

Report on Process for Determining Targets of Lethal or Capture Operations (U)

An explanation of the legal and policy considerations and approval processes used in determining whether an individual or group of individuals could be the target of a lethal or capture operation conducted by the Armed Forces of the United States outside the United States and outside of Afghanistan (U)

Submitted in response to the reporting requirement contained in section 1043 of the National Defense Authorization Act for Fiscal Year 2014 (Public Law 113-66).



The estimated cost of report or study for the Department of Defense is approximately \$5,260 for the 2014 Fiscal Year. This includes \$50 in expenses and \$5,210 in DoD labor.

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(U) This report is provided in response to the requirement in section 1043 of the National Defense Authorization Act for Fiscal Year 2014 (Public Law 113-66), which provides that “the Secretary of Defense shall submit to the congressional defense committees a report containing an explanation of the legal and policy considerations and approval processes used in determining whether an individual or group of individuals could be the target of a lethal operation or capture operation conducted by the Armed Forces of the United States outside the United States and outside of Afghanistan.”

~~(TS//NF)~~ On May 22, 2013, the President issued the Presidential Policy Guidance (PPG) on “Procedures for Approving Direct Action Against Terrorist Targets Located Outside the United States and Areas of Active Hostilities.” Direct action, as articulated in the PPG, refers to lethal and non-lethal uses of force, including capture operations, against terrorist targets.

~~(TS//NF)~~ The Secretary of Defense approved Department of Defense guidance for implementation of the PPG on December 12, 2013. That DoD guidance outlines the process by which all requests or proposals by Combatant Commanders for direct action are informed by input from three interconnected tracks: (1) a legal review, which is conducted by the DoD Office of General Counsel; (2) a policy review, which is conducted by the Office of the Under Secretary of Defense for Policy; and (3) an operational review, which is conducted by the Joint Staff. This report, therefore, outlines the legal, policy, and operational considerations, and the approval process used by DoD in determining whether an individual or group of individuals will be the target of a lethal operation or capture operation conducted by the Armed Forces of the United States outside the United States and outside of Afghanistan.

(U) The policy of the U.S. Government is that capture operations are always preferable to the use of lethal force in counterterrorism operations, because capturing a terrorist offers the best opportunity to gather meaningful intelligence to mitigate and disrupt terrorist plots. Capture operations are conducted only against suspects who may lawfully be captured or otherwise taken into custody by the United States and only when the operation can be conducted in accordance with applicable law and consistent with respect for the sovereignty of other States. Lethal force will not be proposed or pursued as punishment or as a substitute for prosecuting a terrorist suspect in a civilian court or a military commission. Lethal force is only used to prevent or stop attacks against U.S. persons, and even then, only when capture is not feasible and no other reasonable alternatives exist to address the threat effectively.

(U) Decisions to capture or otherwise use force against individual terrorists outside the United States and areas of active hostilities (e.g., Afghanistan) are made at the most senior levels of the U.S. Government, informed by departments and agencies with relevant expertise and institutional roles. Senior national security officials—including the deputies and heads of key departments and agencies—review proposals to make sure that U.S. policy standards are met, and attorneys—including the senior lawyers of key departments and agencies—review proposals to determine their legality.

Legal Considerations (U)

(U) All proposals for direct action, whether for a capture or a lethal operation, must undergo a legal review to ensure that the activity is lawful and may be conducted in accordance with applicable law. A legal review is done whether the intended operation is against, for example, a senior operational leader of a terrorist organization or the forces that organization is using or intends to use to conduct a terrorist attack.

(U) The principal domestic legal basis for DoD direct action operations is the 2001 Authorization for the Use of Military Force (Public Law 107-40) (AUMF). Another potential legal basis is Article II of the U.S. Constitution. The United States remains in a state of armed conflict with al-Qa'ida, the Taliban, and associated forces. The AUMF, enacted one week after the attacks of September 11, 2001, explicitly authorizes the President to "use all necessary and appropriate force against those nations, organizations, or persons he determines planned, authorized, committed, or aided the terrorist attacks that occurred on September 11, 2001, or harbored such organizations or persons, in order to prevent any further acts of international terrorism against the United States by such nations, organizations or persons." The AUMF does not geographically restrict the use of military force against al-Qa'ida and associated forces to Afghanistan.

(U) As a matter of international law, the United States may use lethal force in accordance with the laws of war in order to prosecute its armed conflict with al-Qa'ida and associated forces in response to the September 11, 2001 attacks, and the United States may also use force consistent with our inherent right of national self-defense. Moreover, whenever the U.S. military uses force on the territory of another State, international legal principles, including respect for another State's sovereignty and the law of armed conflict, imposes important constraints on the ability of the United States to act unilaterally – and on the way in which the United States can use force.

(U) We take extraordinary care to ensure that all offensive military operations are conducted in a manner consistent with well-established law of armed conflict requirements, including: (1) *military necessity*, which requires that the use of military force (including all measures needed to defeat the enemy as quickly and efficiently as possible, which are not forbidden by the law of war) be directed at accomplishing a valid military purpose; (2) *humanity*, which forbids the unnecessary infliction of suffering, injury, or destruction; (3) *distinction*, which requires that only lawful targets—such as combatants and other military objectives—may be intentionally targeted; and (4) *proportionality*, which requires that the anticipated collateral damage of an attack not be excessive in relation to the anticipated concrete and direct military advantage from the attack.

(U) These well-established rules that govern the use of force in armed conflict apply regardless of the type of weapon system used. From a legal standpoint, the use of remotely

piloted aircraft for lethal operations against identified individuals presents the same issues as similar operations using manned aircraft. However, advanced precision technology gives us a greater ability to observe and wait until the enemy is away from innocent civilians before launching a strike, and thus to minimize the risk to innocent civilians.

Policy Considerations (U)

~~(TS//NF)~~ The policy criteria that are considered for all DoD proposals for direct action by U.S. military forces, whether capture or lethal operations, are outlined in the PPG. First and foremost is the determination that the contemplated operation will protect U.S. lives. (b) (1)

[REDACTED]

~~(TS//NF)~~ For lethal operations, an informed, high-level official of the U.S. Government must determine that the proposed target poses a continuing, imminent threat to U.S. persons. Whether a threat is “imminent” incorporates consideration of the relevant window of opportunity to act, the possible harm that missing the window would cause to civilians, and the likelihood of heading off future disastrous attacks against the United States. The use of lethal operations against a proposed target is only proposed if there is a clear determination that no other reasonable alternatives to lethal action by U.S. military forces exist to address the threat to U.S. persons effectively. The criteria used in this assessment include a determination that the relevant governmental authorities in the country where action is contemplated against a proposed target consent or are unable or unwilling to address the threat to U.S. persons effectively, and that there are no other reasonable alternatives to lethal action to address the threat to U.S. persons effectively.

~~(TS//NF)~~ (b) (1)

[REDACTED]

~~(TS//NF)~~ All capture operations planning that contemplates the U.S. military holding a detainee pursuant to law of war authorities must address how and when the International

Committee of the Red Cross will be notified of, and provided timely access to, the detainee. When possible and consistent with the primary objective of collecting intelligence from a captured individual, intelligence will be collected in a manner that preserves the availability of long-term disposition options, including prosecution. Whenever possible, third-country custody options that are consistent with U.S. national security are explored. Where transfer to a third country is not assessed as feasible or consistent with U.S. national security interests, the preferred long-term disposition option for suspects captured or otherwise taken into custody by the United States is prosecution in a civilian court or, where available, a military commission. Consistent with that preference, wherever possible and consistent with the primary objective of collecting intelligence, intelligence will be collected in a manner that allows it to be used as evidence in a criminal prosecution. In accordance with PPG guidance, in no event will additional detainees be brought to the detention facilities at the Guantanamo Bay Naval Base.

~~(TS//NF)~~ The concurrence of [REDACTED] is also sought for any proposed capture or lethal operation, to inform the policy assessment concerning [REDACTED] factors that need to be considered. [REDACTED]

[REDACTED] Any disagreement raised by [REDACTED] with a proposed military counterterrorism operation are elevated to [REDACTED], respectively, with the President resolving any final disagreements between those Principals.

~~(TS//NF)~~ (b) (1)

Operational Considerations (U)

~~(TS//NF)~~ The PPG is clear that capture operations offer the best opportunity for meaningful intelligence gain from CT operations and the mitigation and disruption of terrorist threats. Therefore, the first operational consideration for proposals is whether a capture operation can be conducted and, if capture is feasible, how such an operation would be conducted. Only if capture is not feasible will a direct action lethal operation be conducted.

~~(TS//NF)~~ Another factor in the operational assessment is the PPG requirement for near certainty that the identified target is present. (b) (1)

(b) (1) [REDACTED]
[REDACTED]
[REDACTED]

~~(TS//NF)~~ Another operational requirement is near certainty that non-combatants will not be injured or killed. Non-combatants are understood to be individuals who may not be made the object of attack under the law of armed conflict. The term “non-combatant” does not include an individual who is targetable as part of a belligerent party to an armed conflict, an individual who is taking a direct part in hostilities, or an individual who is targetable in the exercise of national self-defense.

~~(TS//NF)~~ [REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]

~~(TS//NF)~~ [REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]

Approval Process (U)

~~(TS//NF)~~ In accordance with the PPG implementation guidance for DoD approved by the Secretary of Defense on December 12, 2013, proposals for direct action (i.e., capture or lethal operations) by Combatant Commanders are submitted to the Director for Operations, Joint Staff, who reviews them and then forwards them to a counterterrorism advisory group that consists of the Chairman and Vice Chairman of the Joint Chiefs of Staff, the Under Secretaries of Defense for Policy and Intelligence, and the Department of Defense General Counsel. The views of the counterterrorism advisory group participants are consolidated and presented to the Secretary of Defense for endorsement and, as appropriate, conditional approval of the request or proposal. The Secretary of Defense’s approval is conditional in that it is subject to interagency review and Presidential notification per the PPG.

~~(TS//NF)~~ (b) (1) [REDACTED]
[REDACTED]

(b) (1)

~~(S)~~ Once the Secretary of Defense submits a counterterrorism direct action request or proposal, the PPG provides a process for interagency review. During this interagency review process, appropriate officials from both the Office of the Secretary of Defense (OSD) and the Joint Staff present the proposal to senior national security officials at the Counterterrorism Security Group (CSG), Deputies Committee (DC), and Principals Committee (PC) meetings led by the National Security Council (NSC) staff. The NSC staff notifies Deputies of the results of the PPG-prescribed interagency review. Upon unanimous agreement among the Principals of the interagency departments and agencies participating in the review, the Joint Staff then communicates the Secretary of Defense's final approval and any additional guidance to the relevant Combatant Commanders for execution of the operation. If there is disagreement among Principals and the Secretary of Defense continues to endorse the proposed activity, the proposal is presented to the President for decision.

Section 1043 of the NDAA for FY 2014

SEC. 1043. REPORT ON PROCESS FOR DETERMINING TARGETS OF LETHAL OR CAPTURE OPERATIONS.

Not later than 90 days after the date of the enactment of this Act, the Secretary of Defense shall submit to the congressional defense committees a report containing an explanation of the legal and policy considerations and approval processes used in determining whether an individual or group of individuals could be the target of a lethal operation or capture operation conducted by the Armed Forces of the United States outside the United States and outside of Afghanistan.