice on interpreting the terms of Executive Orders, and the General Counsel's office thus may provide legal counsel on specific questions involving the proper interpretation of Executive Order 13526.

8) In 2007, after the passage of the 2006 Military Commissions Act and the 2005 Detainee Treatment Act and the Supreme Court's decision in *Hamdan v. Rumsfeld*, the Office of Legal Counsel concluded that a number of "enhanced interrogation" techniques remained lawful. The harshest of these was "sleep deprivation," carried out by shackling naked, diapered detainees to the ceiling for up to 96 consecutive hours. As you noted during your testimony in 2009, President Obama forbade the CIA from using these techniques, or any interrogation technique outlined in the Army Field Manual—but that prohibition is an Executive Order, which a future President could rescind. If President Obama's Executive Orders on CIA interrogation and detention were overturned, what binding legal authorities would prevent the CIA from engaging in the techniques authorized by the 2007 OLC memos?

   ANSWER: Under the President's January 22, 2009, Executive Order 13491, "Ensuring Lawful Interrogations," no U.S. Government personnel may rely on

any interpretation of the law governing interrogation issued by the Department of Justice between September 11, 2001 and January 20, 2009. *See* Exec. Order No. 13491, § 3(c) (2009). Further, on June 11, 2009, the Acting Assistant Attorney General in charge of the Office of Legal Counsel (OLC) determined that the July 20, 2007 opinion you reference was encompassed by that Presidential order and formally withdrew the opinion. I support that decision.

Were a subsequent President to revoke Executive Order 13491 and seek to authorize the CIA to engage in interrogation practices different from those authorized by and listed in the Army Field Manual, a new legal review by the Department of Justice would be required to analyze whether the proposed interrogation practices would be consistent with the Constitution, all statutes in place at that time, and any judicial decisions interpreting those authorities. As mentioned above, I support the withdrawal of the July 20, 2007 opinion.

QUESTIONS FROM SENATOR HEINRICH

1) What is your legal opinion on the participation of CIA officers in the interrogations of detainees in liaison custody in which harsh or extreme interrogation techniques are used? In your opinion, is it legal for CIA officers to continue their participation in these interrogations when they witness, know, or otherwise suspect that a detainee has been tortured by a liaison service?

   ANSWER: In my view, CIA officers should not continue to participate in the interrogation of detainees in liaison custody when harsh or extreme interrogation techniques are used. For example, CIA officers should not participate in any interrogations when they witness, know or otherwise suspect a detainee has been tortured or mistreated, as their participation could, depending upon the circumstances, result in violations of law or administrative restrictions. If confirmed, I will make myself familiar with and review current CIA policies and guidance on this subject.

   - In such a circumstance, is there any requirement—legal or policy—that the CIA officer involved report these activities either to the CIA Office of Inspector General, or to anybody?

     ANSWER: Although I am not familiar with CIA's internal policies, I believe the CIA officer involved should report the matter to his or her supervisors and to the Office of General Counsel, for a determination whether the activities must be reported to the CIA Office of Inspector General, the Department of Justice, the Intelligence Committees, and/or the President's Intelligence Oversight Board.

2) How do you see the role of the General Counsel's office, if any, in determining whether information has been be properly classified?

   ANSWER: Please see my answer above to a similar question from Senator Udall.

QUESTION FROM SENATOR LEVIN

1) At your confirmation hearing, you stated that, if confirmed, you would ensure that the Committee had access to information "as appropriate." Please identify any types of documents that you believe is appropriate for the Intelligence Community to withhold from the committee.

ANSWER: I believe that the CIA has an obligation to keep the Intelligence Committees fully and currently informed of its intelligence activities, including the legal basis for those activities, as required by sections 502 and 503 of the National Security Act. If confirmed, I would view advising the Agency about meeting this obligation to be an important part of my core responsibilities as General Counsel. I am not familiar with all of the types of documents at the CIA or the legal and policy issues associated with the disclosure of those documents. However, I am aware that there are statutory prohibitions that would make disclosure of certain types of documents to the Committee unlawful. For instance, if the CIA had received grand jury materials pursuant to Federal Rule of Criminal Procedure 6(e)(3)(D), I believe Rule 6(e) would prohibit disclosure of that grand jury material to the Committee. In addition, as I discussed at my confirmation hearing, I believe that the confidentiality of certain pre-decisional and deliberative materials, such as confidential legal advice, preserves space for full and frank deliberations within the Executive Branch. At the same time, the CIA has an obligation to keep the Committee currently and fully informed, with limited exceptions, of all intelligence activities in which the Agency is engaged, including the legal basis for those activities. If confirmed, I look forward to working with the Committee to ensure that the CIA accommodates the Committee's interest in such activities. I believe that enabling such oversight is especially important because the classified nature of much of what the Agency does increases the need for Congress to be informed and engaged.