

BACKGROUND

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Drone Strikes: The Legality of U.S. Targeting Terrorists Abroad

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Abstract

Targeted drone strikes by the United States against terrorists comply with international law, particularly with the law of war, both because the U.S. is engaged in an armed conflict with al-Qaeda and associated forces and because the U.S. has an inherent right of self-defense. Armed drones are particularly well suited to target enemy belligerents while minimizing the harm to civilian populations—per the law of war. The United States should preserve its ability to use all of the tools in its arsenal, including armed drones, to ensure that terrorist organizations and their operatives do not successfully attack the U.S. homeland.

The debate over the circumstances in which lethal force may be used against terrorist organizations operating from foreign territory is not new. Nor is it a new reality that the United States must confront armed, non-state actors that threaten its national security and the lives of its people.

Lethal force, including targeted drone strikes, may lawfully be used against an enemy belligerent during an armed conflict or under circumstances in which the belligerent constitutes an imminent threat to national security. Because the United States is currently engaged in an armed conflict with al-Qaeda and its associated forces, whose operatives continue to pose an imminent threat, U.S. armed forces may target them with lethal force wherever they may be found, whether on the “hot” battlefield of Afghanistan or operating from other nations, such as Pakistan and Yemen.

American targeted drone strikes comply with international law, in particular that part of international law known as the law of war,

KEY POINTS

- The U.S. may lawfully use targeted drone strikes against an enemy belligerent during an armed conflict or when the target constitutes an imminent threat to national security.
- The U.S. is currently engaged in an armed conflict with al-Qaeda and its associated forces, and U.S. armed forces may lawfully target them with lethal force wherever they may be found, whether on the “hot” battlefield of Afghanistan or elsewhere.
- U.S. targeted drone strikes comply with international law, particularly with the law of war, which requires belligerents to distinguish combatants from civilians and minimize harm to civilians.
- Critics of U.S. drone strikes would have the United States forget the lessons of September 11, when a small, non-state terrorist organization operating from a nation with which the U.S. was not at war planned and launched an attack that killed almost 3,000 Americans.
- The United States must preserve its ability to use all tools in its arsenal, including armed drones.

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which requires belligerents to distinguish combatants from civilians and minimize harm to the civilian population. Based on the information available to the public, it appears that the United States takes great care to adhere to these principles by targeting only combatants and by taking care to avoid civilian casualties. Indeed, the evidence indicates that armed drones are particularly well suited to carry out targeted strikes that meet the standards of the law of war.

This paper summarizes the main issues regarding the legality of targeted drone strikes and seeks to answer the central questions surrounding their use: Part I asks what is the legal basis for U.S. drone strikes on al-Qaeda, Part II asks in which countries may the U.S. conduct drone strikes, and Part III asks whether U.S. drone strikes adhere to international humanitarian law.¹

The paper recommends that:

1. The United States continue to affirm that it has the authority under the laws of war and its inherent right to self-defense to target and suppress threats to U.S. national security wherever they may be found,
2. Neither Congress nor the Obama Administration take any action or pass any legislation that would derogate from the September 2001 Authorization for Use of Military Force (AUMF), and
3. Congress and the Administration reject calls to establish a judicial or quasi-judicial “drone court” to scrutinize the targeting decisions made by U.S. military and intelligence officers.

Part I: What Is the Legal Basis for U.S. Drone Strikes on al-Qaeda?

Critics of U.S. drone strikes generally maintain that transnational terrorism should be treated as a law enforcement matter and that individual terrorists should be arrested and tried as common criminals. Such critics often claim that the United States is not engaged in an armed conflict with al-Qaeda that is recognized by international law and therefore is not justified in using lethal force except under highly restrictive, arguably prohibitive, circumstances.² In short, these critics believe that U.S. drone strikes in places such as Pakistan, Yemen, and Somalia violate international law.

To the American ear, the use of the term “law” in the phrase “international law” conjures up the idea of binding rules enforced by judicial authorities and law enforcement officials. However, what Americans understand as “law” in a domestic context is often out of place in considering U.S. compliance with “international law.” In the conduct of war, the U.S. President must comply with the supreme law of the land, which the U.S. Constitution makes clear consists of the Constitution itself, laws made in pursuance thereof, and treaties to which the United States is a party. The United States also makes a practice of following what is known as “customary international law,” which “is comprised of those practices and customs that States view as obligatory and that are engaged in or otherwise acceded to by a preponderance of States in a uniform and consistent fashion.”³

In the conduct of war, the United States must follow the relevant treaties to which it is a party, such as the four Geneva Conventions of 1949. The United States also follows customary principles of international humanitarian law, also known as the law of

1. This paper does not attempt to present a comprehensive analysis of all issues that have been raised in connection with drone strikes, but rather to provide an introduction to the most commonly asked legal questions. Questions regarding, for example, whether it is legal for the CIA to direct drone strikes, whether there is a duty to attempt to capture targets, and whether persons may be targeted on U.S. territory are not specifically addressed herein.

2. For example, see Mary Ellen O’Connell, “Unlawful Killing with Combat Drones: A Case Study of Pakistan, 2004–2009,” *Notre Dame Legal Studies Research Paper* No. 09-43, July 2010, http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1501144 (accessed March 26, 2013).

3. *United States v. Yousef*, 327 F.3d 56, 91 n. 24 (2d Cir. 2003), cert. denied, 540 U.S. 993 (2003). In *Yousef*, the U.S. Court of Appeals for the Second Circuit identified how a U.S. court, when considering a case involving international law, should determine the content of that law: “In the event that there is no ‘controlling executive or legislative act or judicial decision’ that the court must apply, a court should identify the norms of customary international law by looking to ‘the general usage and practice of nations [,] or by [looking to] judicial decisions recognizing and enforcing that law...[,or by] consulting the works of jurists writing professedly on public law.’ However, materials beyond the laws and practices of states, such as the writings of jurists, may serve only as ‘evidence’ of these principles of customary international law, to which courts may look ‘not for the speculations of their authors concerning what the law ought to be, but for trustworthy evidence of what the law really is.’” 327 F.3d at 93 (internal citations omitted).

armed conflict or the law of war. The United States does so both because it respects customary international law and because it has a practical interest in encouraging reciprocal observance of the law of war by others, so as to protect U.S. armed forces and its civilian population. The United States has an extensive program to train its armed forces in compliance with the Constitution, U.S. laws that relate to war, treaties to which the U.S. is a party, and the law of war.⁴

However, U.S. conformity to widely accepted principles of international law is of little or no matter to the critics of the U.S. drone program. Their primary objection seems to be that, since al-Qaeda is a loosely confederated terrorist organization scattered across different regions of the globe, the United States cannot be truly engaged in an armed conflict that would justify the use of lethal force.

Senior Obama Administration officials have consistently rejected that notion and have invoked both the existence of an armed conflict with al-Qaeda and the inherent right of the United States to defend itself against imminent attacks as justification for U.S. drone strikes against al-Qaeda and its associated forces:

- In March 2010, State Department Legal Adviser Harold Koh stated regarding targeted killing: “[A]s 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.”⁵
- In September 2011, White House counterterrorism adviser John Brennan stated: “[W]e are at war with al-Qa’ida. In an indisputable act of aggression, al-Qa’ida attacked our nation and killed nearly 3,000 innocent people. And as we

were reminded just last weekend, al-Qa’ida seeks to attack us again. Our ongoing armed conflict with al-Qa’ida stems from our right—recognized under international law—to self-defense.”⁶

- In March 2012, Attorney General Eric Holder stated: “Because the United States is in an armed conflict, we are authorized to take action against enemy belligerents under international law. The Constitution empowers the President to protect the nation from any imminent threat of violent attack. And international law recognizes the inherent right of national self-defense. None of this is changed by the fact that we are not in a conventional war.”⁷

In short, the United States may lawfully target al-Qaeda in multiple countries with lethal force under two related, but independent justifications:

1. The United States and al-Qaeda are two belligerents engaged in an armed conflict and
2. Even in the absence of an armed conflict, the United States has an inherent right to defend itself against the threat posed by al-Qaeda.

The U.S. Armed Conflict with al-Qaeda.

Because the United States is engaged in an ongoing armed conflict with al-Qaeda and its associated forces, it may lawfully target them with lethal force because the members of those organizations are belligerents. They may be targeted just as the U.S. targeted North Korean forces during the Korean War and Iraqi forces during the Gulf Wars.

Critics contend, however, that the United States is not now—and perhaps never has been—in an armed conflict with al-Qaeda that would be recognized under international law and that, accordingly, drone strikes in places such as Pakistan, Yemen, and

4. See U.S. Department of Defense, “DOD Law of War Program,” Directive 2311.01E, May 9, 2006, <http://www.dtic.mil/whs/directives/correspdf/231101e.pdf> (accessed March 26, 2013).

5. Harold Hongju Koh, “The Obama Administration and International Law,” speech at the Annual Meeting of the American Society of International Law, Washington, DC, March 25, 2010, <http://www.state.gov/s/l/releases/remarks/139119.htm> (accessed March 26, 2013).

6. John O. Brennan, “Strengthening Our Security by Adhering to Our Values and Laws,” remarks at Harvard Law School, September 16, 2011, <http://www.whitehouse.gov/the-press-office/2011/09/16/remarks-john-o-brennan-strengthening-our-security-adhering-our-values-an> (accessed March 26, 2013).

7. Eric Holder, speech at Northwestern University School of Law, Chicago, March 5, 2012, <http://www.justice.gov/iso/opa/ag/speeches/2012/ag-speech-1203051.html> (accessed March 26, 2013).

Somalia are not justified and are in fact “extrajudicial executions” prohibited by international human rights law.⁸

However, as a sovereign and independent nation, the United States may determine for itself whether it is at war with another nation or, in this case, with a transnational terrorist organization. U.S. officials have considered the United States to be in a state of armed conflict with al-Qaeda since at least the attacks on September 11, 2001. President George W. Bush’s Military Order of November 13, 2001, states:

International terrorists, including members of al Qaida, have carried out attacks on United States diplomatic and military personnel and facilities abroad and on citizens and property within the United States on a scale that has created a state of armed conflict that requires the use of the United States Armed Forces.⁹

As a sovereign and independent nation, the United States may determine for itself whether it is at war with another nation or, in this case, with a transnational terrorist organization.

Neither the Geneva Conventions nor their Additional Protocols define “armed conflict” or set a threshold of violent activity that must be present for an armed conflict to be deemed to exist between two belligerents. The general view is that the existence

of an armed conflict depends on the particular facts and circumstances of each case.¹⁰ One international court, the Appeals Chamber of the International Criminal Tribunal for the former Yugoslavia (ICTY) in the case of *Prosecutor v. Tadić*, devised a broad definition for armed conflict, which in its view exists “whenever there is a resort to armed force between States or protracted armed violence between governmental authorities and organized armed groups or between such groups within a State.”¹¹

That definition conforms to the two traditionally recognized types of armed conflict—“international” and “non-international.” When two governments engage in armed hostilities, such as when the United States was at war with Germany and Japan in World War II, it is considered an “international armed conflict” (IAC) under the Geneva Conventions.¹² By contrast, when the hostilities are confined to the territory of a single nation, such as when a government is engaged in an armed conflict with a non-state actor (usually a rebel force), it is considered a “non-international armed conflict” (NIAC).¹³ The current conflict in Syria between Syrian government forces and armed rebel groups falls into this category.

The ongoing armed conflict between the United States and al-Qaeda does not fit neatly into either category.¹⁴ Al-Qaeda is not a nation-state and therefore cannot be said to be engaged in an IAC with the United States. Neither is the United States fighting an armed uprising or other form of sustained, violent conflict with al-Qaeda entirely within U.S. territory, regardless of al-Qaeda’s clear intent to strike targets within the United States. Nevertheless, the United States is engaged in an armed conflict with the terrorist organization.

8. Asma Jahangir, “Civil and Political Rights, Including the Questions of Disappearances and Summary Executions,” E/CN.4/2003/3, U.N. Commission on Human Rights, January 13, 2003, p. 16, <http://unispal.un.org/UNISPAL.NSF/0/9290E9E5BC4B6EDD8525717200511711> (accessed March 26, 2013).

9. George W. Bush, “Detention, Treatment, and Trial of Certain Non-Citizens in the War Against Terrorism,” Military Order, November 13, 2001, in *Federal Register*, Vol. 66, No. 222 (November 16, 2001), pp. 57833–57836.

10. Robert P. Barnidge, “A Qualified Defense of American Drone Attacks in Northwest Pakistan Under International Humanitarian Law,” *Boston University International Law Journal*, Vol. 30, No. 2 (Summer 2012), pp. 423–425, <http://www.bu.edu/law/central/jd/organizations/journals/international/> (accessed March 26, 2013).

11. *Prosecutor v. Tadić: Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction*, International Criminal Tribunal for the Former Yugoslavia, IT-94-1-A, ¶ 70, October 2, 1995.

12. Geneva Conventions, Common Article 2.

13. Geneva Conventions, Common Article 3.

14. Some commentators have characterized the United States’ conflict with al-Qaeda as an “internationalized” NIAC. Ryan J. Vogel, “Drone Warfare and the Law of Armed Conflict,” *Denver Journal of International Law and Policy*, Vol. 39, No. 1 (Winter 2011), pp. 110–112.

Al-Qaeda is an organized, armed, transnational non-state actor that has planned and executed attacks against the United States while being harbored in Afghanistan. From October 2001 until the establishment of the current Afghan government, the United States was arguably engaged in an IAC with Afghanistan, ruled then by the Taliban government.¹⁵ Since that time the United States and the new Afghan government have arguably been engaged in a NIAC, together fighting the remaining elements of the Taliban and its al-Qaeda allies operating within the borders of Afghanistan.

Complicating matters regarding the designation of the conflict under international law is the fact that al-Qaeda and Taliban fighters have not confined their activities to Afghan territory, but have crossed the border into the Federally Administered Tribal Areas (FATA) of northwestern Pakistan, where they continue to plan and launch attacks against U.S. and Afghan forces. Further complicating matters is the fact that al-Qaeda and its associated forces are no longer confined to Afghanistan and the FATA of Pakistan, but have dispersed, spreading their operations to nations in the Middle East and Africa.

Because al-Qaeda twice declared war on the United States, successfully attacked the United States both before and after September 11, and has not abandoned its intent to launch future attacks, the United States continues to consider itself in a state of armed conflict.¹⁶ Both Congress and the executive branch have consistently characterized the conflict with al-Qaeda as an armed conflict governed by the law of war.¹⁷ The Bush Administration's initial position was that the U.S. "global war on terror" was neither an IAC nor a NIAC because al-Qaeda is not a

nation-state and operates from more than one country. In 2006, the U.S. Supreme Court disagreed in *Hamdan v. Rumsfeld*, ruling that, in the context of the treatment of detainees, the conflict was governed by Common Article 3 of the Geneva Conventions.¹⁸ The *Hamdan* decision effectively categorized the conflict between the United States and al-Qaeda as a NIAC, a view that the Obama Administration has since adopted.¹⁹

Critics contend that the hostilities between the United States and al-Qaeda do not qualify as an armed conflict under the ICTY's decision in *Prosecutor v. Tadić* because the conflict is not sufficiently intense. The ICTY Appeals Chamber further refined its definition of armed conflict, stating that the distinction between an armed conflict and something falling short is the intensity of the conflict and the organization of the parties to the conflict.²⁰ In this manner the ICTY has attempted to draw a line between sustained armed conflicts between two belligerents and, in contrast, riots and other civil unrest falling short of war. Professor Kenneth Anderson of American University's Washington College of Law writes that the existence of a NIAC requires "something more than merely fleeting, sporadic, relatively minor violence" such as "violence that is sustained, intense, systematic, and organized."²¹

The threshold of hostilities between the United States and al-Qaeda has been high enough that it may be said that a NIAC continues between the two belligerents. In Afghanistan, the United States, its NATO allies, and Afghan forces continue to fight al-Qaeda and Taliban militants, many of whom have moved their operations into the frontier region of Pakistan. Operatives and militants who have sworn

15. *Ibid.*

16. The Heritage Foundation, "Al-Qaeda: Declarations & Acts of War," <http://www.heritage.org/research/projects/enemy-detention/al-qaeda-declarations>.

17. Vogel, "Drone Warfare and the Law of Armed Conflict," pp. 106-108.

18. *Hamdan v. Rumsfeld*, 548 U.S. 557 (2006), and Jelena Pejic, "The Protective Scope of Common Article 3: More Than Meets the Eye," *International Review of the Red Cross*, Vol. 93, No. 881 (March 2011), p. 7, <http://www.icrc.org/fre/assets/files/review/2011/irrc-881-pejic.pdf> (accessed March 26, 2013).

19. *Al-Aulaqi v. Obama et al.*, "Opposition to Plaintiff's Motion for Preliminary Injunction and Memorandum in Support of Defendants' Motion to Dismiss," U.S. District Court for the District of Columbia, p. 1, September 24, 2010, <http://static1.firedoglake.com/28/files/2010/09/100925-Al-Aulaqi-USG-PI-Opp-MTD-Brief-FILED.pdf> (accessed March 26, 2013).

20. *Prosecutor v. Tadić*, "Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction," ¶ 70.

21. Kenneth Anderson, "Targeted Killing and Drone Warfare: How We Came to Debate Whether There Is a 'Legal Geography of War,'" American University, Washington College of Law *Research Paper* No. 2011-16, April 26, 2011, pp. 5-7, http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1824783 (accessed March 26, 2013).

allegiance to al-Qaeda continue to plan attacks on the United States from Pakistan, Yemen, and the Sahel region of North Africa.

Indeed, since September 11, the United States has thwarted more than 50 terrorist plots, many of which emanated from Afghanistan, Pakistan, and Yemen.²² These attacks were planned and financed by al-Qaeda and its associates and originated from countries beyond the “hot” battlefield of Afghanistan. Terrorists who desire to execute attacks within the United States have sought and received training in Pakistan, including Jose Padilla, Uzair Parach, Hamid Hayat, Bryant Neal Vinas, Najibullah Zazi, and Faisal Shahzad. Both the “cargo planes bomb plot” to bomb Chicago-area synagogues and the attempt by “Christmas Day Bomber” Umar Farouk Abdulmutallab were hatched in Yemen.²³

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Whether the sum total of these attempted terrorist attacks are of an intensity sufficient to sustain an armed conflict is a debatable point, but in the end analysis the United States will make that final determination. To date, the United States has determined that it is indeed engaged in an armed conflict with al-Qaeda and its associated forces and may therefore target any of its leaders, facilitators, and operatives wherever they are based.

Even if international lawyers and human rights activists believe that the United States is not engaged in an armed conflict with al-Qaeda, it does not necessarily follow that the U.S. cannot use lethal force against al-Qaeda militants wherever they choose to mount attacks against the United States. To the contrary, the United States need not sit idly by and ignore threats to its citizens simply

because the hostilities with al-Qaeda are not sufficiently intense.

The Right to Self-Defense. The United States may use lethal force to defend itself against imminent threats to its citizens and its security. It may do so without a formal congressional declaration of war, without a congressional authorization for the use of military force, and without the existence of an armed conflict recognized under international law. Self-defense is an inherent right of a nation-state.

Indeed, a nation’s inherent right to defend itself in the absence of a Security Council resolution is contemplated by the United Nations Charter. Specifically, Article 51 of the Charter states: “Nothing in the present Charter shall impair the inherent right of individual or collective self-defence if an armed attack occurs against a Member of the United Nations, until the Security Council has taken measures necessary to maintain international peace and security.”²⁴

On the day after September 11, the U.N. Security Council unanimously condemned al-Qaeda’s terrorist attacks “in the strongest terms” and regarded “such acts, like any act of international terrorism, as a threat to international peace and security.” Security Council Resolution 1368 called on all nations “to work together urgently to bring to justice the perpetrators, organizers and sponsors of these terrorist attacks and stresses that those responsible for aiding, supporting or harbouring the perpetrators, organizers and sponsors of these acts will be held accountable.” Importantly, the Security Council reaffirmed and recognized “the inherent right of individual or collective self-defence in accordance with the Charter.”²⁵

Yet critics contend that the U.S. may not invoke that very right, which is acknowledged by Article 51, against operatives in Pakistan or Yemen because those particular operatives either did not launch an “armed attack” against the United States or because the operatives do not pose an “imminent threat” to the United States. Such critics take an unreasonably narrow view of Article 51 and a nation’s right to self-defense.

22. James Jay Carafano, Steven P. Bucci, and Jessica Zuckerman, “Fifty Terror Plots Foiled Since 9/11: The Homegrown Threat and the Long War on Terrorism,” Heritage Foundation *Backgrounder* No. 2682, April 25, 2012, <http://www.heritage.org/research/reports/2012/04/fifty-terror-plots-foiled-since-9-11-the-homegrown-threat-and-the-long-war-on-terrorism>.

23. *Ibid.*

24. Charter of the United Nations, October 24, 1945, Art. 51, <http://www.un.org/en/documents/charter/index.shtml> (accessed March 26, 2013).

25. U.N. Security Council, Resolution 1368, S/RES/1368, September 12, 2001.

In the current age when, less and less, nations mass their tanks and troops on the border, the calculation regarding what is an “imminent” threat must be considered in the proper context. Whether assessing threats in 1945 or in the post-9/11 world, the right to self-defense “is not a static concept but rather one that must be reasonable and appropriate to the threats and circumstances of the day.”²⁶

Senior Obama Administration officials, following the lead of the Bush Administration, have adopted an approach to what constitutes an imminent threat that may not comport with current academic opinion, but does find increasing support among nations. As related by then-White House counterterrorism adviser John Brennan:

We are finding increasing recognition in the international community that a more flexible understanding of “imminence” may be appropriate when dealing with terrorist groups, in part because threats posed by non-state actors do not present themselves in the ways that evidenced imminence in more traditional conflicts. After all, al-Qa’ida does not follow a traditional command structure, wear uniforms, carry its arms openly, or mass its troops at the borders of the nations it attacks. Nonetheless, it possesses the demonstrated capability to strike with little notice and cause significant civilian or military casualties. Over time, an increasing number of our international counterterrorism partners have begun to recognize that the traditional conception of what constitutes an “imminent” attack should be broadened in light of the modern-day capabilities, techniques, and technological innovations of terrorist organizations.²⁷

It is unlikely that national governments charged with protecting their citizens will ever reach a meeting of the minds with certain international legal academics, human rights activists, and other critics. However, since such critics have yet to formulate a set of principles or real-world practices that adequately meet the threat posed by violent, transnational, non-state terrorist organizations, the United

States and other nations are justified in confronting that threat as it currently exists while striving to comply with recognized tenets of international law.

Part II: In Which Countries May the U.S. Conduct Drone Strikes?

While U.S. drone strikes against al-Qaeda and Taliban targets in Afghanistan have garnered little attention by comparison, human rights activists and international legal academics have criticized strikes on the territory of countries outside that “hot” battlefield for several years. However, the ongoing armed conflict between the United States and al-Qaeda is not confined to the territory where the September 11 plot was hatched. Nor is the U.S. right to defend itself against imminent threats posed by al-Qaeda restricted to only Afghanistan. While al-Qaeda and its associated forces have metastasized to different parts of the world, they have maintained their intent to strike the United States and kill its citizens wherever they may be. The United States must continue to deter and eliminate that threat with drone strikes and any other means at its disposal.

U.S. armed forces possess the domestic authority to use force against al-Qaeda wherever its operatives may be located and found to pose a threat to U.S. national security.

Congressional Authorization. As an initial matter, it should be noted that U.S. armed forces possess the domestic authority to use force against al-Qaeda wherever its operatives may be located and found to pose a threat to U.S. national security. Days after the September 11 attacks, Congress passed the Authorization for Use of Military Force.²⁸ The AUMF’s stated purpose is “to prevent any future acts of international terrorism against the United States” by any person, organization, or nation that the President determines to have “planned, authorized, committed, or aided” the September 11 attacks.

26. Daniel Bethlehem, “Self-Defense Against an Imminent or Actual Armed Attack by Nonstate Actors,” *The American Journal of International Law*, Vol. 106, No. 4 (October 2012), p. 772.

27. Brennan, “Strengthening Our Security by Adhering to Our Values and Laws.”

28. Authorization for Use of Military Force, Public Law 107-40, September 14, 2001.

To achieve that end, the President may “use all necessary and appropriate force against those nations, organizations, or persons.”

Congress attached no temporal or geographic limitations to its authorization. Nothing in the AUMF limits U.S. forces from pursuing al-Qaeda outside the borders of Afghanistan or requires U.S. forces to cease hostilities upon achieving a particular military objective. As long as a person, organization, or nation is found to have planned, authorized, committed, or aided the September 11 attacks, the President may use all force he deems necessary and appropriate against that person, organization, or nation to prevent any future act of terrorism against the United States.

Neither the U.N. Charter nor Security Council Resolution 1368 places geographic limitations on the right of self-defense. When elements of al-Qaeda and the Taliban plan and launch attacks against the United States or Afghan forces from Pakistan, Yemen, or elsewhere, the United States has the right to target those elements on Pakistani and Yemeni soil. The fact that al-Qaeda and its associated forces currently operate from bases in Yemen, Somalia, and the Sahel does not somehow extinguish the right of the United States to defend itself.

Geographic Constraints on Targeting a Transnational Threat? Critics of U.S. drone attacks maintain that international law prohibits the United States from striking al-Qaeda operatives located beyond “active” battlefields such as Afghanistan. Such critics are alarmed that the United States carries out targeted strikes in Pakistan, Yemen, and Somalia—nations with which the United States is not currently at war.

But the United States has every right to defend itself against al-Qaeda and strike it wherever it operates. Indeed, throughout its history the United States has lawfully defended itself against attacks made by non-state actors operating from the territories of nations with which the United States was not at war. As related by Professor Jordan J. Paust of the University of Houston Law Center:

- In 1817 U.S. forces attacked and temporarily occupied Amelia Island (near Jacksonville, Florida),

then claimed by Spain, to thwart attacks from “pirates, smugglers, and privateers” using the island as a base to attack U.S. shipping.

- Similarly, from 1814 to 1818, “the United States claimed self-defense in partial justification for use of force against Seminole Indians and former slaves...in response to their attacks emanating from Spanish Florida.”
- In 1916, the United States used armed force on Mexican territory during its pursuit of Francisco “Pancho” Villa in response to his attacks on towns in Texas and New Mexico.
- In 1998, in response to the terrorist bombings of U.S. embassies in Kenya and Tanzania, the United States launched cruise missile strikes against targets in Afghanistan and Sudan. Notably, the United States justified its strikes based on “the right of self-defense confirmed by Article 51 of the Charter.”²⁹

Importantly, in none of these instances did the hostilities between the United States and the non-state actors—pirates, raiders, and terrorists—rise to a level of an armed conflict, but they were rather exercises of the inherent right of self-defense. It is also clear that none of the other nations involved—Spain, Mexico, Afghanistan, and Sudan—considered themselves to be at war with the United States, or vice versa, at the time that the U.S. used lethal force on their territory to confront the threats posed by the non-state actors.

The right to attack enemy forces wherever they may be makes sense at a basic level within the context of an armed conflict. When war was declared against Germany and Japan in December 1941, the United States did not restrict its military objectives to expelling German forces from France, but confronted them in several other nations with which the United States was not at war. During the course of World War II, the United States fought in battles to expel German forces from North Africa and the Netherlands, and Japanese forces from islands scattered across the Pacific Ocean. U.S. and Allied forces

29. Jordan J. Paust, “Self-Defense Targetings of Non-State Actors and Permissibility of U.S. Use of Drones in Pakistan,” *Journal of Transnational Law & Policy*, Vol. 19, No. 2 (Spring 2010), pp. 244-248, http://www.law.fsu.edu/journals/transnational/vol19_2/paust.pdf (accessed March 26, 2013).

would never have considered confining the conflict to only the nations in which the initial hostilities broke out.

A Question of Consent. By targeting and striking al-Qaeda operatives in Pakistan, Yemen, and elsewhere outside Afghanistan, the United States is either engaging in a NIAC, performing a legitimate act of self-defense, or—as critics of U.S. drone policy allege—perpetrating illegitimate acts of “aggression” on the territory of those nations. The first two are permitted by international law, and the latter is prohibited. Press reports indicate the former to be the case, at least at present, because the governments of Pakistan and Yemen have consented to the U.S. strikes.

In September 2012, *The Wall Street Journal* reported that the U.S. and Pakistani governments have an arrangement that permits the United States to target al-Qaeda and Taliban militants operating from the FATA while allowing Pakistani officials to maintain a level of consensual ambiguity.³⁰ According to the press report, for many years the CIA has faxed the Inter-Services Intelligence (ISI), Pakistan’s intelligence service, on a regular basis to outline “broad areas” of airspace within Pakistan where the United States intends to conduct drone strikes. Without formally endorsing a drone strike, the ISI would acknowledge receipt of the fax and clear the airspace identified by the CIA, thereby giving implied if not express consent to the United States to conduct drone operations.³¹

There is no such ambiguity about U.S. drone strikes in Yemen. In a September 2012 interview described in *The Washington Post*, Yemeni President Abed Rabbo Mansour Hadi is quoted as saying in regard to U.S. targeted strikes against Al-Qaeda in the Arabian Peninsula (AQAP) that “[e]very operation, before taking place, they take permission from the president.”³²

Consent, implicit or explicit, given by government representatives in countries such as Pakistan and Yemen is certainly desirable, but such consent is not absolutely necessary under international law. The United States must be prepared to defend itself against al-Qaeda even in nations that expressly withhold their consent. The United States has so acted in the past. As previously noted, the United States did not seek or receive the consent of Spain, Mexico, Afghanistan, or Sudan before striking pirates, raiders, and terrorists operating from their respective territories.

Of course, the United States should not violate the sovereignty of another nation lightly or without clear cause. Yet as former State Department Legal Adviser Abraham Sofaer stated in 1989, sovereignty cannot act as an absolute bar to the lawful exercise of self-defense:

[T]erritorial integrity is not entitled to absolute deference in international law, and our national defense requires that we claim the right to act within the territory of other States in appropriate circumstances, however infrequently we may choose for prudential reasons to exercise it.³³

Sofaer went on to state that the United States supports “the legality of a nation attacking a terrorist base from which attacks on its citizens are being launched, if the host country either is unwilling or unable to stop the terrorists from using its territory for that purpose.” In situations in which a nation is either unwilling or unable to suppress a threat to the United States posed by al-Qaeda operatives within its borders, the United States has a right under international law to suppress that threat with force, even without the consent of the nation concerned. The “unwilling or unable” doctrine is widely accepted under international law, although the limits of the

30. Adam Entous, Siobhan Gorman, and Evan Perez, “U.S. Unease over Drone Strikes,” *The Wall Street Journal*, September 26, 2012, <http://online.wsj.com/article/SB10000872396390444100404577641520858011452.html> (accessed March 26, 2013; subscription required).

31. According to the same press report, the ISI ceased acknowledging receipt of the CIA faxes after the United States conducted the raid on the compound of Osama bin Laden, but has continued to clear the airspace as before and has not interfered with the drone missions.

32. Greg Miller, “In Interview, Yemeni President Acknowledges Approving U.S. Drone Strikes,” *The Washington Post*, September 29, 2012, http://www.washingtonpost.com/world/national-security/yemeni-president-acknowledges-approving-us-drone-strikes/2012/09/29/09bec2ae-0a56-11e2-affd-d6c7f20a83bf_story.html (accessed March 27, 2013). See also Adam Entous, Siobhan Gorman, and Julian E. Barnes, “U.S. Relaxes Drone Rules,” *The Wall Street Journal*, April 26, 2012, <http://online.wsj.com/article/SB10001424052702304723304577366251852418174.html> (accessed March 27, 2013; subscription required).

33. Abraham D. Sofaer, “Terrorism, the Law, and the National Defense,” *Military Law Review*, Vol. 126, p. 106 (Fall 1989), pp. 89-123, <https://www.jagcnet.army.mil/DOCLIBS/MILITARYLAWREVIEW.NSF> (accessed March 27, 2013).

doctrine are not fully defined.³⁴ Whether a nation consents to U.S. targeted strikes or is otherwise unwilling or unable to suppress a terrorist organization operating within its borders must necessarily be assessed on a case-by-case basis.

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Part III: Do U.S. Drone Strikes Adhere to the Law of War?

Targeted strikes, like any other military attack by U.S. armed forces, must adhere to recognized principles of the law of war. This is true whether the United States is engaged in an NIAC or if it is exercising its inherent right to self-defense. The principles of the law of war are relevant to any armed attack, whether a Marine sniper firing on a distant combatant, Army attack helicopters striking an armored column, or a Navy warship targeting a bunker with a cruise missile.

The fundamental principles commonly discussed in the debate over drone strikes are necessity, distinction, and proportionality.

Necessity and Distinction. Under the law of war, whether engaging in hostilities pursuant to a NIAC or exercising the inherent right to self-defense, an armed attack must adhere to the principles of necessity and distinction. A combatant must target only other combatants (the principle of “distinction”) and targeting such combatants must be considered militarily necessary to bring about the submission of the enemy (the principle of “necessity”).

The principle of distinction requires that only combatants and military objectives be targeted. While civilian casualties may occur during hostilities, intentionally targeting civilians is forbidden unless they “directly participate in hostilities.”³⁵ The principle of necessity requires that an attack against an enemy provide the attacker with a “definite military advantage” for the purpose of effecting the “complete submission of the enemy as soon as possible.”³⁶

In a traditional armed conflict, decisions regarding whether a target satisfies the tests of distinction and necessity are straightforward. Enemy tanks, artillery, aircraft, warships, and infantry are obviously non-civilian in nature and almost always qualify as necessary to destroy in order to bring about the enemy’s submission. The conflict against al-Qaeda is less traditional because U.S. targeting analysis in the context of drone strikes focuses almost exclusively on individual enemy combatants—the commanders, lieutenants, facilitators, and other al-Qaeda operatives—rather than airfields, munitions plants, and the like. Moreover, al-Qaeda combatants regularly dress as civilians, pose as non-combatants, operate from civilian areas, and even use civilians and other protected persons and objects as shields.³⁷

Critics of U.S. targeted strikes on al-Qaeda commanders and facilitators often condemn such strikes as militarily unnecessary or even “assassinations” said to be prohibited by international law. Responding to allegations that targeting individual commanders is somehow unlawful under international law, State Department Legal Adviser Harold Koh stated:

[S]ome 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

34. Ashley Deeks, “‘Unwilling or Unable’: Toward a Normative Framework for Extraterritorial Self-Defense,” *Virginia Journal of International Law*, Vol. 52, No. 3 (March 2012), pp. 483-550, http://www.vjil.org/assets/pdfs/vol52/issue3/Deeks_Post_Production.pdf (accessed March 27, 2013).

35. The scope of what constitutes “direct participation in hostilities” is debatable. For example, see Nils Melzer, “Interpretive Guidance on the Notion of Direct Participation in Hostilities Under International Humanitarian Law,” International Committee of the Red Cross, May 2009, <http://www.icrc.org/eng/assets/files/other/icrc-002-0990.pdf> (accessed March 27, 2013).

36. Vogel, “Drone Warfare and the Law of Armed Conflict,” p. 115.

37. *Ibid.*, p. 118, note 89.

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.³⁸

In any event, press reports indicate that the Obama Administration goes to great lengths in determining that an individual al-Qaeda operative is a non-civilian, militarily necessary target before qualifying the operative as subject to lethal force.

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The publicly available information on the Obama Administration's targeting analysis indicates that the U.S. military and CIA adhere to the principles of distinction and necessity. For example, in an April 2012 speech, counterterrorism adviser John Brennan described how armed drones are particularly well suited to carry out strikes against al-Qaeda militants while respecting the principle of distinction:

Targeted strikes conform to the principle of distinction, the idea that only military objectives may be intentionally targeted and that civilians

are protected from being intentionally targeted. With the unprecedented ability of remotely piloted aircraft to precisely target a military objective while minimizing collateral damage, one could argue that never before has there been a weapon that allows us to distinguish more effectively between an al-Qaeda terrorist and innocent civilians.³⁹

Reports in *The New York Times* and *The Washington Post* indicate that military, intelligence, and Administration officials oversee a rigorous process to determine whether a particular individual is necessary to target.⁴⁰ According to these reports, a large group of national security officials convenes regularly to discuss and debate various individuals for inclusion on a list of approved targets. The "biographies" of the potential targets are discussed, and the debate over whether to include an individual on the list can stretch over several meeting sessions. Factors such as the imminence of the threat posed by the individual and the feasibility of his capture are taken into account. A parallel process, described in a speech by CIA General Counsel Stephen Preston, is conducted by the CIA for targeted strikes.⁴¹ The targets nominated are ultimately sent to President Obama for approval, who "signs off on every strike in Yemen and Somalia and also on the more complex and risky strikes in Pakistan—about a third of the total."⁴²

Over time the process for selecting targets evolved into a "next generation" targeting list known as the "disposition matrix." The National Counterterrorism Center (NCTC) developed the matrix to "augment" the separate, but overlapping lists developed by the Pentagon and the CIA, resulting in "a single, continually evolving database in which biographies, locations, known associates and affiliated organizations are all catalogued." The

38. Koh, "The Obama Administration and International Law."

39. John O. Brennan, "The Efficacy and Ethics of U.S. Counterterrorism Strategy," April 30, 2012, <http://www.wilsoncenter.org/event/the-efficacy-and-ethics-us-counterterrorism-strategy> (accessed March 27, 2013).

40. Jo Becker and Scott Shane, "Secret 'Kill List' Proves a Test of Obama's Principles and Will," *The New York Times*, May 29, 2012, <http://www.nytimes.com/2012/05/29/world/obamas-leadership-in-war-on-al-qaeda.html> (accessed March 27, 2013), and Greg Miller, "Plan for Hunting Terrorists Signals U.S. Intends to Keep Adding Names to Kill Lists," *The Washington Post*, October 23, 2012, http://articles.washingtonpost.com/2012-10-23/world/35500278_1_drone-campaign-obama-administration-matrix (accessed March 27, 2013).

41. Stephen W. Preston, "CIA and the Rule of Law," speech at Harvard Law School, April 10, 2012, <http://www.cfr.org/rule-of-law/cia-general-counsel-stephen-prestons-remarks-rule-law-april-2012/p27912> (accessed March 27, 2013).

42. Becker and Shane, "Secret 'Kill List' Proves a Test of Obama's Principles and Will."

targeting criteria focus on al-Qaeda's operational leaders and key facilitators, and the names are submitted to a panel of National Security Council officials for approval. Targeting lists are reviewed regularly at meetings at NCTC headquarters attended by officials from the Pentagon, State Department, and CIA.⁴³

If accurate, press accounts regarding the "disposition matrix" describe a process that appears to satisfy the principles of distinction and necessity in regard to targeted drone strikes. This is to say that, by positively identifying a potential target as an al-Qaeda combatant and continually assessing whether the target poses a threat, the process distinguishes the target from the civilian population and establishes the military necessity for targeting the combatant.

Proportionality. Even if an al-Qaeda operative is properly identified, placed in the "disposition matrix" and deemed militarily necessary to target, the law-of-war principle of "proportionality" must also be satisfied for a strike on that operative to be considered lawful. The principle of proportionality requires belligerents to take care to minimize harm to innocent civilians during an armed attack.

Specifically, the principle of proportionality prohibits attacks on military targets where the expected harm to civilians (for example, within the blast radius of an explosion) is excessive in comparison to the military advantage expected to be gained from the attack.⁴⁴ Luis Moreno-Ocampo, the former Chief Prosecutor of the International Criminal Court, described the principle as follows:

Under international humanitarian law and the Rome Statute [of the International Criminal Court], the death of civilians during an armed conflict, no matter how grave and regrettable, does not in itself constitute a war crime. International humanitarian law and the Rome Statute permit belligerents to carry out

proportionate attacks against military objectives, even when it is known that some civilian deaths or injuries will occur. A crime occurs if... an attack is launched on a military objective in the knowledge that the incidental civilian injuries would be clearly excessive in relation to the anticipated military advantage.⁴⁵

Senior Obama Administration officials, including State Department Legal Adviser Harold Koh, Attorney General Eric Holder, and CIA General Counsel Stephen Preston have regularly affirmed in public speeches that the United States adheres to the principle of proportionality when striking al-Qaeda targets.⁴⁶ For example, John Brennan stated:

Targeted strikes conform to the principle of proportionality, the notion that the anticipated collateral damage of an action cannot be excessive in relation to the anticipated military advantage. By targeting an individual terrorist or small numbers of terrorists with ordnance that can be adapted to avoid harming others in the immediate vicinity, it is hard to imagine a tool that can better minimize the risk to civilians than remotely piloted aircraft.⁴⁷

By its nature, adherence to the principle of proportionality must be determined on a case-by-case, attack-by-attack basis. In the context of drone strikes, targeting analyses and decisions accounting for the principles of distinction and necessity are reportedly made by military and intelligence officials when al-Qaeda operatives are placed on the disposition matrix, likely well in advance of an actual attack. Factors concerning a determination of proportionality, by contrast, may usually be considered and weighed only after the target has been physically located and the surrounding environment assessed for potential civilian casualties.

43. Miller, "Plan for Hunting Terrorists Signals U.S. Intends to Keep Adding Names to Kill Lists."

44. Attacks are prohibited when they "may be expected to cause incidental loss of civilian life, injury to civilians, damage to civilian objects, or a combination thereof, which would be excessive in relation to the concrete and direct military advantage anticipated." See Geneva Convention Additional Protocol I, Art. 51(5)(b).

45. Luis Moreno-Ocampo, letter concerning the situation in Iraq, Office of the Prosecutor, International Criminal Court, February 9, 2006, p. 5, http://www.iccnw.org/documents/OTP_letter_to_senders_re_Iraq_9_February_2006.pdf (accessed March 27, 2013).

46. Koh, "The Obama Administration and International Law"; Holder, speech at Northwestern University School of Law; and Preston, "CIA and the Rule of Law."

47. Brennan, "The Efficacy and Ethics of U.S. Counterterrorism Strategy."

Since U.S. military and intelligence officials likely decide questions of proportionality at the time of attack or very shortly before, little or no information is publicly available to assess whether and to what extent the civilian impact of a particular drone strike was considered. One former U.S. intelligence official has explained that the CIA requires confirmatory intelligence—e.g., radio intercepts and visual imagery—before ordering a drone strike and that “even with confirmation, sometimes the CIA will not carry out a strike if there are indications that civilians are at risk.”⁴⁸ Yet without access to the decision-making process regarding a particular drone strike—a process that is highly classified—it is difficult to assess the extent to which the decision to strike adhered to the principle of proportionality.

That said, by their nature, drone strikes are designed to be precise attacks on individual targets of military significance as opposed to indiscriminate attacks, such as carpet bombing a military installation situated alongside civilian buildings or an artillery barrage on an armored column travelling through an area known to be populated by civilians. That is not to say that drone strikes have not caused civilian casualties. They have. However, no evidence indicates that U.S. armed forces or CIA officers, in carrying out targeted strikes, have disregarded the principle of proportionality. While civilian deaths have reportedly resulted from drone strikes, there is no indication that U.S. personnel ordered such strikes without regard for civilian casualties or with foreknowledge that civilian casualties would greatly exceed the military advantage advanced by the strike.

In sum, no evidence indicates that U.S. targeted drone strikes violate the law of war principles of necessity, distinction, or proportionality, much less in any intentional, systematic, or chronic manner. To the contrary, the use of drones, which can loiter over a target for hours waiting for the optimal moment to strike, is a particularly effective

method of eliminating individual terrorist threats while adhering to the law of war. The publicly available evidence indicates that the U.S. government chooses its targets carefully and regularly reassesses the threats posed by those targets. While there is no guarantee that all civilian casualties can be eliminated, the use of drone strikes, as opposed to an armed invasion or use of large munitions, vastly minimizes the exposure of civilians.

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A Drone Court? Certain former Obama Administration officials, the editorial board of *The New York Times*, and at least one U.S. Senator have called for the establishment of a special oversight panel or court to review the Administration’s targeting determinations, particularly in instances in which a U.S. citizen is targeted.⁴⁹ Essentially, such a court would scrutinize the Administration’s targeting decisions, presumably including its decisions to place individuals on the “disposition matrix.” The court would apparently have the authority to overrule and nullify targeting decisions. The creation of such a court is ill advised and of doubtful constitutionality.

The proponents of a drone court apparently do not appreciate the potential unintended consequences of establishing such an authority. The idea is wrongheaded and raises more questions than it answers. For instance, could the drone court decide as a matter of law that a targeted strike is not justified because the United States is not engaged in

48. Associated Press, “Secrecy of U.S. Strikes in Pakistan Criticized,” NBC News, January 29, 2010, http://www.nbcnews.com/id/35149384/ns/world_news-south_and_central_asia/ (accessed March 27, 2013).

49. Editorial, “A Court for Targeted Killings,” *The New York Times*, February 13, 2013, <http://www.nytimes.com/2013/02/14/opinion/a-special-court-is-needed-to-review-targeted-killings.html> (accessed March 27, 2013); Neal K. Katyal, “Who Will Mind the Drones?” *The New York Times*, February 20, 2013, <http://www.nytimes.com/2013/02/21/opinion/an-executive-branch-drone-court.html> (accessed March 27, 2013); Philip Elliott, “Gates Backs Lawmakers’ Oversight of Drone Program,” Associated Press, February 11, 2013, <http://bigstory.ap.org/article/gates-backs-lawmakers-oversight-drone-program> (accessed March 27, 2013); and Kevin Miller, “King Presses for Review Before Drone Strikes on U.S. Citizens,” *Portland Press Herald*, February 8, 2013, <http://www.pressherald.com/politics/president/maine-king-court-drone-strikes-angus.html> (accessed March 27, 2013).

an armed conflict with al-Qaeda? Could the drone court rule that members of a force associated with al-Qaeda (e.g., AQAP) may not be targeted because AQAP was not directly involved in the September 11 attacks and therefore the strike is not authorized under the AUMF? The proposed drone court cannot avoid these fundamental questions since the justification for the targeted strikes is dependent on the answers to these questions.

Even if the proposed drone court attempts to eschew intervention into foundational questions such as the existence of an armed conflict, it still would not be in a position to rule on the “easy” questions involved in each and every drone strike. Does the target constitute an “imminent threat” to the United States? When civilian casualties may occur as a result of the strike, does the drone court have the authority to overrule the targeting decision as a violation of the principle of proportionality? Is the target an innocent civilian or a civilian “directly participating in hostilities”? Should U.S. forces attempt to capture the target before resorting to a drone strike? Is capture feasible? Any drone court, even if constituted with former military and intelligence officials, is ill suited to weigh all of the competing factors that go into a decision to target an al-Qaeda operative and make a timely decision, particularly when there is often only a short window of time to order a strike.

Regardless, creating a judicial or quasi-judicial review process will not ameliorate, much less resolve, objections to U.S. targeted killing practices. Critics will continue to demand more judicial process, including appeals from the proposed drone court, and additional transparency no matter what kind of forum is established to oversee targeting decisions.

What the U.S. Should Do

The U.S. drone program and its practices regarding targeted strikes against al-Qaeda and its associated forces are lawful. They are lawful because the United States is currently engaged in an armed conflict with those terrorist entities and because the United States has an inherent right to defend itself against imminent threats to its security. Moreover, the available evidence indicates that U.S. military and intelligence forces conduct targeted strikes in a manner consistent with international law. Military and intelligence officials go to great lengths to identify al-Qaeda operatives that pose an imminent threat and continually reassess the level of that

threat. Decisions on each potential target are debated among U.S. officials before the target is placed in the “disposition matrix.” In conducting targeted strikes U.S. forces strive to minimize civilian casualties, although such casualties cannot always be prevented.

The United States will continue to face asymmetric threats from non-state actors operating from the territory of nations that are either unwilling or unable to suppress the threats. To confront these threats, the United States must retain its most effective operational capabilities, including targeted strikes by armed drones, even if U.S. forces degrade al-Qaeda and its associated forces to such an extent that the United States no longer considers itself to be in a non-international armed conflict. Moreover, the United States must continue to affirm its inherent right to self-defense to eliminate threats to its national security, regardless of the presence or absence of an armed conflict recognized by international law.

To that end, the United States should:

- **Continue to affirm existing use-of-force authorities.** During the past three years, senior officials of the Obama Administration have publicly set out in significant detail U.S. policies and practices regarding drone strikes. The Administration should continue to do so, emphasizing that U.S. policies adhere to widely recognized international law. Critics of the United States will continue to claim that a lack of transparency surrounds U.S. policy and actions. Such critics will likely never be satisfied, not even with full disclosure of the relevant classified legal memoranda, and their criticism will not cease until the United States abandons its practice of targeting terrorist threats in Pakistan, Yemen, and elsewhere. However, consistent repetition of the U.S. legal position on targeted drone strikes may blunt such criticism.
- **Not derogate from the AUMF.** At the 2012 NATO summit in Chicago, NATO agreed that the vast majority of U.S. and other NATO forces would be withdrawn from Afghanistan by the end of 2014, a time frame that President Obama confirmed during this year’s State of the Union address. Some critics of U.S. drone policy will inevitably argue that due to the drawdown the

United States may no longer credibly claim that it remains in a state of armed conflict with the Taliban, al-Qaeda, and its associated forces, whether they are located in Afghanistan, the FATA, or elsewhere. Congress should pass no legislation that could be interpreted as a derogation from the AUMF or an erosion of the inherent right of the United States to defend itself against imminent threats posed by transnational terrorist organizations.

- **Not create a drone court.** The concept of a drone court is fraught with danger and may be an unconstitutional interference with the executive branch's authority to wage war. U.S. armed forces have been lawfully targeting enemy combatants in armed conflicts for more than 200 years without being second-guessed by Congress or a secret "national security court." Targeting decisions, including those made in connection with drone strikes, are carefully deliberated by military officers and intelligence officials based on facts and evidence gathered from a variety of human, signals, and imagery intelligence sources. During an armed conflict, all al-Qaeda operatives are subject to targeting; therefore, a drone court scrutinizing targeting decisions would serve no legitimate purpose.

Rather than creating a special tribunal that is ill equipped to pass judgment on proportionality and military necessity, and that will never

fully assuage the concerns of the critics of drone strikes, Congress should continue to leave decisions pertaining to the disposition of al-Qaeda terrorists—including U.S. citizens—with military and intelligence officials.

Conclusion

The debate within the international legal, academic, and human rights communities on the legality and propriety of drone strikes will likely continue unabated. To surrender to the demands of such critics would be equivalent to forgetting the lessons of September 11, when a small, non-state terrorist organization operating from a nation with which the United States was not at war planned and launched an attack that killed almost 3,000 Americans.

The United States should preserve its ability to use all of the tools in its arsenal to ensure that the plots hatched by terrorist organizations do not become successful attacks on the U.S. homeland. Armed drones have proved to be one of the most effective and discriminating tools available to U.S. forces, and their lawful use should continue until such time as non-state, transnational terrorist organizations no longer present an imminent threat to the United States.

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