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"Drones and the War on Terror: When Can the U.S. Target Alleged American Terrorists Overseas?"

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Thank you, Mr. Chairman and members of the committee, for inviting me to testify on the question of when the United States may lawfully target alleged American terrorists overseas. I am a Senior Fellow in Governance Studies at the Brookings Institution. I co-founded and am Editor in Chief of the *Lawfare Blog*, a website devoted to balanced and sober discussion of "Hard National Security Choices." I also serve on the Hoover Institution's Task Force on National Security and Law. I am the author or editor of several books on subjects related to law and national security: *Detention and Denial: The Case for Candor After Guantánamo* (2011), *Law and the Long War: The Future of Justice in the Age of Terror* (2008), and *Legislating the War on Terror: An Agenda for Reform* (2009). I have written extensively about the legal underpinnings of U.S. targeted killing operations. Currently, I am co-authoring a book with Professor Kenneth Anderson of American University's Washington College of Law, entitled *Speaking the Law: The Obama Administration's Addresses on National Security Law*, from which this testimony is partially adapted. The views I am expressing here also reflect those of Professor Anderson—but not those of any other person or entity.

In this testimony I want to explain the essential legal rationale underlying the administration's position with respect to the lethal targeting of an American citizen abroad who is believed to be a senior operational leader of Al Qaeda or associated forces. I also intend to address some of the misreadings of the administration's view, which have cast it in a far more menacing light than its rather restrained reality justifies. In fact, as I will explain, there is nothing extraordinary about the administration's position, which actually claims very little in the way of power to target Americans. The exact contours of the administration's thinking remain somewhat clouded by its refusal to release the legal memoranda that underlie both its public statements and the leaked "White Paper" that has recently garnered so much attention. What's more, the precise legal theory may vary somewhat depending on whether military or covert forces do the targeting.

That said, enough is public to draw the following conclusion: No significant aspect of the administration's position on this subject ought to give rise to concern that it is claiming undue power.

What the Obama Administration Is and Is Not Claiming

The ability to kill one of its own citizens is one of the most awesome and terrifying powers a people can vest in its government. And the power to do so without judicial check is certainly anomalous in a society that provides for judicial review of countless lesser exertions of government power. As federal district Judge John D. Bates has written, "How is it that judicial approval is required when the United States decides to target a U.S. citizen overseas for electronic surveillance, but that, according to [the government], judicial scrutiny is prohibited when the United States decides to target a U.S. citizen overseas for death?"[1]

Yet there is something equally terrifying about a government unwilling to protect its people from ongoing threats of attack from overseas. And sometimes—remarkably rarely, actually—those threats come from American citizens who have taken leadership positions in organizations devoted to attacking the United States, with which the United States is in a state of armed conflict, and against which Congress has authorized the use of necessary and appropriate force.

Commentators often characterize strong governmental powers as a slippery slope. But in dealing overseas with major Al Qaeda figures who hold American citizenship, the Obama administration confronts a slippery slope with not one, but two distinct bottoms. Down one side lies a government empowered to do terrible things to its nationals—and to the nationals of other countries—without sufficient legal justification or oversight. Down the other slope lies a government powerless to confront very real threats to the safety and lives of its citizens while terrorist figures operate with impunity from sanctuaries in ungoverned spaces. It is not sufficient to avoid sliding down one of these slippery slopes. American policy must avoid both.

With that as background, consider for a moment the targeting powers the Obama administration is *not* claiming with respect to Americans overseas who affiliate themselves with the enemy:

- It is not claiming the authority to target just any such American citizen—only an American citizen who is a senior operational leader of Al Qaeda or one of its associated (that is, co-belligerent) forces.

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[1] *Al-Aulaqi v. Obama*, 727 F. Supp. 2d 1, 8 (D.D.C. 2010).

- It is not claiming the authority to target any American citizen, even a senior operational terrorist, if his capture is a feasible alternative. In other words, if capture by law enforcement or military means offers the government a plausible basis to proceed, it will not use lethal force.
- It is not claiming the authority to target an American citizen who poses no imminent threat to American lives.
- It is not claiming the authority to act contrary to international law, including the laws of war and the U.N. Charter's protection of nations' rights of sovereignty.

Given this rather restrictive posture, it is not surprising that there is only one reported case of U.S. forces—whether military or covert—actively targeting a specific American citizen with lethal force. While four American citizens are known to have been killed in drone strikes, only one of those individuals—Anwar Al-Aulaqi—appears to have been the specific target of the strike in which he was killed. The others, including Al-Aulaqi's son and Samir Khan, were collateral deaths in strikes on others.

The point is that the authority by which the Obama administration claims to target citizens under certain narrow circumstances is not a broad claim of executive power. To the contrary, while the claimed power is important in conceptual terms—as it represents such a dramatic exercise of governmental power with respect to the individual—the Obama administration has only asserted a very limited targeting authority with respect to citizens, and it has used it sparingly. That claim—that targeting an American citizen overseas is lawful in a war authorized by Congress when the target is a senior operational leader of Al Qaeda or its co-belligerents, his capture is not feasible, he presents an imminent threat to the United States, and the operation against him is conducted in a manner consistent with applicable law of war principles—is an entirely reasonable one.

The Administration's Substantive Position

The administration's view of this matter has a number of subsidiary components, each of which warrants brief explication.

First, the administration contends that the United States is in a state of armed conflict with Al Qaeda, the Taliban, and associated forces. President Obama himself made the point in a major address as early as May 2009 that warfare lay at the heart of the relationship between the United States and certain foreign terrorist organizations, saying, "Now let me be clear: we are indeed at war with Al Qaeda

and its affiliates."[2] The administration has since consistently maintained that the United States' use of force in the current conflict is authorized by Congress—specifically by the Authorization for the Use of Military Force ("AUMF")[3]—and consistent with international law.[4]

The nature of this conflict, it bears emphasis, involves *actual* war—not war as a metaphor for policy seriousness, but armed conflict in the strict legal sense. This is the government's position—including the Congress's position—even though the enemy is not a state. In the parlance of international law, the United States considers itself as fighting a "non-international armed conflict"—that is, an armed conflict against something other than another sovereign state. Since many U.S. actions using lethal force would constitute murder or other crimes during peacetime, this is actually a pivotal point.

Another important aspect of the government's view of the conflict is that the war is not limited to Al Qaeda itself, but also includes its "affiliates," at least when those affiliates qualify as "associated forces." This is an intentional framing of the activity and identity of these groups so as to treat them within the framework of co-belligerency for purposes of international law. And while many commentators have asserted that the armed conflict is limited legally to particular theaters of conflict or hot battlefields, the administration has consistently rejected this notion as well. Attorney General Eric Holder addressed this point in a major address last March at Northwestern University:

> Our legal authority is not limited to the battlefields in Afghanistan. Indeed, neither Congress nor our federal courts have limited the geographic scope of our ability to use force to the current conflict in Afghanistan. We are at war with a stateless enemy, prone to shifting operations from country to country. Over the last three years alone, Al Qaeda and its associates have directed several attacks—fortunately, unsuccessful—against us from countries other than Afghanistan. Our government has both a

[2] President Barack Obama, Remarks by the President on National Security (May 21, 2009).

[3] Authorization for Use of Military Force, Pub. L. 107-40, 115 Stat. 224 (2001).

[4] *See, e.g.*, Legal Adviser Harold Koh, The Obama Administration and International Law (Mar. 25, 2010).

> responsibility and a right to protect this nation and its people from such threats.[5]

The notions that an armed conflict exists, that it is not limited to Afghanistan but extends at least to those places from which the enemy strikes, and that it includes Al Qaeda's co-belligerent forces are all contested by advocacy groups, international organizations, and prominent figures in the legal academy. Importantly, as Holder noted, however, they have not been contested either by the Congress or by the courts. The AUMF did not specify a legal geography of the conflict and thereby create zones of impunity to which this country's military enemies might flee and from which they might then attack—and Congress has never sought to impose geographic limits on the conflict after the fact either. In fact, Congress in 2012 specifically reaffirmed—as least as regards detention authority—that the AUMF was still a vital document and reached members and supporters of enemy groups, including associated forces. It did so, once again, without reference to geography.[6] What's more, the courts, in Guantánamo detention cases, have recognized both that the armed conflict extends beyond the hot battlefield of Afghanistan[7] and that the executive branch's authority to use force extends beyond core Al Qaeda and Taliban forces and includes "associated forces."[8] In other words, there is no dispute among the branches of government that the United States is in a state of armed conflict with Al Qaeda and its co-belligerents, wherever they may be.

Second, in this armed conflict—as, indeed, in any armed conflict—the United States is lawfully entitled to target the enemy with lethal force. The existence of an ongoing armed conflict means that, legally speaking, the administration can strike, assuming the target is a lawful one, whenever it wants. As a matter of international law and domestic AUMF authority, it does not have to do a separate legal analysis of whether force can be used against each individual member of enemy forces or

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[5] Attorney General Eric Holder, Address at Northwestern University School of Law (Mar. 5, 2012) ("Northwestern Address").

[6] The National Defense Authorization Act for Fiscal Year 2012 ("NDAA") reaffirmed detention authority under the AUMF. *See* Pub. L. 112-81, § 1021, 125 Stat. 1297, 1562 (2012). The NDAA does not speak to the question of targeting authority.

[7] *See, e.g.*, *Salahi v. Obama*, 625 F.3d 745, 750- (D.C. Cir. 2010) (Reversing a grant of habeas corpus despite the fact that detainee was captured in Mauritania, nowhere near any hot battlefield, and transferred to U.S. custody).

[8] *See, e.g.*, *Khan v. Obama*, 655 F.3d 20, 21 (D.C. Cir. 2011) (affirming the detention of a petitioner found to be "part of" Hezb-i Islami Gulbuddin, an associated force of Al Qaeda and the Taliban).

whether each individual member poses an imminent threat; a single conflict is, after all, already under way. Nor is there some general legal obligation to seek to capture a lawful target before attacking using lethal force where the target is not *hors de combat*. Similarly, there is no obligation to give warning or to offer surrender before launching an attack, though surrender must be accepted once completed. While the administration has made it clear that, as a policy matter, it does prefer to capture whenever possible—to reap the intelligence harvest of interrogations, to avoid unnecessary death, and to bring suspects to justice in the criminal justice system—this is generally not a legal requirement but a set of prudential, humanitarian, and tactical considerations.

Again, this point should engender no particular controversy—though it nonetheless does. The ability to target the enemy in an armed conflict with lethal force is a simple, and lawful, operational necessity in a world in which enemy organizations in countries and locations impossible to reach by law enforcement continue to threaten the United States. The fact of armed conflict—and the consequent availability of targeting—does not mean automatic recourse to hostilities, of course. There are many places in the world where the United States can and does pursue terrorists through law enforcement, interdiction of terrorist financing, and other non-hostilities-based tools of counterterrorism. But there are other places in the world that are weakly governed, ungoverned, or simply hostile to the United States, where terrorist groups responsible for September 11 have fled, or in which associated terrorist groups or cells have arisen and joined the conflict against the United States. The armed conflict framework, and the inherently-tied authority to target the enemy with lethal force, is essential to reaching these actors and denying them sanctuary from which to attack this country.

Third, there exists no general immunity from targeting for U.S. citizens who sign up to wage war against their own country. Americans have fought in foreign armies against their country in numerous armed conflicts in the past, and their citizenship has never relieved them of the risks of that belligerency—nor does it convey any need for judicial review of targeting decisions. U.S. nationals fought for Axis countries during World War II, for example. And it would have been impossible to prosecute the Civil War had some principle required the Union Army to refrain from targeting U.S. citizens—or required judicial review of targeting decisions directed against citizens. This principle is no different if a rebel leads Al Qaeda operations against the United States in Yemen than if he leads an army against U.S. forces in Virginia.

Fourth, whatever the Constitution's guarantee of Due Process may require before targeting a U.S. citizen aligned with the enemy overseas—and the administration assumes it does impose some demands—these requirements are more than

satisfied by a high-level, rigorous internal judgment that this person is a senior operational leader of Al Qaeda or its affiliates who poses an imminent threat, whose capture is not feasible, and whose targeting would be consistent with the laws of war.

To understand why this position must be correct, consider an example from an entirely different context: a domestic hostage situation. In such situations, even law enforcement will use targeted killings, and it will do so without judicial pre-approval when the threat to the lives of the hostages is adequately serious and when there are no available alternatives. What's more, police officers will not wait until the threat to the hostages is imminent in the sense that the hostage-taker is literally lifting his gun to kill innocents in real time. Rather, they will often act—including with lethal force—within the windows of opportunity that circumstances may offer them. Nobody takes the position that such actions constitute unlawful extra-judicial killings. Rather, we accept that the preservation of the lives of the hostages justifies the use of lethal force based on standards totally different from the standards of proof and evidence that would suffice before a judge or jury. Importantly, the standards ordinarily applied to such uses of lethal force against U.S. citizens do not sound in *process* but instead in the Fourth Amendment balancing test of *Tennessee v. Garner*[9] and *Scott v. Harris*.[10] As the Supreme Court put it in *Garner*, "[w]here the officer has probable cause to believe that the suspect poses a threat of serious physical harm, either to the officer or to others, it is not constitutionally unreasonable to prevent escape by using deadly force."[11]

I submit that the case that truly meets the administration's legal test—and only one such case has presented itself—is not profoundly different from this hostage situation. Yes, the action was taken by military or covert operatives, not police and not pursuant to law enforcement authorities. And yes, the imminence of the harm Anwar Al-Aulaqi threatened was, in some temporal sense, less certain. Al-Aulaqi was not, after all, literally holding hostages, and the precise window of time in which he posed a serious threat to American lives was not entirely clear. The nature of terrorist plots, which involve great secrecy and operational security, means that authorities may not know how imminent a threat really is; hostage takers are less subtle. In another sense, however, the problem Al-Aulaqi posed was far less controllable and far more threatening than an ordinary hostage standoff. Remoteness gave him relative security. And critically, the government *had no other*

[9] 471 U.S. 1 (1985).

[10] 550 U.S. 372 (2007).

[11] 471 U.S. at 11.

obvious tool by which to neutralize the threat he posed. Indicting him and seeking his extradition from a country that does not have custody of him, can't keep track of its prisoners, and lacks full control over its territory was not a promising avenue. A capture operation would have involved much greater risk to U.S. forces and foreign civilians and a much greater affront to the sovereignty of a country that seems to allow unacknowledged American air strikes but is not especially eager to have American boots on the ground. To have declined to act in that situation would have been, perhaps, to decline the last and only opportunity to prevent an attack on American civilians—and the Constitution no more requires that than it requires that police forego the shot at the hostage taker.

In short, the administration's position with respect to the targeting of a tiny number of senior, overseas operational terrorists who hold American citizenship, far from a radical claim of new executive powers of life and death, is actually a restrained and careful claim of powers that are—in and of themselves—well-established. We should regard the power to target the high-level operational terrorist who poses an imminent threat to American lives, and whose capture is not feasible, as an inevitable consequence of a war against a highly-networked enemy which attacks from far-flung safe havens beyond the reach of law enforcement.

What "Imminent" Does and Does Not Mean

A great deal of confusion and anxiety about the targeting of American citizens has flowed from the inelegant discussion in the White Paper of the word "imminent." Neither the White Paper nor Holder's speech makes clear what precise legal question the concept of imminence is addressing in its analysis. It is a bit of a mystery, in fact, whether the administration is using it to address resort-to-force matters under international law, domestic separation-of-powers questions, issues of the constitutional rights of the targets, as a possible defense against criminal prohibitions on killing Americans, or perhaps as a prudential invocation of the standards of international human rights law. What is clear is that the administration, for whatever reason, has limited itself in targeting Americans overseas to circumstances of an imminent threat. And its specific characterization of imminence has produced a barrage of criticism. The criticism, in my view, is unwarranted and rests on a misreading of the White Paper. Although it is true that the administration is using the term in a manner slightly relaxed from its common-sense meaning, many commentators and media figures are dramatically overstating the degree of relaxation. A word of explanation on this point is in order.

The term "imminent threat," as the administration uses it, is something of a term of art—one that does not equate precisely to the common understanding of the word. Attorney General Holder has openly emphasized—consistent with the U.S. view of imminence in other national-security law circumstances—that this use does not mean imminence in some immediate temporal sense. It does not mean, for example, the last chance to act before disaster strikes. Rather, this definition of imminence incorporates a more flexible notion of an open window in time to address a threat which, left unaddressed, has independent momentum toward an unacceptable outcome. The Constitution, Holder explained,

> does not require the president to delay action until some theoretical end-stage of planning—when the precise time, place, and manner of an attack become clear. Such a requirement would create an unacceptably high risk that our efforts would fail and that Americans would be killed.
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> Whether the capture of a U.S. citizen terrorist is feasible is a fact-specific, and potentially time-sensitive, question. It may depend on, among other things, whether capture can be accomplished in the window of time available to prevent an attack and without undue risk to civilians or to U.S. personnel. Given the nature of how terrorists act and where they tend to hide, it may not always be feasible to capture a United States citizen terrorist who presents an imminent threat of violent attack. In that case, our government has the clear authority to defend the United States with lethal force.[12]

The White Paper's wording on the subject of imminence is unfortunately imprecise, but it should not be over-read as authorizing—as one journalist put it—the killing of top Al Qaeda leaders "even if there is no intelligence indicating they are engaged in an active plot to attack the U.S."[13] In reality, the White Paper says something much more modest: that a finding of imminence does not require "clear evidence" that "a specific attack" will take place in the "immediate future." It goes on to say that for those senior Al Qaeda leaders who are "continually planning attacks," one has to consider the window of opportunity available in which to act against them and the probability that another window may not open before an attack comes to fruition. The result is that a finding of imminence for such a senior-level Al Qaeda operational leader can be based on a determination that such a

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[12] Holder, Northwestern Address.

[13] Michael Isikoff, "Justice Department Memo Reveals Legal Case for Drone Strikes on Americans," *NBC News* (Feb. 4, 2013).

figure is "personally and continually" planning attacks—not on a determination that any one planned attack is necessarily nearing ripeness.

The confusion arises largely out of a single, poorly-worded and easily misunderstood passage on page 8 of the White Paper:

> a high-level official could conclude, for example, that an individual poses an "imminent threat" of violent attack against the United States where he is an operational leader of Al Qa'ida or an associated force and is personally continually involved in planning terrorist attacks against the United States. Moreover, where the al-Qa'ida member in question has recently been involved in activities posing an imminent threat of violent attack against the United States, and there is no evidence suggesting that he has renounced or abandoned such activities, that member's involvement in al-Qa'ida's continuing terrorist campaign against the United States would support the conclusion that the member poses an imminent threat.[14]

The temptation is to read this passage broadly, as stating that targeting may be predicated on nothing more than an unrenounced history of plotting attacks—and without regard for the target's present-day activities. In my view, however, such a reading places the White Paper at odds both with other public administration statements and with the history of U.S. interpretation of "imminence" in the international law context. The better way to understand the passage is that the first sentence of the paragraph states the general rule: that an Al Qaeda operational leader may be considered an imminent threat if he is "personally continually" planning attacks against the United States. The second sentence states the view that when evaluating whether a potential target is personally and continually planning such attacks, his recent activity is important to that evaluation, and a recent history of plotting major attacks will tend to support the inference that a person is currently plotting as well—at least to the extent it is not contradicted by some sort of renunciation of violence.

Read this way, the passage strikes me as both correct and unsurprising. If one is trying to assess whether Anwar Al Aulaqi is personally and continually planning major attacks against the U.S., after all, surely it is not irrelevant that he had only recently coaxed Umar Farouk Abdulmutallab onto a plane with a bomb,[15] emailed

[14] Department of Justice White Paper, "Lawfulness of a Lethal Operation Directed Against a U.S. Citizen Who is a Senior Operational Leader of Al-Qa'ida or An Associated Force" at 8 ("White Paper").

[15] *See* Government's Sentencing Memorandum, *United States of America v. Umar Farouk Abdulmutallab*, No. 2:10-cr-20005 at 13-14 (E.D. Mich., Feb. 10, 2012) (noting defendant's

with would-be terrorists in Britain about how to carry out attacks on aviation,[16] and corresponded with Nidal Hassan in the run-up to the latter's shooting at Fort Hood.[17] To the contrary, surely this pattern of behavior supports an inference—at least to *some* extent—that this is a person who is continually plotting attacks of this nature. And surely it is also relevant that the possible target has not merely failed to renounce participation in such attacks but is also continuing to release videos calling for them.

Whether a pattern of this sort would adequately and *on its own* support a finding that an individual is continually involved in plotting major attacks would likely depend on how recent the pattern was, and how extensive. But there is nothing especially remarkable about the government's position that for senior operational figures, recent past leadership conduct of an operational nature can serve as probative evidence of a figure's current role.

While the precise contours of the administration's thinking on the subject will remain unclear as long as it refuses to release the underlying legal memoranda, there is good reason to believe that this narrower reading of the White Paper's "imminence" language—and not the more expansive readings—accurately reflects the administration's thinking.[18] I urge the committee to seek clarification on this point from the administration and would certainly hope that the administration would be willing, if asked by this committee, to clarify its views on what "imminent" does and does not mean.

Unless and until the broader readings of the White Paper's imminence language are confirmed to reflect administration thinking, there is no reason to believe that

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following of and meetings with Al-Aulaqi to discuss jihad and martyrdom missions, the defendant's subsequent training at an Al Qaeda in the Arabian Peninsula ("AQAP") camp, Al-Aulaqi's introduction of defendant to AQAP bombmaker, Al-Aulaqi's instructions to defendant about the need to attack a U.S. airliner over U.S. soil, and Al-Aulaqi's arranging for a martyrdom video by defendant).

[16] *See* Thomas Joscelyn, "Awlaki's Emails to Terror Plotter Show Operational Role," THE LONG WAR JOURNAL (Mar. 2, 2011) (noting correspondence between Al-Aulaqi and Rajib Karim, discussing the latter's knowledge of British airport technologies, baggage handlers, and security personnel; and inquiring about the possibility of getting a "package or person" on a U.S.-bound aircraft).

[17] *See generally* "Anwar Awlaki E-Mail Exchange with Fort Hood Shooter Nidal Hassan," INTELWIRE (July 19, 2012).

[18] *See* Benjamin Wittes, "Are People Overreading the White Paper on Imminence?" LAWFARE (Feb. 12, 2013), *see also* Benjamin Wittes, "More on Overreading Imminence," LAWFARE (Feb. 13, 2013).

the government has adopted a concept of imminence so expansive as to widen the narrow conception of the category the administration has declared the lawful authority to target. Nor is there any evidence to suggest that the government is, in fact, targeting Americans based on nothing more than a distant pattern of past acts.

The Criticism the Administration Has Faced

Finally, I wish to note the major objections to the administration's position and address each briefly. Nearly all criticism of the administration's position with respect to the targeted killings of Americans overseas partakes of one or more of these arguments, some of which suggest policy steps or legal changes well worth discussion and debate. None, however, offers a persuasive reason to doubt the legality of the Al-Aulaqi strike or to doubt the integrity of the administration's underlying legal theory. And some of them, as I will explain, fly directly in the face of enactments by the Congress.

First, some critics doubt the fundamental premise that the United States is engaged in an armed conflict that legally supports targeting the enemy with lethal force or that this armed conflict extends to the places in which, and the groups against whom, the United States is engaged in lethal-force operations. Some of these organizations and scholars deny that the United States can be engaged in a geographically non-specific armed conflict in locations remote from the hot battlefields of Afghanistan and—depending on the scholar—Pakistan. Others object to the premise that a single non-international armed conflict can authorize lethal operations against a variety of non-state actors in disparate locations around the world. The ACLU and the Center for Constitutional Rights, for example, arguing against the legality of the Al-Aulaqi strike and the separate strike that killed his son, contended that "[t]he killings of Anwar Al-Aulaqi, Samir Khan, and Abdulrahman Al-Aulaqi took place outside the context of any armed conflict."[19] More broadly, international law scholar Kevin Jon Heller has argued that,

> The actual organization of "al-Qa'ida and its associated forces" fatally undermines the White Paper. If those terrorist groups do not form a single organized armed group, there can be no single NIAC [non-international armed conflict] between the US and "al-Qa'ida and its associated forces." And if there is no single NIAC between the United States and "al-Qa'ida and its associated forces," the US cannot—by its own standards—justify

[19] Brief of Petitioner in Opposition to Defendant's Motion to Dismiss at 4, *Al-Aulaqi v. Panetta*, No. 12-cv-01192 (D.D.C., Feb. 5, 2013).

> targeting anyone who is a "senior operational commander" in one of those groups simply by citing the existence of the hostilities between the US and al-Qai'da in Afghanistan. On the contrary, in order to lawfully target a "senior operational commander" in a terrorist group that does not qualify as part of al-Qaida in Afghanistan, the US *would*, in fact, have to show . . . that there is a separate NIAC between the US and that group where that group is located.[20]

This view has currency among European allies, among advocacy groups, and in the legal academy. Unfortunately for its proponents, it has no currency among the three branches of government of the United States. The courts and the executive branch have both taken the opposite view, and this body passed a broad authorization for the use of force and despite many opportunities, has never revisited that document to impose limitations by geography or to preclude force on the basis of co-belligerency—much less to clarify that the AUMF does not, any longer, authorize the use of military force at all. Congress has been repeatedly briefed on U.S. targeting decisions, including those involving U.S. persons.[21] It was therefore surely empowered to either use the power of the purse to prohibit such action or to modify the AUMF in a way that undermined the President's legal reasoning. Not only has it taken neither of these steps, but Congress has also funded the relevant programs. Moreover, as I noted above, Congress's recent reaffirmation of the AUMF in the 2012 NDAA with respect to detention, once again contains no geographical limitation.

There is, in other words, a consensus among the branches of government on the point that the United States *is* engaged in an armed conflict that involves co-belligerent forces and follows the enemy to the new territorial ground it stakes out;

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[20] Kevin Jon Heller, "The DOJ White Paper's Fatal International Law Flaw—Organization," OPINIO JURIS (Feb. 5, 2013).

[21] As Senator Dianne Feinstein, chair of the Senate Intelligence Committee, has said:

> The committee has devoted significant time and attention to targeted killings by drones. The committee receives notifications with key details of each strike shortly after it occurs, and the committee holds regular briefings and hearings on these operations—reviewing the strikes, examining their effectiveness as a counterterrorism tool, verifying the care taken to avoid deaths to non-combatants and understanding the intelligence collection and analysis that underpins these operations. In addition, the committee staff has held 35 monthly, in-depth oversight meetings with government officials to review strike records (including video footage) and question every aspect of the program.

Senator Diane Feinstein, "Feinstein Statement on Intelligence Committee Oversight of Targeted Killings" (Feb. 13, 2013).

it is a consensus to which the Congress is institutionally a party. It is a consensus that rejects the particular view of the law advanced by numerous critics. And it is a consensus on which the executive branch is entitled to rely in formulating its legal views.

Second, a mounting chorus of critics has insisted that judicial review must be a feature of the legal framework that authorizes the targeting of any American nationals. The *New York Times*, for example, has editorialized that "[g]oing forward, [President Obama] should submit decisions like [the Al-Aulaqi] one to review by Congress and the courts. If necessary, Congress could create a special court to handle this sort of sensitive discussion, like the one it created to review wiretapping."[22]

The question of whether targeting judgments might benefit from some form of judicial review—either prospectively or after-the-fact—is an enormously complicated one that two of my co-panelists today are addressing directly. Scholars have put together several thoughtful proposals for review mechanisms,[23] and I don't rule out the idea of some form of judicial review—though I tend to disfavor it. But critically, none of these or other proposals to change the rules to include judicial review undermines the integrity of the administration's view of *current* law, which simply does not provide for judicial involvement in targeting decisions. Whether some as-yet-unwritten statutory framework might usefully provide for judicial involvement presents a difficult question. But it's hard to fault Attorney General Holder for failing to bring the Anwar Al-Aulaqi case for prospective review before a court that does not exist.

Finally, the administration has been criticized, mainly from the political Right, for having applied a constitutional analysis at all in a wartime context to which it supposedly has no application. As former Office of Legal Counsel official John Yoo put it in a recent essay,

> [I]nstead of relying on the traditional authority to kill the enemy, the leaked memo reveals how a legal fog threatens to envelop U.S. soldiers and agents on the front lines. The administration has replaced the clarity of the rules of

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[22] Editorial, "To Kill an American," N.Y. TIMES (Feb. 5, 2013).

[23] *See, e.g.*, Jennifer C. Daskal, "The Geography of the Battlefield: A Framework for Detention and Targeting Outside the 'Hot' Conflict Zone," 161 U. PENN. L. REV. (forthcoming 2013); Neal K. Katyal, "Who Will Mind the Drones?" N.Y. TIMES, Feb. 20, 2013; Steve Vladeck, "Why a "Drone Court" Won't Work—But (Nominal) Damages Might..." LAWFARE (Feb. 10, 2013).

> war with the vague legal balancing tests that govern policemen on the beat. . . .
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> The memo shows that for the first time in the history of American arms, presidential advisers will weigh the due-process rights of enemy combatants on the battlefield against the government's interests, judge an individual's "imminent" threat of violence, and ponder whether capture is feasible before deciding to strike. . . .
>
> The memo even suggests that American al Qaeda leaders such as Anwar al-Awlaki (killed in a 2011 drone strike in Yemen) enjoy due-process rights. But in doing so, it dissipates the rights of the law-abiding at home.[24]

This point would have considerable merit if, in fact, the administration has broadly concluded that Americans who join the enemy overseas have constitutional rights that require balancing against other interests in traditional, day-to-day combat operations. Because the underlying legal memoranda remain classified, we cannot know for sure precisely what the administration has done on this score.

But neither the White Paper nor Holder's speech on the subject supports the notion that the administration has done more than assume for purposes of argument that Al-Aulaqi had constitutional rights in the context of the targeting decision. The White Paper, for example, says that if the target is "a U.S. citizen who *may* have rights under the Due Process Clause" (emphasis added), those rights would not be violated by a strike that met the administration's conditions.[25] It goes on to say that the Justice Department "*assumes* that the rights afforded by the Fifth Amendment's Due Process Clause . . . attach to a U.S. citizen even while he is abroad" (emphasis added) and proceeds to analyze the question under that assumption.[26] There are similar hedges in the Fourth Amendment analysis. The White Paper takes pains, in fact, in its opening paragraph, to insist that it "does not attempt to determine the minimum requirements necessary to render such an operation lawful" nor "what might be required to render a lethal operation against a U.S. citizen lawful in other circumstances"—like on a traditional battlefield or against a lower-level figure.[27]

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[24] John Yoo, "The Real Problem With Obama's Drone Memo," WALL ST. J., Feb. 7, 2013.

[25] White Paper at 2.

[26] *Id.* at 5.

[27] *Id.* at 1.

Similarly, in Holder's major statement on the subject, he carefully included the words "at least" in the following statement:

> an operation using lethal force in a foreign country, targeted against a U.S. citizen who is a senior operational leader of al Qaeda or associated forces, and who is actively engaged in planning to kill Americans, would be lawful *at least* in the following circumstances: First, the U.S. government has determined, after a thorough and careful review, that the individual poses an imminent threat of violent attack against the United States; second, capture is not feasible; and third, the operation would be conducted in a manner consistent with applicable law of war principles (emphasis added).

Moreover, he added,

> these circumstances are sufficient under the Constitution for the United States to use lethal force against a U.S. citizen abroad—but it is important to note that the legal requirements I have described may not apply in every situation—such as operations that take place on traditional battlefields.[28]

These caveats suggest that the administration was attempting to think through and address all of the possible legal objections that might plausibly arise to the targeting of Al-Aulaqi. One of those potential objections was a claim that his targeting would violate his constitutional rights. So the administration appears to have asked itself whether—assuming without deciding that such rights apply in this situation—the Constitution would be offended by targeting Al-Aulaqi under the circumstances presented. It did not address the lower-level operative or the circumstances of the battlefield, because it did not confront them and—admirably, in my view—chose to address only the specific legal questions that the Al-Aulaqi case forced it to confront. Al-Aulaqi was a senior operational figure of an enemy armed force that is constantly plotting and devoted to attacking the United States, against which Congress has authorized the use of force, whose capture the intelligence community did not consider feasible and who was assessed to present an imminent threat. So the Office of Legal Counsel addressed only the question of whether it would violate any law to target such a person—leaving other, harder questions for another day. Whether the administration has in fact concluded—or merely assumed for purposes of its analysis—that the Bill of Rights in fact restrains the targeting of an American overseas strikes me as a ripe and important question for this committee in conducting oversight of the executive branch on this matter.

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[28] Holder, Northwestern Address.

Conclusion

In summary, notwithstanding the shrill rhetoric of its many critics, the Obama administration has taken a measured and serious position concerning the targeting of Americans overseas. It is a position that reserves the right to target in the most extreme cases, while leaving open the question of what the minimum threshold must be in order for a citizen's targeting to be deemed lawful in less dire circumstances. To put it bluntly, the administration has claimed no more than the authority to target a set of people which, to date, is known to contain exactly one member. A government that asserts the power to kill its citizens is a frightening thing. More frightening still, however, is the government that forswears the power to target citizens in that menacing set and thus leaves such citizens unchecked.

Thank you for this opportunity to share my views on this important subject.

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