17-157

United States Court of Appeals

FOR THE SECOND CIRCUIT

Docket No. 17-157

AMERICAN CIVIL LIBERTIES UNION,
AMERICAN CIVIL LIBERTIES UNION FOUNDATION,

Plaintiffs-Appellees,

—v.—

DEPARTMENT OF JUSTICE, including its components THE OFFICE OF LEGAL COUNSEL AND OFFICE OF INFORMATION POLICY, DEPARTMENT OF DEFENSE, DEPARTMENT OF STATE, CENTRAL INTELLIGENCE AGENCY,

Defendants-Appellants.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

JOINT APPENDIX
VOLUME II OF IV
(Pages A-294 to A-496)

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The Washington Post

World

Libyan rebels welcome U.S. drones; McCain visits Benghazi

By Greg Jaffe,, Edward Cody and William Branigin April 22, 2011

Libyan rebels welcomed President Obama's deployment of armed Predator drones and received praise from their most prominent U.S. visitor Friday, as they expressed hope that increased American support would help turn the tide in a conflict that the top U.S. military officer acknowledged is becoming deadlocked.

Sen. John McCain (R-Ariz.), an early proponent of helping the rebels in their fight against forces loyal to longtime leader Moammar Gaddafi, arrived Friday in Benghazi, the de facto rebel capital in eastern Libya, and told reporters that the anti-Gaddafi fighters are his heroes.

The previously unannounced visit came a day after the U.S. military sent the first two Predators to Libya but had to cut short their mission because of bad weather. McCain, the top Republican on the Senate Armed Services Committee, said he was meeting with members of the Transitional National Council, the rebel government in Benghazi, to assess the situation. As he left a hotel in the city with a security detail, he said of the rebels, "They are my heroes," the Associated Press reported.

In Baghdad, meanwhile, Adm. Mike Mullen, chairman of the Joint Chiefs of Staff, conceded that the conflict in Libya is "certainly moving towards a stalemate," even though he said airstrikes by U.S. and allied warplanes have reduced Gaddafi's ground forces by "somewhere between 30 and 40 percent."

Speaking to U.S. troops during a visit to the Iraqi capital, Mullen said the capabilities of those ground forces "will continue to go away over time," Reuters news agency reported. Ultimately, he said, "Gaddafi's gotta go," and coalition actions "are going to continue to put the squeeze on him until he's gone." But he said it was unclear how long that would take. "Is he going to figure that out? I don't know," Mullen said.

Mullen also said the United States is watching for any al-Qaeda involvement in the Libyan opposition but has not detected anything significant. "In fact, I've seen no al-Qaeda representation there at all," he said.

Responding to the U.S. decision to deploy Predators, Benghazi-based rebel spokesman Abdul Hafidh Ghoga told al-Jazeera television: "There's no doubt that will help protect civilians, and we welcome that step from the American administration." Other rebels made similar comments.

The deployment deepened U.S. involvement in the stalemated conflict and once again put U.S. assets into a strike role against loyalist ground forces.

The U.S. military will continue to maintain at least two Predators over Libya at all times, officials said Thursday.

At a news conference, Defense Secretary Robert M. Gates was adamant that the use of the drones was not a prelude to an even deeper U.S. commitment involving more strike aircraft or U.S. ground troops. "I think the president has been firm, for example, on boots on the ground," he said. "There is no wiggle room in that. . . . This is a very limited capability."`

Armed drones are in heavy demand in places such as Afghanistan, Pakistan and Yemen, and the announcement of their deployment to Libya seemed designed at least in part to send a message to Gaddafi that the United States remains invested in the conflict.

It also served as a demonstration of U.S. resolve to European allies, who have been pressing for greater involvement by the U.S. military in the weeks since it took on a supporting role in the mission.

Rebel forces in eastern Libya have failed to maintain advances from their Benghazi base and forward positions at the crossroads town of Ajdabiya. Their major prize in western Libya, Misurata, has come under relentless barrages from Libyan army artillery and rocket launchers, causing rebel leaders to plead for intervention by foreign ground troops.

On Thursday, rebels in Misurata were buoyed by news that armed drones had been deployed to the region. "It is wonderful news," a rebel spokesman said.

He said that NATO airstrikes had helped drive loyalist forces back in the last couple of days. "It is still very desperate but not so bleak. There is some hope after these victories," said the spokesman, who declined to be identified for fear of retribution.

The armed Predators' first mission over Libya was cut short Thursday because of bad weather. The unmanned aircraft can stay over an area for upwards of 12 hours at a stretch, making them much better at distinguishing rebel troops from loyalist forces than faster-moving fighter jets, which also must stay at higher altitudes.

Predators carry relatively small Hellfire missiles that are much more effective than precision guided bombs at striking enemy troops in heavily populated urban areas.

In recent weeks the sustained NATO airstrikes have driven Gaddafi's forces to seek the protection of cities, where it has been more difficult to strike them without causing civilian deaths. The drones could open up targets there were previously off-limits to NATO aircraft.

"The character of the fight has changed," said Gen. James Cartwright, the vice chairman of the Joint Chiefs of Staff. "You are seeing . . . people that are digging in or nestling up against crowded areas, where collateral damage is" a concern.

Libyan officials condemned the use of the drones as a violation of the U.N. Security Council resolution that authorized intervention in Libya for the sole purpose of protecting civilians.

"On the contrary, they will kill more civilians, and this is very sad," Deputy Foreign Minister Khaled Kaim told reporters in Tripoli. "What they are doing is undemocratic, illegitimate, and I hope they will reverse their decision."

Both Britain and France have clearly stated that a major focus of the air campaign is to destroy Gaddafi's military and weaken his grip on power. By their yardstick — helping rebel forces topple Gaddafi — the bombing campaign has fallen short.

No one inside the U.S. military expects that the Predators by themselves will be enough to break the stalemate between loyalist and rebel forces in Misurata or other key Libyan cities.

But Thursday, Gates, who had expressed deep skepticism about intervening in Libya, struck a somewhat optimistic note about the progress of the bombing campaign. The sustained strikes were slowly eroding Gaddafi's ground forces. "Day after day, the capabilities of his military are being reduced," Gates told reporters.

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The U.N.-backed sanctions on the Libyan regime will over time prevent Gaddafi from replenishing his ammunition stocks, paying his soldiers and hiring mercenaries, Gates predicted. "That's not a short-term thing," he said. "But the fact is that it is taking place day after day. We'll just have to see. This is an uncertainty."

Some European officials have lamented the absence of U.S. A-10 Warthog ground-attack jets — specifically designed for close air support — and AC-130 gunships. While the low- and slow-flying planes were deployed in small numbers during the first two weeks of the campaign, they were rarely used because of fears they would be shot down by the Libyan army.

The Predators can fly at low altitudes without putting a pilot at risk. Last month Gates said that the Air Force was able to maintain about 48 Predators around the world at any given time.

In Afghanistan, the drones are flying long hours along the Afghanistan-Pakistan border in an effort to spot Taliban fighters who are moving back into Afghanistan for the upcoming fighting season. Gates said that no drones have been shifted from Afghanistan.

Separately, State Department officials Thursday acknowledged delays in releasing $25 million in U.S. aid to the Libyan rebels. The decision to provide the non-lethal support — including vehicles, boots and body armor — was announced Wednesday to address what U.S. officials had described as an urgent need.

But State Department spokesman Mark Toner said the White House had not yet signed off on releasing the equipment.

"We're trying to meet their needs in a coherent and appropriate way," Toner said. "We don't want to give them things they don't necessarily need."

Cody reported from Brussels. Staff writers Simon Denyer and Joby Warrick and staff researcher Julie Tate contributed to this report.

William Branigin writes and edits breaking news. He previously was a reporter on the Post's national and local staffs and spent 19 years overseas, reporting in Southeast Asia, Central America, the Middle East and Europe.

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Exhibit 12

May 2011 White Paper

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DEPARTMENT OF JUSTICE WHITE PAPER

May 25, 2011

Legality of a Lethal Operation by the Central Intelligence Agency Against a U.S. Citizen (b)(1) (b)(3)

This white paper sets forth the legal basis upon which the Central Intelligence Agency ("CIA") could use lethal force in Yemen against a United States citizen who senior officials reasonably determined was a senior leader of al-Qaida or an associated force of al-Qaida. (b)(1) (b)(3) Furthermore, 18 U.S.C. § 1119(b), which criminalizes the murder abroad of a United States national by another U.S. national, does not prohibit such use of lethal force. The text and legislative history of the relevant statutes, precedents of the Office of Legal Counsel ("OLC"), and ordinary principles of statutory construction support the conclusion that section 1119 imposes no bar to operations against a senior leader of al-Qaida or an associated force who nevertheless is a U.S. citizen. Section 1119(b) bars only "unlawful" killings (cross-referencing 18 U.S.C. §§ 1111, 1112, 1113), and, in light of the circumstances outlined below, the killing would not be "unlawful" because it would fall within the traditional justification for conduct undertaken pursuant to "public authority." Here, the authority to use lethal force in national self-defense, as recognized by congressional enactments, would make this kind of operation lawful, and section 1119 would not be violated. (b)(1) (b)(3)

Nor would such an operation violate either 18 U.S.C. § 956(a)—which makes it a crime to conspire within the jurisdiction of the United States "to commit at any place outside the United States an act that would constitute the offense of murder, kidnapping, or maiming if committed in the special maritime and territorial jurisdiction of the United States" if any conspirator acts within the United States to effect any object of the conspiracy—or the War Crimes Act, 18 U.S.C. § 2441. Finally, an operation, under the circumstances outlined below, would not transgress any possible constitutional limitations—a conclusion that is also relevant to the judgment that a CIA operation would be performed pursuant to public authority and thus would not violate either section 1119(b) or section 956(a).[1] (b)(1) (b)(3)

[1] This white paper addresses exclusively the use of force abroad, in the circumstances described herein. It does not address legal issues that the use of force in different circumstances or in any nation other than Yemen might present. (b)(1) (b)(3)

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I.

A.

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Furthermore, according to the CIA, although there may be no occasion for surrender in light of the means by which such an operation would be carried out, the CIA would prefer to capture this target, and if a potential target offers to surrender, such surrender would be accepted, if feasible. This would include any targets in Yemen, although the CIA assesses that a capture in Yemen would not be feasible at this time. *See infra* at 20-21. The CIA has further represented that this sort of operation would not be undertaken in a perfidious or treacherous manner.

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(b)(1)
(b)(3)

Finally, any U.S. citizen targeted in such an operation would be an individual with an operational and senior leadership role in al-Qaida or one of its associated forces. Moreover, the individual would be one who had previously participated in operational planning for attempted attacks on the United States and who has expressed interest in conducting additional terrorist attacks in the United States.

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II.

Subsection 1119(b) of title 18 provides that "[a] person who, being a national of the United States, kills or attempts to kill a national of the United States while such national is outside the United States but within the jurisdiction of another country shall be punished as provided under sections 1111, 1112, and 1113." 18 U.S.C. § 1119(b).[4] In light of the nature of the operation described above, and the fact that its target would be a "national of the United States" who is outside the United States, it might be suggested that section 1119(b) would prohibit such an operation. Section 1119, however, bars only unlawful killings, and the United States' use of lethal force in national self-defense is not an unlawful killing. Section 1119 is best construed to incorporate the public authority justification, which can render lethal action carried out by a governmental official lawful in some circumstances, and this public authority justification would apply to such a CIA operation.

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(b)(3)

A.

Although section 1119(b) refers only to the "punish[ments]" provided under sections 1111, 1112, and 1113, courts have construed section 1119(b) to incorporate the substantive elements of those cross-referenced provisions of title 18. *See, e.g.*, *United States v. Wharton*, 320 F.3d 526, 533 (5th Cir. 2003); *United States v. White*, 51 F. Supp. 2d 1008, 1013-14 (E.D. Ca. 1997). Section 1111 of title 18 sets forth criminal penalties for "murder," and provides that "[m]urder is the unlawful killing of a human being with malice aforethought." *Id.* § 1111(a). Section 1112 similarly provides criminal sanctions for "manslaughter," and states that "[m]anslaughter is the unlawful killing of a human being without malice." *Id.* § 1112. Section

[4] *See also* 18 U.S.C. § 1119(a) (providing that "national of the United States" has the meaning stated in section 101(a)(22) of the Immigration and Nationality Act, 8 U.S.C. § 1101(a)(22)). (U)

(b)(1)
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1113 provides criminal penalties for "attempts to commit murder or manslaughter." *Id.* § 1113. It is therefore clear that section 1119(b) bars only "unlawful killings."[5] (U)

This limitation on section 1119(b)'s scope is significant, as the legislative history to the underlying offenses that the section incorporates makes clear. The provisions section 1119(b) incorporates derive from sections 273 and 274 of the Act of March 4, 1909, ch. 321, 35 Stat. 1088, 1143. The 1909 Act codified and amended the penal laws of the United States. Section 273 of the enactment defined murder as "the unlawful killing of a human being with malice aforethought," and section 274 defined manslaughter as "the unlawful killing of a human being without malice." 35 Stat. 1143.[6] In 1948, Congress codified the federal murder and manslaughter provisions at sections 1111 and 1112 of title 18 and retained the definitions of murder and manslaughter in nearly identical form, *see* Act of June 25, 1948, ch. 645, 62 Stat. 683, 756, including the references to "unlawful killing" that remain in the statutes today—references that track similar formulations in some state murder statutes.[7] (U)

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[5] Section 1119 itself also expressly imposes various procedural limitations on prosecution. Subsection 1119(c)(1) requires that any prosecution be authorized in writing by the Attorney General, the Deputy Attorney General, or an Assistant Attorney General, and precludes the approval of such an action "if prosecution has been previously undertaken by a foreign country for the same conduct." In addition, subsection 1119(c)(2) provides that "[n]o prosecution shall be approved under this section unless the Attorney General, in consultation with the Secretary of State, determines that the conduct took place in a country in which the person is no longer present, and the country lacks the ability to lawfully secure the person's return"—a determination that "is not subject to judicial review," *id.* (U)

[6] A 1908 joint congressional committee report on the Act explained that "[u]nder existing law [i.e., prior to the 1909 Act], there [had been] no statutory definition of the crimes of murder or manslaughter." Report by the Special Joint Comm. on the Revision of the Laws, Revision and Codification of the Laws, Etc., H.R. Rep. No. 2, 60th Cong., 1st Sess., at 12 (Jan. 6, 1908) ("Joint Committee Report"). The 1878 edition of the Revised Statutes, however, did contain a definition for manslaughter (but not murder): "Every person who, within any of the places or upon any of the waters [within the exclusive jurisdiction of the United States] unlawfully and willfully, but without malice, strikes, stabs, wounds, or shoots at, otherwise injures another, of which striking, stabbing, wounding, shooting, or other injury such other person dies, either on land or sea, within or without the United States, is guilty of the crime of manslaughter." Revised Statutes § 5341 (1878 ed.) (quoted in *United States v. Alexander*, 471 F.2d 923, 944-45 n.54 (D.C. Cir. 1972)). With respect to murder, the 1908 report noted that the legislation "enlarges the common-law definition, and is similar in terms to the statutes defining murder in a large majority of the States." Joint Committee Report at 24; *see also Revision of the Penal Laws: Hearings on S. 2982 Before the Senate as a Whole*, 60th Cong., 1st Sess. 1184, 1185 (1908) (statement of Senator Heyburn) (same). With respect to manslaughter, the report stated that "[w]hat is said with respect to [the murder provision] is true as to this section, manslaughter being defined and classified in language similar to that to be found in the statutes of a large majority of the States." Joint Committee Report at 24. (U)

[7] *See, e.g.*, Cal. Penal Code § 187(a) (West 2009) ("Murder is the unlawful killing of a human being, or a fetus, with malice aforethought."); Fla. Stat. § 782.04(1)(a) (West 2009) (including "unlawful killing of a human being" as an element of murder); Idaho Code Ann. § 18-4001 (West 2009) ("Murder is the unlawful killing of a human being"); Nev. Rev. Stat. Ann. § 200.010 (West 2008) (including "unlawful killing of a human being" as an element of murder); R. I. Gen. Laws § 11-23-1 (West 2008) ("The unlawful killing of a human being with malice aforethought is murder."); Tenn. Code Ann. § 39-13-201 (West 2009) ("Criminal homicide is the unlawful killing of another person"). Such statutes, in turn, reflect the view often expressed in the common law of murder that the crime requires an "unlawful" killing. *See, e.g.*, Edward Coke, *The Third Part of the Institutes of Laws of England* 47 (London, W. Clarke & Sons 1809) ("Murder is when a man of sound memory, and of the age of discretion, unlawfully killeth within any county of the realm any reasonable creature *in rerum natura* under the king's peace, with malice fore-thought, either expressed by the party, or implied by law, so as the party wounded, or hurt, &c. die of the wound, or hurt, &c. within a year and a day after the same."); 4 William Blackstone, *Commentaries on the*

As this legislative history indicates, guidance as to the meaning of what constitutes an "unlawful killing" in sections 1111 and 1112—and thus for purposes of section 1119(b)—can be found in the historical understandings of murder and manslaughter. That history shows that states have long recognized justifications and excuses to statutes criminalizing "unlawful" killings.[8] One state court, for example, in construing that state's murder statute explained that "the word 'unlawful' is a term of art" that "connotes a homicide with the absence of factors of excuse or justification," *People v. Frye*, 10 Cal. Rptr. 2d 217, 221 (Cal. App. 1992). That court further explained that the factors of excuse or justification in question include those that have traditionally been recognized. *Id.* at 221 n.2. Other authorities support the same conclusion. *See, e.g., Mullaney v. Wilbur*, 421 U.S. 684, 685 (1975) (requirement of "unlawful" killing in Maine murder statute meant that killing was "neither justifiable nor excusable"); *cf. also* Rollin M. Perkins & Ronald N. Boyce, *Criminal Law* 56 (3d ed. 1982) ("Innocent homicide is of two kinds, (1) justifiable and (2) excusable."). Accordingly, section 1119 does not proscribe killings covered by a justification traditionally recognized, such as under the common law or state and federal murder statutes. *See White*, 51 F. Supp. 2d at 1013 ("Congress did not intend [section 1119] to criminalize justifiable or excusable killings."). (U)

B.

Before one such recognized justification—the justification of "public authority"—can be analyzed in the context of a potential CIA operation, it is necessary to explain why section 1119(b) incorporates that particular justification. (b)(1) (b)(3)

The public authority justification, generally understood, is well-accepted, and it is clear it may be available even in cases where the particular criminal statute at issue does not expressly refer to a public authority justification.[9] Prosecutions where such a "public authority"

Laws of England 195 (Oxford 1769) (same); *see also A Digest of Opinions of the Judge Advocates General of the Army* 1074 n.3 (1912) ("Murder, at common law, is the unlawful killing by a person of sound memory and discretion, of any reasonable creature in being and under the peace of the State, which malice aforethought either express or implied.") (internal quotation marks omitted). (U)

[8] The same is true with respect to other statutes, including federal laws, that modify a prohibited act other than murder or manslaughter with the term "unlawfully." *See, e.g., Territory v. Gonzales*, 89 P. 250, 252 (N.M. Terr. 1907) (construing the term "unlawful" in statute criminalizing assault with a deadly weapon as "clearly equivalent" to "without excuse or justification"). For example, 18 U.S.C. § 2339C makes it unlawful, *inter alia*, to "unlawfully and willfully provide[] or collect[] funds" with the intention that they be used (or knowledge they are to be used) to carry out an act that is an offense within certain specified treaties, or to engage in certain other terrorist acts. The legislative history of section 2339C makes clear that "[t]he term 'unlawfully' is intended to embody common law defenses." H.R. Rep. No. 107-307, at 12 (2001). Similarly, the Uniform Code of Military Justice makes it unlawful for members of the armed forces to, "without justification or excuse, unlawfully kill[] a human being" under certain specified circumstances. 10 U.S.C. § 918. Notwithstanding that the statute already expressly requires lack of justification or excuse, it is the longstanding view of the armed forces that "[k]illing a human being is *unlawful*" for purposes of this provision "when done without justification or excuse." Manual for Courts-Martial United States (2008 ed.), at IV-63, art. 118, comment (c)(1) (emphasis added). (U)

[9] Where a federal criminal statute incorporates the public authority justification, and the government conduct at issue is within the scope of that justification, there is no need to examine whether the criminal prohibition has been repealed, impliedly or otherwise, by some other statute that might potentially authorize the governmental

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justification is invoked are understandably rare, *see* American Law Institute, Model Penal Code and Commentaries § 3.03 Comment 1, at 24 (1985); *cf. Visa Fraud Investigation*, 8 Op. O.L.C. 284, 285 n.2, 286 (1984), and thus there is little case law in which courts have analyzed the scope of the justification with respect to the conduct of government officials.[10] Nonetheless, discussions in the leading treatises and in the Model Penal Code demonstrate its legitimacy. *See* 2 Wayne R. LaFave, *Substantive Criminal Law* § 10.2(b), at 135 (2d ed. 2003); Perkins & Boyce, *Criminal Law* at 1093 ("Deeds which otherwise would be criminal, such as taking or destroying property, taking hold of a person by force and against his will, placing him in confinement, or even taking his life, are not crimes if done with proper public authority."); *see also* Model Penal Code § 3.03(1)(a), (d), (e), at 22-23 (proposing codification of justification where conduct is "required or authorized by," inter alia, "the law defining the duties or functions of a public officer . . ."; "the law governing the armed services or the lawful conduct of war"; or "any other provision of law imposing a public duty"); National Comm'n on Reform of Federal Criminal Laws, A Proposed New Federal Criminal Code § 602(1) ("Conduct engaged in by a public servant in the course of his official duties is justified when it is required or authorized by law."). And OLC has invoked analogous rationales when it has analyzed whether Congress intended a particular criminal statute to prohibit specific conduct that otherwise falls within a government agency's authorities.[11] (U)

The public authority justification does not excuse all conduct of public officials from all criminal prohibitions. The legislature may design some criminal prohibitions to place bounds on the kinds of governmental conduct that can be authorized by the Executive. Or the legislature may enact a criminal prohibition in order to delimit the scope of the conduct that the legislature

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conduct, including by the authorizing statute that might supply the predicate for the assertion of the public authority justification itself. Rather, in such cases, the criminal prohibition simply does not apply to the particular governmental conduct at issue in the first instance because Congress intended that prohibition to be qualified by the public authority justification that it incorporates. Conversely, where another statute expressly authorizes the government to engage in the *specific* conduct in question, then there would be no need to invoke the more general public authority justification doctrine, because in such a case the legislature itself has, in effect, carved out a specific exception permitting the executive to do what the legislature has otherwise generally forbidden. Such a circumstance is not addressed in this white paper. (U)

[10] The question of a "public authority" justification is much more frequently litigated in cases where a private party charged with a crime interposes the defense that he relied upon authority that a public official allegedly conferred upon him to engage in the challenged conduct. *See generally* United States Attorneys' Manual tit. 9, Criminal Resource Manual § 2055 (describing and discussing three different such defenses of "governmental authority"); National Comm'n on Reform of Federal Criminal Laws, A Proposed New Federal Criminal Code § 602(2); Model Penal Code § 3.03(3)(b); *see also United States v. Fulcher*, 250 F.3d 244, 253 (4th Cir. 2001); *United States v. Rosenthal*, 793 F.2d 1214, 1235-36 (11th Cir. 1986); *United States v. Duggan*, 743 F.2d 59, 83-84 (2d Cir. 1984); Fed. R. Crim. P. 12.3 (requiring defendant to notify government if he intends to invoke such a public authority defense). Such cases are not addressed in this white paper, and the discussion of the "public authority" justification is limited to the question of whether a particular criminal law applies to specific conduct undertaken by *government agencies* pursuant to their authorities. (U)

[11] *See, e.g.*, *Visa Fraud Investigation*, 8 Op. O.L.C. at 287-88 (concluding that civil statute prohibiting issuance of visa to an alien known to be ineligible did not prohibit State Department from issuing such a visa where "necessary" to facilitate important Immigration and Naturalization Service undercover operation carried out in a "reasonable" fashion).

(b)(1)
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has otherwise authorized the Executive to undertake pursuant to another statute.[12] But the recognition that a federal criminal statute may incorporate the public authority justification reflects the fact that it would not make sense to attribute to Congress the intent with respect to each of its criminal statutes to prohibit all covered activities undertaken by public officials in the legitimate exercise of their otherwise lawful authorities, even if Congress has clearly intended to make those same actions a crime when committed by persons who are not acting pursuant to such public authority. In some instances, therefore, the better view of a criminal prohibition may well be that Congress meant to distinguish those persons who are acting pursuant to public authority, at least in some circumstances, from those who are not, even if the statute by terms does not make that distinction express. *Cf. Nardone v. United States*, 302 U.S. 379, 384 (1937) (federal criminal statutes should be construed to exclude authorized conduct of public officers where such a reading "would work obvious absurdity as, for example, the application of a speed law to a policeman pursuing a criminal or the driver of a fire engine responding to an alarm").[13] (U)

Here, in the case of a federal murder statute, there is no general bar to applying the public authority justification to criminal prohibition. For example, with respect to prohibitions on the unlawful use of deadly force, the Model Penal Code recommended that legislatures should make the public authority (or "public duty") justification available, though only where the use of such force is covered by a more particular justification (such as defense of others or the use of deadly force by law enforcement), where the use of such force "is otherwise expressly authorized by law," or where such force "occurs in the lawful conduct of war." Model Penal Code § 3.03(2)(b), at 22; *see also id.* Comment 3, at 26. Some states proceeded to adopt the Model Penal Code recommendation.[14] Other states, although not adopting that precise formulation, have enacted specific statutes dealing with the question of when public officials are justified in using deadly force, which often prescribe that an officer acting in the performance of his official duties must reasonably have believed that such force was "necessary."[15] Other states have more broadly provided that the public authority defense is available where the government officer engages in a "reasonable exercise" of his official functions.[16] There is, however, no federal

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[12] *See, e.g.*, *Nardone v. United States*, 302 U.S. 379, 384 (1937) (government wiretapping was proscribed by federal statute). (U)

[13] Each potentially applicable statute must be carefully and separately examined to discern Congress's intent in this respect—such as whether it imposes a less qualified limitation than section 1119 imposes. *See generally, e.g.*, *United States Assistance to Countries that Shoot Down Civil Aircraft Involved in Drug Trafficking*, 18 Op. O.L.C. 148 (1994); *Application of Neutrality Act to Official Government Activities*, 8 Op. O.L.C. 58 (1984). (U)

[14] *See, e.g.*, Neb. Rev. Stat. § 28-1408(2)(b); Pa. C.S.A. § 504(b)(2); Tex. Penal Code tit. 2, § 9.21(c). (U)

[15] *See, e.g.*, Ariz. Rev. Stat. § 13-410.C; Maine Rev. Stat. Ann. tit. 17, § 102.2. (U)

[16] *See, e.g.*, Ala. Stat. § 13A-3-22; N.Y. Penal Law § 35.05(1); LaFave, *Substantive Criminal Law* § 10.2(b), at 135 n.15; *see also* Robinson, *Criminal Law Defenses* § 149(a), at 215 (proposing that the defense should be available only if the actor engages in the authorized conduct "when and to the extent necessary to protect or further the interest protected or furthered by the grant of authority" and where it "is reasonable in relation to the gravity of the harms or evils threatened and the importance of the interests to be furthered by such exercise of authority"); *id.* § 149(c), at 218-20. (U)

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statute that is analogous, and neither section 1119 nor any of the incorporated title 18 provisions setting forth the substantive elements of the section 1119(b) offense, provide any express guidance as to the existence or scope of this justification. (U)

Against this background, the touchstone for the analysis of whether section 1119 incorporates not only justifications generally, but also the public authority justification in particular, is the legislative intent underlying this criminal statute. Here, the statute should be read to exclude from its prohibitory scope killings that are encompassed by traditional justifications, which include the public authority justification. There are no indications that Congress had a contrary intention. Nothing in the text or legislative history of sections 1111-1113 of title 18 suggests that Congress intended to exclude the established public authority justification from those that Congress otherwise must be understood to have imported through the use of the modifier "unlawful" in those statutes (which, as explained above, establish the substantive scope of section 1119(b)).[17] Nor is there anything in the text or legislative history of section 1119 itself to suggest that Congress intended to abrogate or otherwise affect the availability under that statute of this traditional justification for killings. On the contrary, the relevant legislative materials indicate that in enacting section 1119 Congress was merely closing a gap in a field dealing with entirely different kinds of conduct than that at issue here. (U)

The origin of section 1119 was a bill entitled the "Murder of United States Nationals Act of 1991," which Senator Thurmond introduced during the 102d Congress in response to the murder of an American in South Korea who had been teaching at a private school there. *See* 137 Cong. Rec. 8675-77 (1991) (statement of Sen. Thurmond). Shortly after the murder, another American teacher at the school accused a former colleague (who was also a U.S. citizen) of having committed the murder, and also confessed to helping the former colleague cover up the crime. The teacher who confessed was convicted in a South Korean court of destroying evidence and aiding the escape of a criminal suspect, but the individual she accused of murder had returned to the United States before the confession. *Id.* at 8675. The United States did not have an extradition treaty with South Korea that would have facilitated prosecution of the alleged murderer and therefore, under then-existing law, "the Federal Government ha[d] no jurisdiction to prosecute a person residing in the United States who ha[d] murdered an American abroad except in limited circumstances, such as a terrorist murder or the murder of a Federal official." *Id.* (U)

To close the "loophole under Federal law which permits persons who murder Americans in certain foreign countries to go punished," *id.*, the Thurmond bill would have added a new section to title 18 providing that "[w]hoever kills or attempts to kill a national of the United States while such national is outside the United States but within the jurisdiction of another country shall be punished as provided under sections 1111, 1112, and 1113 of this title." S. 861, 102d Cong. (1991) (incorporated in S. 1241, 102d Cong. §§ 3201-03 (1991)). The proposal also

[17] The argument that the use of the term "unlawful" supports the conclusion that section 1119 incorporates the public authority justification does not suggest that the absence of such a term would require a contrary conclusion regarding the intended application of a criminal statute to otherwise authorized government conduct in other cases. Each statute must be considered on its own terms to determine the relevant congressional intent. *See supra* note 13. (U)

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contained a separate provision amending the procedures for extradition "to provide the executive branch with the necessary authority, in the absence of an extradition treaty, to surrender to foreign governments those who commit violent crimes against U.S. nationals." 137 Cong. Rec. 8676 (1991) (statement of Sen. Thurmond) (discussing S. 861, 102d Cong., § 3).[18] The Thurmond proposal was incorporated into an omnibus crime bill that both the House and Senate passed, but that bill did not become law. (U)

In the 103d Congress, a revised version of the Thurmond bill was included as part of the Violent Crime Control and Law Enforcement Act of 1994. H.R. 3355 § 60009, 103d Cong. (1994). The new legislation differed from the previous bill in two key respects. First, it prescribed criminal jurisdiction only where both the perpetrator and the victim were U.S. nationals, whereas the original Thurmond bill would have extended jurisdiction to all instances in which the victim was a U.S. national (based on so-called "passive personality" jurisdiction[19]). Second, the revised legislation did not include the separate provision from the earlier Thurmond legislation that would have amended the procedures for extradition. Congress enacted the revised legislation in 1994 as part of Public Law No. 103-322, and it was codified as section 1119 of title 18. *See* Pub. L. No. 103-322, § 60009, 108 Stat. 1796, 1972 (1994). (U)

Thus, section 1119 was designed to close a jurisdictional loophole—exposed by a murder that had been committed abroad by a private individual—to ensure the possibility of prosecuting U.S. nationals who murdered other U.S. nationals in certain foreign countries that lacked the ability to lawfully secure the perpetrator's appearance at trial. This loophole had nothing to do with the sort of [redacted] CIA counterterrorism operation at issue here. Indeed, prior to the enactment of section 1119, the only federal statute expressly making it a crime to kill U.S. nationals abroad, at least outside the special and maritime jurisdiction of the United States, reflected what appears to have been a particular concern with protection of Americans from terrorist attacks. *See* 18 U.S.C. § 2332(a), (d) (criminalizing unlawful killings of U.S. nationals abroad where the Attorney General or his subordinate certifies that the "offense was intended to coerce, intimidate, or retaliate against a government or a civilian population").[20] It therefore would be anomalous to now read section 1119's closing of a limited jurisdictional gap as having been intended to jettison important applications of the established public authority justification, particularly in light of the statute's incorporation of substantive offenses codified in statutory

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[18] The Thurmond proposal also contained procedural limitations on prosecution virtually identical to those that Congress ultimately enacted and codified at 18 U.S.C. § 1119(c). *See* S. 861, 102d Cong. § 2. (U)

[19] *See* Geoffrey R. Watson, *The Passive Personality Principle*, 28 Tex. Int'l L.J. 1, 13 (1993); 137 Cong. Rec. 8677 (1991) (letter for Senator Ernest F. Hollings, from Janet G. Mullins, Assistant Secretary, Legislative Affairs, U.S. State Department (Dec. 26, 1989), submitted for the record during floor debate on the Thurmond bill) (S4752) ("The United States has generally taken the position that the exercise of extraterritorial criminal jurisdiction based solely on the nationality of the victim interferes unduly with the application of local law by local authorities."). (U)

[20] Courts have interpreted other federal homicide statutes to apply extraterritorially despite the absence of an express provision for extraterritorial application. *See, e.g.*, 18 U.S.C. § 1114 (criminalizing unlawful killings of federal officers and employees); *United States v. Al Kassar*, 582 F. Supp. 2d 488, 497 (S.D.N.Y. 2008) (construing 18 U.S.C. § 1114 to apply extraterritorially). (U)

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provisions that from all indications were intended to incorporate recognized justifications and excuses. (U)

It is true that here the target may be a U.S. citizen. Nevertheless, U.S. citizenship does not provide a basis for concluding that section 1119 would fail to incorporate the established public authority justification for a killing in this case. As explained above, section 1119 incorporates the federal murder and manslaughter statutes, and thus its prohibition extends only to "unlawful" killings, 18 U.S.C. §§ 1111, 1112, a category that was intended to include, from all of the evidence of legislative intent, only those killings that may not be permissible in light of traditional justifications for such action. At the time the predecessor versions of sections 1111 and 1112 were enacted, it was understood that killings undertaken in accord with the public authority justification were not "unlawful" because they were justified. There is no indication that, because section 1119(b) proscribes the unlawful killing abroad of U.S. nationals by U.S. nationals, it silently incorporated all justifications for killings *except* that public authority justification.

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III.

Given that section 1119 incorporates the public authority justification, the next question is whether a potential CIA operation would be encompassed by that justification and, in particular, whether that justification would apply even when the target is a United States citizen. The analysis leads to the conclusion that it would—a conclusion that depends in part on the further determination that this kind of operation would accord with any potential constitutional protections of a United States citizen in these circumstances (*see infra* part VI). In reaching this conclusion, this white paper does not address other circumstances involving different facts. The facts addressed here would be sufficient to establish the justification, whether or not any particular fact is necessary to the conclusion.[21]

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A.

The frame of reference here is that the United States is currently in the midst of an armed conflict, *see* Authorization for Use of Military Force ("AUMF"), Pub. L. No. 107-40, 115 Stat. 224, § 2(a) (2001), and the public authority justification would encompass an operation such as this one were it conducted by the military consistent with the laws of war. As one legal commentator has explained by example, "if a soldier intentionally kills an enemy combatant in time of war and within the rules of warfare, he is not guilty of murder," whereas, for example, if that soldier intentionally kills a prisoner of war—a violation of the laws of war—"then he commits murder." 2 LaFave, *Substantive Criminal Law* § 10.2(c), at 136; *see also State v. Gut*, 13 Minn. 341, 357 (1868) ("That it is legal to kill an alien enemy in the heat and exercise of war, is undeniable; but to kill such an enemy after he laid down his arms, and especially when he is confined in prison, is murder."); Perkins & Boyce, *Criminal Law* at 1093 ("Even in time of war an alien enemy may not be killed needlessly after he has been disarmed and securely

[21] In light of the conclusion that section 1119 and the statutes it cross-references incorporate this justification, and that the justification would cover an operation of the sort discussed here, this discussion does not address whether other grounds might exist for concluding that such an operation would be lawful. (TS/NF)

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imprisoned").[22] Moreover, without invoking the public authority justification by terms, OLC has relied on the same notion in an opinion addressing the intended scope of a federal criminal statute that concerned the use of possibly lethal force. *See United States Assistance to Countries that Shoot Down Civil Aircraft Involved in Drug Trafficking*, 18 Op. O.L.C. 148, 164 (1994) ("*Shoot Down Opinion*") (concluding that the Aircraft Sabotage Act of 1984, 18 U.S.C. § 32(b)(2), which prohibits the willful destruction of a civil aircraft and otherwise applies to U.S. government conduct, should not be construed to have "the surprising and almost certainly unintended effect of criminalizing actions by military personnel that are lawful under international law and the laws of armed conflict").

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As explained above, an operation of this sort would be targeted at a senior leader of al-Qaida or its associated forces who participated in operational planning for attempted attacks on the United States on behalf of such forces and who continues to plan such attacks. *See supra* at 2. Such an individual would have engaged in conduct bringing him within the scope of the AUMF. Any military operation against such a person, therefore, would be carried out against someone who is within the core of individuals against whom Congress has authorized the use of necessary and appropriate force. (TS/NF)

This sort of operation would also be consistent with the laws of war applicable to a non-international armed conflict[23] if carried out by military personnel. Any military member

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[22] *Cf. Public Committee Against Torture in Israel v. Government of Israel*, HCJ 769/02 ¶ 19, 46 I.L.M. 375, 382 (Israel Supreme Court sitting as the High Court of Justice, 2006) ("When soldiers of the Israel Defense Forces act pursuant to the laws of armed conflict, they are acting 'by law', and they have a good justification defense [to criminal culpability]. However, if they act contrary to the laws of armed conflict they may be, *inter alia*, criminally liable for their actions."); *Calley v. Callaway*, 519 F.2d 184, 193 (5th Cir. 1975) ("an order to kill unresisting Vietnamese would be an illegal order, and . . . if [the defendant] knew the order was illegal or should have known it was illegal, obedience to an order was not a legal defense"). (U)

[23] The rules of non-international armed conflict are relevant because the Supreme Court has held that the United States is engaged in a non-international armed conflict with al-Qaida. *Hamdan v. Rumsfeld* 548 U.S. 557, 628-31 (2006). Although an operation of the kind discussed here would occur in Yemen, a location that is far from the most active theater of combat between the United States and al-Qaida, that does not affect the conclusion. There appears to be no authority for the proposition that when one of the parties to an armed conflict plans and executes operations from a base in a new nation, an operation to engage the enemy in that location can never be part of the original armed conflict—and thus subject to the laws of war governing that conflict—unless and until the hostilities become sufficiently intensive and protracted within that new location. Nor is there any obvious reason why that more categorical, nation-specific rule should govern in a non-international armed conflict. Rather, the determination of whether a particular operation would be part of an ongoing armed conflict for purposes of international law requires consideration of the particular facts and circumstances present in each case.

Here, any potential operation would target a senior leader of al-Qaida or its associated forces. Moreover, such an operation would be conducted in Yemen, where a co-belligerent of al-Qaida, engaged in hostilities against the United States as part of the same comprehensive armed conflict and in league with the principal enemy, has a significant and organized presence, and from which it is conducting terrorist training in an organized manner and has executed and is planning to execute attacks against the United States. Finally, the target of such an operation would be someone continuously planning attacks from that Yemeni base of operations against the United States, as the conflict with al-Qaida continues. These facts in combination support the judgment that this sort of operation in Yemen would be conducted as part of the non-international armed conflict between the United States and al-Qaida. (TS/NF)

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responsible for such a strike would likely have an obligation to abort a strike if he or she concluded that civilian casualties would be disproportionate or that such a strike would in any other respect violate the laws of war. *See* Chairman of the Joint Chiefs of Staff, Instruction 5810.01D, *Implementation of the DoD Law of War Program* ¶ 4.a, at 1 (Apr. 30, 2010) ("It is DOD policy that . . . [m]embers of the DOD Components comply with the law of war during all armed conflicts, however such conflicts are characterized, and in all other military operations."). Moreover, the targeted nature of this sort of operation would help to ensure that it would comply with the principle of distinction. *See, e.g.*, United States Air Force, *Targeting*, Air Force Doctrine Document 2-1.9, at 88 (June 8, 2006) (explaining that the "four fundamental principles that are inherent to all targeting decisions" are military necessity, humanity (the avoidance of unnecessary suffering), proportionality, and distinction). Further, while such an operation would be conducted without warning, it would not violate the prohibitions on treachery and perfidy—which are addressed to conduct involving a breach of confidence by the assailant. *See, e.g.*, Hague Convention IV, Annex, art. 23(b), 36 Stat. at 2301-02 ("[I]t is especially forbidden . . . to kill or wound treacherously individuals belonging to the hostile nation or army"); *cf. also* Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts, art. 37(1) (prohibiting the killing, injuring or capture of an adversary in an international armed conflict by resort to acts "inviting the confidence of [the] adversary. . . with intent to betray that confidence," including feigning a desire to negotiate under truce or flag of surrender; feigning incapacitation; and feigning noncombatant status).[34]

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In light of all these circumstances, a military operation against the sort of individual described above would comply with international law, including the laws of war applicable to this armed conflict, and would fall within Congress's authorization to use "necessary and appropriate force" against al-Qaida. Consequently, the potential attack, if conducted under military authority in the manner described, should be understood to constitute the lawful conduct of war and thus to be encompassed by the public authority justification.

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B.

Given the assessment that an analogous operation carried out pursuant to the AUMF would fall within the scope of the public authority justification, there is no reason to reach a

[34] Although the United States is not a party to the First Protocol, the State Department has announced that "we support the principle that individual combatants not kill, injure, or capture enemy personnel by resort to perfidy." Remarks of Michael J. Matheson, Deputy Legal Adviser, Department of State, *The Sixth Annual American Red Cross-Washington College of Law Conference on International Humanitarian Law: A Workshop on Customary International Law and the 1977 Protocols Additional to the 1949 Geneva Conventions*, 2 Am. U. J. of Int'l L. & Pol'y 415, 425 (1987). (U)

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different conclusion for a CIA operation.[25] As discussed above, such an operation would consist of an attack against an operational leader of an enemy force, as part of the United States's ongoing non-international armed conflict with al-Qaida.

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would conduct an operation of this sort in a manner that accords with the rules of international humanitarian law governing this armed conflict. See supra at 2, 4-5.[26]

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[25] The potential restrictions imposed by two other criminal laws—18 U.S.C. §§ 956(a) and 2441—are addressed in Parts IV and V of this white paper. Part VI explains why the Constitution would impose no bar to a potential CIA operation under these circumstances, based on the facts outlined above. (U)

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If the killing by a member of the armed forces would comply with the law of war and otherwise be lawful, actions of CIA officials facilitating that killing should also not be unlawful. *See, e.g.*, *Shoot Down Opinion* at 165 n.33 ("[O]ne cannot be prosecuted for aiding and abetting the commission of an act that is not itself a crime.") (citing *Shuttlesworth v. City of Birmingham*, 373 U.S. 262 (1963)).

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Nor does the fact that CIA personnel would be involved in this sort of lethal operation itself cause it to violate the laws of war. It is true that CIA personnel, by virtue of their not being part of the armed forces, would not enjoy the immunity from prosecution under the domestic law of the countries in which they act for their conduct in targeting and killing enemy forces in compliance with the laws of war—an immunity that the armed forces enjoy by virtue of their status. *See* Philip Alston, *Report of the Special Rapporteur on extrajudicial, summary or arbitrary executions* ¶ 71, at 22 (United Nations Human Rights Council, Fourteenth Session, Agenda Item 3, May 28, 2010); *see also* Yorum Dinstein, *The Conduct of Hostilities Under the Law of International Armed Conflict* 31 (2004) ("*Conduct of Hostilities*"). Nevertheless, lethal activities conducted in accord with the laws of war, and undertaken in the course of lawfully authorized hostilities, do not violate *the laws of war* by virtue of the fact that they are carried out in part by government actors who are not entitled to the combatant's privilege. The contrary view "arises . . . from a fundamental confusion between acts punishable under international law and acts with respect to which international law affords no protection." Richard R. Baxter, *So-Called "Unprivileged Belligerency": Spies, Guerillas, and Saboteurs*, 28 Brit. Y.B. Int'l L. 323, 342 (1951) ("the law of nations has not ventured to require of states that they . . . refrain from the use of secret agents or that these activities upon the part of their military forces or civilian population be punished"). *Accord* Yoram Dinstein, *The Distinction Between Unlawful Combatants and War Criminals*, in *International Law at a Time of Perplexity: Essays in Honour of Shabtai Rosenne* 103-16 (Y. Dinstein ed., 1989). Statements in the Supreme Court's decision in *Ex parte Quirin*, 317 U.S. 1 (1942), are sometimes cited for the contrary view. *See, e.g.*, *id.* at 36 n.12 (suggesting that passing through enemy lines in order to commit "any hostile act" while not in uniform "renders the offender liable to trial for violation of the laws of war"); *id.* at 31 (enemies who come secretly through the lines for purposes of waging war by destruction of life or property "without uniform" not only are "generally not to be entitled to the status of prisoners of war," but also "to be offenders against the law of war subject to trial and punishment by military tribunals"). Because the Court in *Quirin* focused on conduct taken behind enemy lines, it is not clear whether the Court in these passages intended to refer only to conduct that would constitute perfidy or treachery. To the extent the Court meant to suggest more broadly that any hostile acts performed by unprivileged belligerents are *for that reason* violations of the laws of war, the authorities the Court cited (the Lieber Code and Colonel Winthrop's military law treatise) do not provide clear support. *See* John C. Dehn, *The* Hamdan *Case and the Application of a Municipal Offense*, 7 J. Int'l Crim. J. 63, 73-

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Nothing in the text or legislative history of section 1119 indicates that Congress intended to criminalize such an operation. Section 1119 incorporates the traditional public authority justification, and did not impose any special limitation on the scope of that justification. As explained above, *supra* at 10-12, the legislative history of that criminal prohibition revealed Congress's intent to close a jurisdictional loophole that would have hindered prosecutions of murders carried out by private persons abroad. It offers no indication that Congress intended to prohibit the targeting of an enemy leader during an armed conflict in a manner that would accord with the laws of war when performed by a duly authorized government agency. Nor does it indicate that Congress, in closing the identified loophole, meant to place a limitation on the CIA that would not apply to the armed forces.

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Thus, just as Congress would not have intended section 1119 to bar a military attack on the sort of individual described above, neither would it have intended the provision to prohibit an attack on the same target, in the same authorized conflict and in similar compliance with the laws of war, carried out by the CIA in accord with

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Finally, there is no basis in prior OLC precedent for reaching a different conclusion. Outside the context of the use of deadly force, OLC has had occasion to address whether particular criminal statutes should be construed to criminalize otherwise authorized government activities, notwithstanding the absence of an express exception to that effect. OLC's opinions on

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79 (2009); *see also* Baxter, *So-Called "Unprivileged Belligerency,"* 28 Brit. Y.B. Int'l L. at 339-40; Michael N. Schmitt, *Humanitarian Law and Direct Participation in Hostilities by Private Contractors or Civilian Employees*, 5 Chi. J. Int'l L. 511, 521 n.45 (2005); W. Hays Parks, *Special Forces' Wear of Non-Standard Uniforms*, 4 Chic. J. Int'l L. 493, 510-11 n.31 (2003). DoD's current Manual for Military Commissions, however, does not endorse the view that the commission of an unprivileged belligerent act, without more, constitutes a violation of the international law of war. *See* Manual for Military Commissions, Part IV, § 5(13), Comment, at IV-11 (2010 ed., Apr. 27, 2010) (murder or infliction of serious bodily injury "committed while the accused did not meet the requirements of privileged belligerency" can be tried by a military commission "even if such conduct does not violate the international law of war").

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[27] As one example, the Senate Report pointed to the Department of Justice's conclusion that the Neutrality Act, 18 U.S.C. § 960, prohibits conduct by private parties but is not applicable to the CIA and other government agencies. *Id.* The Senate Report assumed that the Department's conclusion about the Neutrality Act was premised on the assertion that in the case of government agencies, there is an "absence of the mens rea necessary to the offense." *Id.* In fact, however, the Department's conclusion about that Act was not based on questions of mens rea, but instead on a careful analysis demonstrating that Congress did not intend the Act, despite its words of general applicability, to apply to the activities of government officials acting within the course and scope of their duties as officers of the United States. *See Application of Neutrality Act to Official Government Activities*, 8 Op. O.L.C. 58 (1984). (U)

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such questions have not directly invoked the public authority justification, but they have engaged in the same basic, context-specific inquiry concerning whether Congress intended the criminal statute at issue to prohibit government activities in circumstances where the same conduct would be unlawful if performed by a private person. OLC concluded in one such opinion that a statutory prohibition on granting visas to aliens in sham marriages, 8 U.S.C. § 1201(g)(3), would not prohibit granting such a visa as part of an undercover operation. *Visa Fraud Investigation*, 8 Op. O.L.C. at 284. OLC explained that courts have recognized that it may be lawful for law enforcement agents to disregard otherwise applicable laws "when taking action that is necessary to attain the permissible law enforcement objective, when the action is carried out in a reasonable fashion." *Id.* at 287. The issuance of an otherwise unlawful visa that was necessary for the undercover operation to proceed, done in circumstances—"for a limited purpose and under close supervision"—that were "reasonable," did not violate the federal statute. *Id.* at 288. Given the combination of circumstances concerning such an operation, it plainly would meet this standard. *See also infra* at 19-22 (explaining that a CIA operation under the proposed circumstances would comply with constitutional due process and the Fourth Amendment's "reasonableness" test for the use of deadly force). (b)(1) (b)(3)

Accordingly, the combination of circumstances present here supports the judgment that a CIA operation of this sort would be encompassed by the public authority justification. Such an operation, therefore, would not result in an "unlawful" killing under section 1111 and thus would not violate section 1119. (b)(1) (b)(3)

IV.

For similar reasons, CIA operation of the kind discussed here would not violate another federal criminal statute dealing with "murder" abroad, 18 U.S.C. § 956(a). That law makes it a crime to conspire within the jurisdiction of the United States "to commit at any place outside the United States an act that would constitute the offense of murder, kidnapping, or maiming if committed in the special maritime and territorial jurisdiction of the United States" if any conspirator acts within the United States to effect any object of the conspiracy. (TS/NF)

Like section 1119(b), section 956(a) bars only unlawful killings, and the United States' use of lethal force in national self-defense is not an unlawful killing. Section 956(a) incorporates by reference the understanding of "murder" in section 1111 of title 18. For reasons explained earlier in this white paper, *see supra* at 5-7, section 956(a) thus incorporates the traditional public authority justification that section 1111 recognizes. A CIA operation, on the facts outlined above, would be covered by that justification. Nor does Congress's reference in section 956(a) to "the special maritime and territorial jurisdiction of the United States" reflect an intent to transform such a killing into a "murder" in these circumstances—notwithstanding that the analysis of the applicability of the public authority justification is limited for present purposes to operations conducted abroad. A contrary conclusion would require attributing to Congress the surprising intention of criminalizing through section 956(a) an otherwise lawful killing of an enemy leader that another statute specifically prohibiting the murder of U.S. nationals abroad does not prohibit. (b)(1) (b)(3)

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The legislative history of section 956(a) further confirms the conclusion that that statute should not be so construed. When the provision was first introduced in the Senate in 1995, its sponsors addressed and rejected the notion that the conspiracy prohibited by that section would apply to "duly authorized" actions undertaken on behalf of the federal government. Senator Biden introduced the provision at the behest of the President, as part of a larger package of anti-terrorism legislation. *See* 141 Cong. Rec. 4491 (1995) (statement of Sen. Biden). He explained that the provision was designed to "fill[] a void in the law," because section 956 at the time prohibited only U.S.-based conspiracies to commit certain property crimes abroad, and did not address crimes against persons. *Id.* at 4506. The amendment was designed to cover an offense "committed by terrorists" and was "intended to ensure that the government is able to punish those persons who use the United States as a base in which to plot such a crime to be carried out outside the jurisdiction of the United States." *Id.* Notably, the sponsors of the new legislation deliberately declined to place the new offense either within chapter 19 of title 18, which is devoted to "Conspiracy," or within chapter 51, which collects "Homicide" offenses (including those established in sections 1111, 1112, 1113 and 1119). Instead, as Senator Biden explained, "[s]ection 956 is contained in chapter 45 of title 18, United States Code, relating to interference with the foreign relations of the United States," and thus was intended to "cover[] those individuals who, without appropriate governmental authorization, engage in prohibited conduct that is harmful to the foreign relations of the United States." *Id.* at 4507. Because, as Senator Biden explained, the provision was designed, like other provisions of chapter 45, to prevent private interference with U.S. foreign relations, "[i]t is not intended to apply to duly authorized actions undertaken on behalf of the United States Government." *Id.*; *see also* 8 Op. O.L.C. 58 (1984) (concluding that section 5 of the Neutrality Act, 18 U.S.C. § 960, which is also in chapter 45 and which forbids the planning of, or participation in, military or naval expeditions to be carried on from the United States against a foreign state with which the United States is at peace, prohibits only persons acting in their private capacity from engaging in such conduct, and does not proscribe activities undertaken by government officials acting within the course and scope of their duties as United States officers). Senator Daschle expressed this same understanding when he introduced the identical provision in a different version of the anti-terrorism legislation a few months later. *See* 141 Cong. Rec. 11,960 (1995) (statement of Sen. Daschle). Congress enacted the new section 956(a) the following year, as part of the Antiterrorism and Effective Death Penalty Act, Pub. L. No. 104-132, tit. VII, § 704(a), 110 Stat. 1214, 1294-95 (1996). The legislative history appears to contain nothing to contradict the construction of section 956(a) described by Senators Biden and Daschle. (U)

Accordingly, section 956(a) would not prohibit an operation of the kind discussed here.

(b)(1)
(b)(3) V.

The War Crimes Act, 18 U.S.C. § 2441, which makes it a federal crime for a member of the Armed Forces or a national of the United States to "commit[] a war crime." *Id.* § 2441(a). Subsection 2441(c) defines a "war crime" for purposes of the statute to mean any conduct (i) that is defined as a grave breach in any of the Geneva Conventions (or any Geneva protocol to which the U.S. is a party); (ii) that is prohibited by four specified articles of the Fourth Hague Convention of 1907, (iii) that is a "grave breach" of Common Article 3 of the Geneva

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(b)(1)
(b)(3)

Conventions (as defined elsewhere in section 2441) when committed "in the context of and in association with an armed conflict not of an international character"; or (iv) that is a willful killing or infliction of serious injury in violation of the 1996 Protocol on Prohibitions or Restrictions on the Use of Mines, Booby-Traps and Other Devices. Of these, the only subsection potentially applicable here is that dealing with Common Article 3 of the Geneva Conventions.[28] (U)

In defining what conduct constitutes a "grave breach" of Common Article 3 for purposes of the War Crimes Act, subsection 2441(d) includes "murder," described in pertinent part as "[t]he act of a person who intentionally kills, or conspires or attempts to kill . . . one or more persons taking no active part in the hostilities, including those placed out of combat by sickness, wounds, detention, or any other cause." 18 U.S.C. § 2441(d)(1)(D). This language derives from Common Article 3(1) itself, which prohibits certain acts (including murder) against "[p]ersons taking no active part in the hostilities, including members of armed forces who have laid down their arms and those placed '*hors de combat*' by sickness, wounds, detention, or any other cause." *See, e.g.*, Geneva Convention Relative to the Treatment of Prisoners of War, Aug. 12, 1949, [1955], art. 3(1), 6 U.S.T. 3316, 3318-20. Although Common Article 3 is most commonly applied with respect to persons within a belligerent party's control, such as detainees, the language of the article is not so limited—it protects all "[p]ersons taking no active part in the hostilities" in an armed conflict not of an international character. (U)

Whatever might be the outer bounds of this category of covered persons, it could not encompass an individual of the sort considered here. Common Article 3 does not alter the fundamental law-of-war principle concerning a belligerent party's right in an armed conflict to target individuals who are part of an enemy's armed forces. The language of Common Article 3 "makes clear that members of such armed forces [of both the state and non-state parties to the conflict] . . . are considered as 'taking no active part in the hostilities' only once they have disengaged from their fighting function ('have laid down their arms') or are placed *hors de combat*; mere suspension of combat is insufficient." International Committee of the Red Cross, *Interpretive Guidance on the Notion of Direct Participation in Hostilities Under International Humanitarian Law* 28 (2009); *cf. also id.* at 34 ("individuals whose continuous function involves the preparation, execution, or command of acts or operations amounting to direct participation in hostilities are assuming a continuous combat function," in which case they can be deemed to be members of a non-state armed group subject to continuous targeting); *accord Gherebi v. Obama*, 609 F. Supp. 2d 43, 65 (D.D.C. 2009) ("the fact that 'members of armed forces who have laid down their arms and those placed *hors de combat*' are not 'taking [an] active part in the hostilities' necessarily implies that 'members of armed forces' who have not surrendered or been incapacitated are 'taking [an] active part in the hostilities' simply by virtue of their membership in those armed forces"); *id.* at 67 ("Common Article 3 is not a suicide pact; it does not provide a free pass for the members of an enemy's armed forces to go to or fro as they please so long as, for example, shots are not fired, bombs are not exploded, and places are not hijacked"). An

[28] An operation of the kind in question here would not involve conduct covered by the Land Mine Protocol. And the articles of the Geneva Conventions to which the United States is currently a party *other than* Common Article 3, as well as the relevant provisions of the Annex to the Fourth Hague Convention, apply by their terms only to armed conflicts between two or more of the parties to the Conventions. *See, e.g.*, Geneva Convention Relative to the Treatment of Prisoners of War, Aug. 12, 1949, [1955], art. 2, 6 U.S.T. 3316, 3406. (TS/NF)

(b)(1)
(b)(3)

active, high-level leader of an enemy force who is continually involved in planning and recruiting for terrorist attacks, can on that basis fairly be said to be taking "an active part in hostilities." Accordingly, targeting him in the circumstances discussed here would not violate Common Article 3 and therefore would not violate the War Crimes Act. (b)(1) (b)(3)

VI.

Although (as explained above) this sort of CIA operation would not violate sections 1119(b), 956(a) and 2441 of title 18 of the U.S. Code, the fact that such an operation may target a U.S. citizen could raise distinct questions under the Constitution. Nevertheless, on the facts outlined above, the Constitution would not preclude such a lethal action because of a target's U.S. citizenship. (b)(1) (b)(3)

The Fifth Amendment's Due Process Clause, as well as the Fourth Amendment, likely protects a U.S. citizen in some respects even while he is abroad. *See Reid v. Covert*, 354 U.S. 1, 5-6 (1957) (plurality opinion); *United States v. Verdugo-Urquidez*, 494 U.S. 259, 269-70 (1990); *see also In re Terrorist Bombings of U.S. Embassies in East Africa*, 552 F.3d 157, 170 n.7 (2d Cir. 2008). The fact that a central figure in al-Qaida or its associated forces is a U.S. citizen, however, does not give that person constitutional immunity from attack. This conclusion finds support in Supreme Court case law addressing whether the military may constitutionally use certain types of military force against a U.S. citizen who is a part of enemy forces. *See Hamdi v. Rumsfeld*, 542 U.S. 507, 521-24 (2004) (plurality opinion); *Ex parte Quirin*, 317 U.S. 1, 37-38 (1942)). (b)(1) (b)(3)

In *Hamdi*, a plurality of the Supreme Court used the *Mathews v. Eldridge* balancing test to analyze the Fifth Amendment due process rights of a U.S. citizen captured on the battlefield in Afghanistan and detained in the United States who wished to challenge the government's assertion that he was a part of enemy forces, explaining that "the process due in any given instance is determined by weighing 'the private interest that will be affected by the official action' against the Government's asserted interest, 'including the function involved' and the burdens the Government would face in providing greater process." 542 U.S. at 529 (plurality opinion) (quoting *Mathews v. Eldridge*, 424 U.S. 319, 335 (1976)). Under this balancing test, at least in circumstances where the highest officers in the Intelligence Community have reviewed the factual basis for a lethal operation, and where the CIA has reviewed, and found infeasible, an operation to capture a targeted individual instead of killing him and continues to monitor whether changed circumstances would permit such an alternative, the Constitution does not require the government to provide further process to the U.S. person before using lethal force against him. *See Hamdi*, 542 U.S. at 534 (plurality opinion) ("[t]he parties agree that initial captures on the battlefield need not receive the process we discuss here; that process is due only when the determination is made to continue to hold those who have been seized"). On the battlefield, the Government's interests and burdens preclude offering a process to judge whether a detainee is truly an enemy combatant. (b)(1) (b)(3)

As explained above, such an operation would be carried out against an individual a decision-maker could reasonably decide poses a "continued" and "imminent" (b)(1) (b)(3)

(b)(1)
(b)(3)

(b)(1)
(b)(3)

(b)(1)
(b)(3)

threat to the United States. Moreover, the CIA has represented that it would capture rather than target such an individual if feasible, but that such a capture operation in Yemen would be infeasible at this time.

(b)(1)
(b)(3)

Cf., e.g., Public Committee Against Torture in Israel v. Government of Israel, HCJ 769/02 ¶ 40, 46 I.L.M. 375, 394 (Israel Supreme Court sitting as the High Court of Justice, 2006) (although arrest, investigation and trial "might actually be particularly practical under the conditions of belligerent occupation, in which the army controls the area in which the operation takes place," such alternatives "are not means which can always be used," either because they are impossible or because they involve a great risk to the lives of soldiers).

(b)(1)
(b)(3)

Although in the "circumstances of war," as the *Hamdi* plurality observed, "the risk of erroneous deprivation of a citizen's liberty in the absence of sufficient process . . . is very real," 542 U.S. at 530, the plurality also recognized that "the realities of combat" render certain uses of force "necessary and appropriate," including against U.S. citizens who have become part of enemy forces—and that "due process analysis need not blink at those realities," *id.* at 531. Thus, at least where, as here, the target's activities pose a "continued and imminent threat of violence or death" to U.S. persons, the highest officers in the Intelligence Community have reviewed the factual basis for a lethal operation, and a capture operation would be infeasible—and where the CIA continues to monitor whether changed circumstances would permit such an alternative—the "realities of combat" and the weight of the government's interest in using an authorized means of lethal force against this enemy are such that the Constitution would not require the government to provide further process to the U.S. person before using such force. *Cf. Hamdi* 542 U.S. at 535 (noting that the Court "accord[s] the greatest respect and consideration to the judgments of military authorities in matters relating to the actual prosecution of war, and . . . the scope of that discretion necessarily is wide") (plurality opinion). (b)(1) (b)(3)

Similarly, even assuming that the Fourth Amendment provides some protection to a U.S. person abroad who is part of al-Qaida and that the sort of operation discussed here would result in a "seizure" within the meaning of that Amendment, such a lethal operation would not violate the Fourth Amendment. The Supreme Court has made clear that the constitutionality of a seizure is determined by "balanc[ing] the nature and quality of the intrusion on the individual's Fourth Amendment interests against the importance of the governmental interests alleged to justify the intrusion." *Tennessee v. Garner*, 471 U.S. 1, 8 (1985) (internal quotation marks omitted); *accord Scott v. Harris*, 550 U.S. 372, 383 (2007). Even in domestic law enforcement operations, the Court has noted that "[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." *Garner*, 471 U.S. at 11. Thus, "if the suspect threatens the officer with a weapon or there is probable cause to believe that he has committed a crime involving the infliction or threatened infliction of serious physical harm,

(b)(1)
(b)(3)

(b)(1)
(b)(3)

deadly force may be used if necessary to prevent escape and if, where feasible, some warning has been given." *Id.* at 11-12. (b)(1) (b)(3)

The Fourth Amendment "reasonableness" test is situation-dependent. *Cf. Scott*, 550 U.S. at 382 (*Garner* "did not establish a magical on/off switch that triggers rigid preconditions whenever an officer's actions constitute 'deadly force'"). What would constitute a reasonable use of lethal force for purposes of domestic law enforcement operations will be very different from what would be reasonable in the situation discussed here. At least where high-level government officials have determined that a capture operation overseas is infeasible and that the targeted person is part of a dangerous enemy force and is engaged in activities that pose a continued and imminent threat to U.S. persons or interests (b)(1) (b)(3) the use of lethal force would not violate the Fourth Amendment. Here, the intrusion on any Fourth Amendment interests would be outweighed by "the importance of the governmental interests [that] justify the intrusion," *Garner*, 471 U.S. at 8, based on the facts outlined above

(b)(1)
(b)(3)

(b)(1)
(b)(3)

Exhibit 13

October 2011 Panetta Statement

The Washington Post

National Security

Panetta: loose lips on CIA's not-so-secret secret

By Craig Whitlock October 7, 2011

SIGONELLA NAVAL AIR STATION, Italy — One of the U.S. government's worst-kept secrets is the CIA's program to hunt and kill suspected terrorists with armed drones. Everybody knows the CIA does it. The agency, however, refuses to publicly acknowledge the covert program, a fig leaf that has obscured the CIA's operations and limited official accountability.

So ears perked up Friday when Defense Secretary Leon E. Panetta not once, but twice made cracks about the agency's fleet of unmanned Predator drones while visiting troops in Italy.

Panetta, who served as CIA director prior to becoming Pentagon chief in July, jokingly told an auditorium full of sailors at the U.S. naval base in Naples that he was enjoying his new job because of all the firepower at his disposal.

"Obviously I have a hell of a lot more weapons available to me here than I had at the CIA," he said. "Although the Predators aren't bad."

A few hours later, during a stop at the Sigonella Naval Air Station in Sicily, Panetta made another reference to the CIA's armed drones.

Standing in front of an unarmed Global Hawk surveillance drone, Panetta lauded the role played by the U.S. military's Predator fleet in the war in Libya. The use of Predators, he added slyly, "is something I was very familiar with in my past job."

Shortly after that remark, as if on cue, a U.S. Air Force Predator took off from the other side of the base. It circled slowly for a few minutes, looking from a distance like a fat, metallic-gray mosquito, before disappearing over the horizon — presumably en route to Libya.

Unlike the CIA, the Pentagon is open about its use of armed Predator drones and a newer model, the Reaper. The military has deployed them in Iraq, Libya and Afghanistan. The CIA flies most of its armed drones over Pakistan, but has recently ramped up its operations in Yemen.

Panetta was visiting Italy to hear from U.S. commanders running the Libya campaign and to give pep talks to U.S.

and NATO forces in Naples and Sicily. With Col. Moammar Gaddafi ousted and most of the country under the control of the opposition, Panetta found himself in a position to crow a bit about NATO's successful military intervention.

Panetta recalled how "a lot of critics" had questioned whether NATO should get involved in Libya and had warned that the alliance would get bogged down in the mission. "The critics have really been proven wrong," he said.

He didn't name any names. But one of the biggest doubters was his predecessor as defense secretary, Robert M. Gates.Gates, who retired in June, had argued that Libya wasn't a national security priority for the Obama administration and that it was a bad idea for the U.S. military to engage in a war in yet another Muslim country.

Craig Whitlock covers the Pentagon and national security. He has reported for The Washington Post since 1998.

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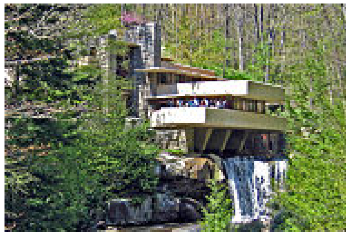

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Exhibit 14

October 2011 Panetta Speech

News Transcript

Press Operations

Secretary Panetta Speaking to Service Members in Naples, Italy

Presenter: Secretary of Defense Leon E. Panetta
October 07, 2011

SECRETARY OF DEFENSE LEON PANETTA: (In progress) – another brother in California and they spent one winter in Sheridan, Wyoming, and my mother said it was time to go to visit the brother in California, and that's what eventually they were able to get out there – made it to Monterey. I was born in Monterey. That's been my home. I represented that area in the Congress. And I used to ask my parents, why did you make the decision to travel all those miles to come to a strange country? It's not like they had the Internet and knew where they were headed and knew all of the challenges that they would face. They had very little money. They had very little education. They had very few skills. No language ability. And suddenly pick up, leave the comfort of family -- obviously a poor area in Italy at the time -- but pick up and go all that way to a strange country. Why would you do that? Why would you do that? My father said the reason that they did it was because he and my mother believed that they could give their children a better life in America. And I think that's the American dream. That's the dream that they wanted for their children. It's the dream that you have for your children and their children and future children. It's the dream of giving our children a safer and better life.

And in many ways that's what you're involved with. That's what you're doing here. And first and foremost, I want to thank you for the service that you provide. Naples obviously is a great place to be located, but it's sacrifice. It's sacrifice. You're away from home. You're away from your families, many of you. And you're doing a tough job. And I thank you for your willingness to do that. This country – this country's strength is based on people like you, men and women like you, that are willing to give something back to the country. Willing to sacrifice, willing to put your lives on the line, and willing, if you have to, fight for your country. That's what makes the United States of America one of the strongest countries in the world. Because of you, because of your sacrifice and because of your public service. And I deeply thank you for that.

You know, having moved from the CIA to the Pentagon, obviously I have a hell of a lot more weapons available to me in this job than I had at the CIA, although the Predators aren't bad. Not a bad weapon. I have an awful lot of technology. I have an awful lot of very sophisticated weaponry at the Pentagon. But I have to tell you, for all the planes, for all the ships, for all the submarines, for all of the sophisticated technology that we have, the most important weapon I have are the men and women who are willing to put on a uniform and fight for this country. Everything else wouldn't be worth much, frankly, were it not for you. And that's what makes us strong, and that's what makes the United States a leader in the world.

Now, we're facing a number of challenges. This is a challenging time. The world is going through a real transformation in a number of areas. And we are facing a lot of threats in a number of areas as a result of that. We're looking at the continuing challenge of fighting two wars in Iraq and Afghanistan. And our hope is that we're going to be able to draw down our forces in Iraq -- we've already begun that process -- and leave behind a stable Iraq that will be able to secure and govern itself.

In Afghanistan, we're also in the process of beginning a drawdown that will take us through 2014. And the fact is, just having come from Brussels where General Allen presented a summary of what's happening of Afghanistan, we're on the right track. We're making good progress. We have weakened the Taliban. The Taliban were not able this last fighting season to really be able to put together a concentrated attack. Yes they did assassinations, yes they did some high-profile attacks of one kind or another, but they were never organized to really go after their objectives. And a lot of that was due to U.S. forces working with ISAF forces and weakening the Taliban, weakening their ability to do that. Operations every night going after leaders in the Taliban to be able to impact on their capability to try to get back and take over that country. So we've weakened them. We've weakened them significantly. We've secured key areas in Afghanistan. We've improved the Afghan military. They are engaged in operations. They're getting better at it.

The same thing is true for the police. We've begun a transition period. We transitioned in seven areas. And we're going to do another tranche of areas this fall. So we're beginning that transition process to try to be able to turn those areas over to the Afghans. There are still issues regarding governance, still issues regarding the capability of the Afghans to be able to provide stability within their own country, to be able to finance challenges that they're going to face in the future. All of those are real. But the bottom line is that we are going in the right direction. We're making good progress. And a lot of it is due, frankly, to the men and women who are willing to put their lives on the line.

One of the toughest things I do in this job is write condolence letters to families of those that have been lost in battle. But one of the things I try to say to those families is that I know how difficult it is to lose a loved one, but I want you to know that your loved one gave his or her life for our country – for our country. And they are heroes, they are patriots, and we will never forget their sacrifice. And that's why we're going to make what they were fighting for work. That's the challenge we have is to ensure that all of the sacrifice that has been done is not in vain, that in fact we are going to accomplish the mission that they died for.

Terrorism remains a threat as well. Again, we've had some great operations against terrorists, al Qaeda. We celebrated the tenth anniversary of 9/11 this year. The reality is we've come a long way fighting al Qaeda. We were able to take down bin Laden. Just recently we took down Awlaki in Yemen. Al Qaeda is spreading to these other areas. We have impacted on the leadership of al Qaeda We have seriously undermined their ability to be able to put together the kind of attacks in the United States that we've experienced in the past.

But a lot more remains to be done. We've got to keep the pressure up. These are individuals that want to attack the United States, and they're going to continue to plan to do that, and our job is to

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the pressure on them wherever they go, whether they're in the FATA, whether they're in Yemen, whether they're in Somalia, whether they're in North Africa, we've got to make damn sure that they have no place to hide.

We're facing continuing problems with nuclear proliferation. Places like Iran and North Korea, rogue nations that are uncertain, rogue nations that are not quite sure what their intentions are, what they will do if they really develop that kind of nuclear capability. Those are threats we have to confront.

We've got the whole challenge of what's happening in the Middle East with the Arab spring and what all of you are involved in, in Libya. And I have to tell you, I express the thanks of the American people to all of you that were involved in that mission. I expressed my thanks to all of the individuals around that NATO table who all came together in what has proven to be a very effective NATO operation of countries joining together in order to make sure the civilian population was protected, in order to make sure that people in that country would have the opportunity to really develop self-expression, to develop the universal rights that are important for people, to develop the political and economic reforms that are important to people. You have given the Libyan people the ability to do that. That's a tremendous accomplishment. And we're going to face other challenges in the Arab spring as these countries emerge. Those are challenges we're going to have to look at, deal with.

We've got cyber attacks now. The whole cyber world is another battlefront for the future. And we have the continuing challenge of rising powers in the world. What's China going to do? What's India going to do? What are continuing issues dealing with Russia and others. So this is a complicated world that involves a number of threats that we've got to confront and deal with, and we will. We have the very best military in the world, perhaps in history. Very best military. And the challenge now is to maintain that as we deal with those threats.

All of this comes at a time when we're facing budgetary constriction. The Congress has just handed a number of -- 300 and -- it's 400 -- 350, but when you interpret it under the baseline that we're dealing with it's about $450-plus billion that I have to reduce the defense budget over 10 years. And as tough as that is, I'm working closely with the service chiefs, I'm working with the combat commanders, I'm working with my undersecretaries, and we think it's tough but it's manageable – that we can do this. It's not going to be easy but we can do this, and we can do it in a way that protects the best military in the world.

I mean, my goals in trying to implement those reductions are, number one, to maintain the best military in the world; number two, not to hollow out the force. We are not going to make the mistakes of the past. After every war in the past we basically made a mistake of hollowing out the force and making it that much more difficult to be able to protect this country. We're not going to make that mistake. Thirdly, we're going to do it n a balanced way. We're going to look at efficiencies, we're going to look at areas where we can try to reduce costs. We're going to look at areas that involve trying to improve procurement of these large systems that are important to modernize with. We're going to look at, as we drawn down troops, beginning to develop some reductions in the force structure as well.

But the end result of all of this has to be that we have an agile, effective and capable force, and to do that the most important element is I can't break faith with you. I can't break faith with those that serve in our military. You've been deployed a number of times, you've been out there fighting, and we have to make sure that we are true to the commitments that we make to all of you.

So those are some of the things that have to guide us as we go through this. I'm not saying this is going to be easy. It's going to be tough. And frankly, the worst thing that could happen is if Congress fails to come up with ways to reduce the deficit and they allow this automatic trigger to take place which will double the number of cuts that face the Defense Department. If that happens, it's a disaster, and it will hollow out the force, and there will be RIFs, and we will make terrible mistakes with regards to our national defense in the future.

Now, that's a fight I've got to make in Washington, but I really believe it's a fight we can win. Why? Because I think people understand that this is the best military, that you're putting your lives on the line, and that as a result of that we are protecting the security of the United States, and in many ways we are protecting the security of the world.

As I said, the fundamental dream that has to drive everything we do is the dream that my parents were all about, the dream of making sure that our children have that safer and more secure and better life for the future. Because of what you do, because of your sacrifice, I think all of us can say we are making that dream real.

Thank you very much for having me, and keep up the great work.

(Applause.)

Okay. Your questions? Go ahead, right here.

Q: Good morning, sir. I – (unintelligible).

SEC. PANETTA: Good morning.

Q: My question today is, is the military retirement system going to be changed?

SEC. PANETTA: Is what?

Q: Is the military retirement system going to be changed?

SEC. PANETTA: The question was whether the military retirement system is going to be jinxed. No, I don't think it is. Look, like everything else, when you're facing these level of cuts, you've got to look at everything, and I think that's important to do. But at the same time, as I said, it's really important that we protect the benefits that were promised to people in the military. So the question is as -- there are groups that have looked at this. And the one that I have made clear is that we have to grandfather benefits in – that if you're serving, if you're in the service, you made a decision to make this a career, that your benefits ought to be protected.

For future people coming in, there may be modifications. Questions have been raised about whether or not somebody who's young and enters the service -- I mean, right now you put money into retirement but you're not able to take that with you if you go out into civilian life. Should you have that opportunity? Should we make those kinds of changes? I mean, those are some of the issues that I think, you know, we ought to be looking at. But the line that I'm drawing is to say we are not going to impact on those that are in the service who are there, who have been deployed, and who have been promised retirement benefits for the service that they've given this country. But for the future, I think we do have to

Look, personnel costs have increased. They've increased dramatically. Right now just healthcare alone I think our costs are almost $52-$53 billion, just for healthcare alone. So if I'm going to protect the force, if I'm going to protect the force structure, if I'm going to protect that best military that we have, we've got to look at every area. We've got to look at efficiencies, we've got to look at going after duplication, we've got to look at going after overhead, we've got to look at going after procurement problems that sometimes develop systems over a 20- or 30-year period and by the time the damn weapon comes on board it's outdated. We've got to develop greater competition in terms of contracts. We've got to be able to look at some of these -- the healthcare areas -- and try to see whether we can in fact find reforms there that not only improve it, but deal with some of the cost increases that are taking place. I mean, I've got to look at all those areas to be fair to everyone.

And if I just said, no, to hell with that, we'll just reduce the force structure, which is what has happened in the past, that would be wrong. But that's the challenge I face. And I'm going to -- listen, we're not going to hide anything from anybody. This is going to be a transparent process. But I have to tell you this, I am not going to do this without the service chiefs working with me. I am not going to do this without combat commanders. I need their best guidance, I need their support, and if I have that we can make this work.

Q: Good morning, Mr. Secretary. Thank you for being here. And thank you also for your public -- not just here -- but your public support of the troops when it comes time to being promised -- getting the things that were promised to us when we came in.

Sir, my question is more of something I've been reading lately in the papers about when folks are in Iraq or so and talking about immunity for the troops. And this is -- for -- against prosecution, local prosecution, for --

SEC. PANETTA: Yeah.

Q: -- matters that may have happened. Obviously, some terrible things have happened which we should prosecute our own for. My question, sir, is both sides have drawn a line in the sand about we're adamant that if we're going to be someplace we should have immunity or we should take care of them ourselves, and Iraq and other areas have said that they're adamant that if we're going to be there we should be obeying their local laws. My question, sir, is how might this affect our remaining in Iraq to the last few people that will be there, but also other places that we might be going to in the future?

SEC. PANETTA: This is obviously a very pertinent question right now as we try to deal with the issue of whether or not we'll have a future presence in Iraq. Right now with regards to Iraq, that is in negotiation. Ambassador, General Austin, are meeting with the Iraqis and continue to discuss A, what are their nights, and B, what's required in order to assist them in the future.

But my -- as Secretary of Defense, if I'm going to put a significant or large group of forces in place, I've got to have protections for you. Got to have protections for you. If you're going to go out and do operations, if you're going to go out and get involved, I mean the reality is that we have to protect you. That's we developed SOFA agreements. That's why we developed agreements that provide those kinds of immunities.

Now, we have presence in embassies, we do have some protection by virtue of the Vienna Convention. There are other protections that we have. But if you're going to play a large role in dealing with another country where it requires, as I said, a large group of troops to be on the ground and to be dealing with that country, I want to make damn sure that you're protected. So we have to make that clear to the people we deal with. If they want the benefits of what we can provide, if they want the assistance, if they want the training, if they want the operational skills that we can provide, then I think they have to understand that they've got to give us some protections in that process. And if something happens, obviously we'll prosecute our own, and we've always done that, and we will. But I have to be able to protect the people that are willing to put their lives on the line.

Q: Good morning, sir. (unintelligible).

My question, sir, is where do you stand when it comes about our manning in the Navy? Our manning. Manning systems, sir. Manning systems, sir.

SEC. PANETTA: Manning system?

Q: Yeah.

SEC. PANETTA: Are you talking about -- (inaudible)?

Q: Personnel manning, sir. Personnel manning. Because right now, sir, I can tell you from my experience we're overworked but undermanned, to be honest, sir. I'm serious. We're overworked and undermanned, so I'm having to pull my arms this way, this way, like this way to help the command.

SEC. PANETTA: Tell me what you're talking about. I mean give me an example.

Q: Well, sir, I'm in logistics. My rate is logistics support, and we support the command logistically with all their operations, whether it Libya or any other thing.

SEC. PANETTA: You're telling me you're working your ass off.

(Laughter).

Q: Always, every day, sir. I hope my -- (unintelligible) -- chief's not hearing this.

(Laughter.)

SEC. PANETTA: Well, look, obviously the thing all of you have done is you have served above and beyond the call of duty in many instances. We're spread out. We're spread out in a number of places. Presence in Iraq, presence in Afghanistan, presence in other parts of the world. We've got a large presence in North -- or in South Korea, in Japan, in Okinawa. We've got presence throughout the countries of the Middle East. We've got all of the threats and all of the challenges that I just talked about. And obviously to be able to – you know, you suddenly get a Libya mission on top of that. To be able to pull the forces together and be able to do the job is demanding. And in many ways, we ask you to do a hell of a lot more than you would normally be doing in order for us to accomplish the mission, but that's what makes us the best military in the world.

So my challenge is to make sure, obviously, that we adequately man our operations and that we support our operations wherever they are. But there are going to be times when I'm going to ask you

are long hours. I know you're overstretched. I know you're doing some of the toughest work possible. But that's what makes you the best military in the world.

And in the end -- in the end it's not about -- it isn't about how much money you make, it isn't about the benefits you get, it's about the fact that you are serving the United States of America and you're protecting the people of our country. That's what it's all about. And it's for that reason that I am here personally to say thank you. Thank you for your sacrifice. I couldn't do this job without you. So there are going to be moments when you're going to be stretched. There are going to be moments where you're going to have to work your tail off. But in the end, the most important thing is that we not only accomplish the mission, which you've done, accomplish the mission, but we are going to keep America safe. That's what we're all responsible for.

Okay. Another question.

MR. : We have time for one more.

SEC. PANETTA: One more. Go ahead.

Q: Fire controlman second class -- (unintelligible). I work down in the Sixth Fleet Tomahawk cell. My question is with the increased emphasis on ballistic missile defense in the region and the stationing of four new warships in Rota, Spain, what is the future of Sixth Fleet and the Mount Whitney in the country of Italy? And on another question, what is your opinion on the role of the Department of Defense and Sixth Fleet with the instability in East Africa at this time, sir?

SEC. PANETTA: Yes. Well, the most important role that we play in the world, particularly with our naval forces, is our ability to project force, to have that presence in the world. It's particularly true in the Pacific region. It's true out in this area as well.

In the Pacific, we're concerned about China. The most important thing we can do is to project our force into the Pacific. To have our carriers there, to have our fleet there, to be able to make very clear to China that we are going to protect international rights to be able to move across the oceans freely. That's a fundamental right and we're going to protect it. And they need to know that we're going to have a presence there as a result of it.

And I think the same thing is true obviously in the Middle East and in this region. We've got to be able to project force here to make clear that we're always going to be around and that we're going to protect the rights to be able to have free movement across the seas and that we'll always be a presence that others will have to deal with. That's a very important role in terms of defense and projecting our defense throughout the world.

With regard specifically on the missile side, obviously our vessels are going to play a very important role, as we did in the announcement we made in Rota, they have the Aegis vessels that will be located there, and that will be part of our missile defense system that we're developing. And we're putting a lot of these pieces in place. We've had other countries that have joined in that system. We're going to continue to work at that because we think that's really important to protecting this region. And hopefully, we'll be able to join up with NATO's efforts in that as well. And it will be a very significant system that will, we think, make the world safer for everyone.

So there's going to be a key role to play, obviously, for the Navy as part of that missile defense system, but more importantly I view the Navy as one of the major factors in projecting force to the world to let everybody know that the United States is there, that we're powerful, and that we'll continue to defend our country when we have to.

Okay, guys. Thank you very much. Good luck.

(Applause.)

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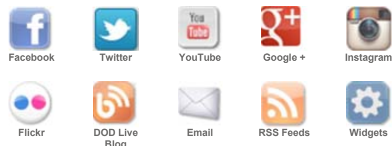

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Exhibit 15

November 2011 White Paper

DEPARTMENT OF JUSTICE WHITE PAPER

Draft November 8, 2011

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

This white paper sets forth a legal framework for considering the circumstances in which the U.S. government could use lethal force in a foreign country outside the area of active hostilities against a U.S. citizen who is a senior operational leader of al-Qa'ida or an associated force[1] of al-Qa'ida—that is, an al-Qa'ida leader actively engaged in planning operations to kill Americans. The paper does not attempt to determine the minimum requirements necessary to render such an operation lawful; nor does it assess what might be required to render a lethal operation against a U.S. citizen lawful in other circumstances, including an operation against enemy forces on a traditional battlefield or an operation against a U.S. citizen who is not a senior operational leader of such forces. Here the Department of Justice concludes only that where the following three conditions are met, a U.S. operation using lethal force in a foreign country against a U.S. citizen who is a senior operational leader of al-Qa'ida or an associated force would be lawful: (1) an informed, high-level official of the U.S. government has determined that the targeted individual poses an imminent threat of violent attack against the United States; (2) capture is infeasible, and the United States continues to monitor whether capture becomes feasible; and (3) the operation would be conducted in a manner consistent with applicable law of war principles. This conclusion is reached with recognition of the extraordinary seriousness of a lethal operation by the United States against a U.S. citizen, and also of the extraordinary seriousness of the threat posed by senior operational al-Qa'ida members and the loss of life that would result were their operations successful.

The President has authority to respond to the imminent threat posed by al-Qa'ida and its associated forces, arising from his constitutional responsibility to protect the country, the inherent right of the United States to national self defense under international law, Congress's authorization of the use of all necessary and appropriate military force against this enemy, and the existence of an armed conflict with al-Qa'ida under international law. Based on these authorities, the President may use force against al-Qa'ida and its associated forces. As detailed in this white paper, in defined circumstances, a targeted killing of a U.S. citizen who has joined al-Qa'ida or its associated forces would be lawful under U.S. and international law. Targeting a member of an enemy force who poses an imminent threat of violent attack to the United States is not unlawful. It is a lawful act of national self defense. Nor would it violate otherwise applicable federal laws barring unlawful killings in Title 18 or the assassination ban in Executive Order No. 12333. Moreover, a lethal operation in a foreign nation would be consistent with international legal principles of sovereignty and neutrality if it were conducted, for example, with the consent of the host nation's government or after a

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[1] An associated force of al-Qa'ida includes a group that would qualify as a co-belligerent under the laws of war. *See Hamlily v. Obama*, 616 F. Supp. 2d 63, 74-75 (D.D.C. 2009) (authority to detain extends to "'associated forces,'" which "mean 'co-belligerents' as that term is understood under the laws of war").

determination that the host nation is unable or unwilling to suppress the threat posed by the individual targeted.

Were the target of a lethal operation a U.S. citizen who may have rights under the Due Process Clause and the Fourth Amendment, that individual's citizenship would not immunize him from a lethal operation. Under the traditional due process balancing analysis of *Mathews v. Eldridge*, we recognize that there is no private interest more weighty than a person's interest in his life. But that interest must be balanced against the United States' interest in forestalling the threat of violence and death to other Americans that arises from an individual who is a senior operational leader of al-Q'aida or an associated force of al-Q'aida and who is engaged in plotting against the United States.

The paper begins with a brief summary of the authority for the use of force in the situation described here, including the authority to target a U.S. citizen having the characteristics described above with lethal force outside the area of active hostilities. It continues with the constitutional questions, considering first whether a lethal operation against such a U.S. citizen would be consistent with the Fifth Amendment's Due Process Clause, U.S. Const. amend. V. As part of the due process analysis, the paper explains the concepts of "imminence," feasibility of capture, and compliance with applicable law of war principles. The paper then discusses whether such an operation would be consistent with the Fourth Amendment's prohibition on unreasonable seizures, U.S. Const. amend. IV. It concludes that where certain conditions are met, a lethal operation against a U.S. citizen who is a senior operational leader of al-Qa'ida or its associated forces—a terrorist organization engaged in constant plotting against the United States, as well as an enemy force with which the United States is in a congressionally authorized armed conflict—and who himself poses an imminent threat of violent attack against the United States, would not violate the Constitution. The paper also includes an analysis concluding that such an operation would not violate certain criminal provisions prohibiting the killing of U.S. nationals outside the United States; nor would it constitute either the commission of a war crime or an assassination prohibited by Executive Order 12333.

I.

The United States is in an armed conflict with al-Qa'ida and its associated forces, and Congress has authorized the President to use all necessary and appropriate force against those entities. *See* Authorization for Use of Military Force ("AUMF"), Pub. L. No. 107-40, § 2(a), 115 Stat. 224, 224 (2001). In addition to the authority arising from the AUMF, the President's use of force against al-Qa'ida and associated forces is lawful under other principles of U.S. and international law, including the President's constitutional responsibility to protect the nation and the inherent right to national self-defense recognized in international law (*see, e.g.*, U.N. Charter art. 51). It was on these bases that the United States responded to the attacks of September 11, 2001, and "[t]hese domestic and international legal authorities continue to this day." Harold Hongju Koh, Legal Adviser, U.S. Department of State, Address to the Annual Meeting of the American Society of International Law: The Obama Administration and International Law (Mar. 25, 2010) ("2010 Koh ASIL Speech").

Any operation of the sort discussed here would be conducted in a foreign country against a senior operational leader of al-Qa'ida or its associated forces who poses an imminent threat of violent attack against the United States. A use of force under such circumstances would be justified as an act of national self-defense. In addition, such a person would be within the core of individuals against whom Congress has authorized the use of necessary and appropriate force. The fact that such a person would also be a U.S. citizen would not alter this conclusion. The Supreme Court has held that the military may constitutionally use force against a U.S. citizen who is a part of enemy forces. *See Hamdi*, 542 U.S. 507, 518 (2004) (plurality opinion); *id.* at 587, 597 (Thomas, J., dissenting); *Ex Parte Quirin*, 317 U.S. at 37-38. Like the imposition of military detention, the use of lethal force against such enemy forces is an "important incident of war." *Hamdi*, 542 U.S. at 518 (plurality opinion) (quotation omitted). *See, e.g.*, General Orders No. 100: *Instructions for the Government of Armies of the United States in the Field* ¶ 15 (Apr. 24, 1863) ("[m]ilitary necessity admits of all direct destruction of life or limb of armed enemies") (emphasis omitted); International Committee of the Red Cross, *Commentary on the Additional Protocols of 8 June 1977 to the Geneva Conventions of 12 Aug. 1949 and Relating to the Protection of Victims of Non-International Armed Conflicts* (Additional Protocol II) § 4789 (1987) ("Those who belong to armed forces or armed groups may be attacked at any time."); Yoram Dinstein, *The Conduct of Hostilities Under the Law of International Armed Conflict* 94 (2004) ("When a person takes up arms or merely dons a uniform as a member of the armed forces, he automatically exposes himself to enemy attack."). Accordingly, the Department does not believe that U.S. citizenship would immunize a senior operational leader of al-Qa'ida or its associated forces from a use of force abroad authorized by the AUMF or in national self-defense.

In addition, the United States retains its authority to use force against al-Qa'ida and associated forces outside the area of active hostilities when it targets a senior operational leader of the enemy forces who is actively engaged in planning operations to kill Americans. The United States is currently in a non-international armed conflict with al-Qa'ida and its associated forces. *See Hamdan v. Rumsfeld*, 548 U.S. 557, 628-31 (2006) (holding that a conflict between a nation and a transnational non-state actor, occurring outside the nation's territory, is an armed conflict "not of an international character" (quoting Common Article 3 of the Geneva Conventions) because it is not a "clash between nations"). Any U.S. operation would be part of this non-international armed conflict, even if it were to take place away from the zone of active hostilities. *See* John O. Brennan, Assistant to the President for Homeland Security and Counterterrorism, Remarks at the Program on Law and Security, Harvard Law School: Strengthening Our Security by Adhering to Our Values and Laws (Sept. 16, 2011) ("The United States does not view our authority to use military force against al-Qa'ida as being restricted solely to 'hot' battlefields like Afghanistan."). For example, the AUMF itself does not set forth an express geographic limitation on the use of force it authorizes. *See Hamdan*, 548 U.S. at 631 (Kennedy, J., concurring) (what makes a non-international armed conflict distinct from an international armed conflict is "the legal status of the entities opposing each other"). None of the three branches of the U.S. Government has identified a strict geographical limit on the permissible scope of the AUMF's authorization. *See, e.g.*,

Letter for the Speaker of the House of Representatives and the President Pro Tempore of the Senate from the President (June 15, 2010) (reporting that the armed forces, with the assistance of numerous international partners, continue to conduct operations "against al-Qa'ida terrorists," and that the United States has "deployed combat-equipped forces to a number of locations in the U.S. Central . . . Command area[] of operation in support of those [overseas counter-terrorist] operations"); *Bensayah v. Obama*, 610 F.3d 718, 720, 724-25, 727 (D.C. Cir. 2010) (concluding that an individual turned over to the United States in Bosnia could be detained if the government demonstrates he was part of al-Qa'ida); *al-Adahi v. Obama*, 613 F.3d 1102, 1003, 1111 (D.C. Cir. 2010) (noting authority under AUMF to detain individual apprehended by Pakistani authorities in Pakistan and then transferred to U.S. custody).

Claiming that for purposes of international law, an armed conflict generally exists only when there is "protracted armed violence between governmental authorities and organized armed groups," *Prosecutor v. Tadic*, Case No. IT-94-1AR72, Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction, ¶ 70 (Int'l Crim. Trib. for the Former Yugoslavia, App. Chamber Oct. 2, 1995), some commenters have suggested that the conflict between the United States and al-Qa'ida cannot lawfully extend to nations outside Afghanistan in which the level of hostilities is less intense or prolonged than in Afghanistan itself. *See*, *e.g.*, Mary Ellen O'Connell, *Combatants and the Combat Zone*, 43 U. Rich. L. Rev. 845, 857-59 (2009). There is little judicial or other authoritative precedent that speaks directly to the question of the geographic scope of a non-international armed conflict in which one of the parties is a transnational, non-state actor and where the principal theater of operations is not within the territory of the nation that is a party to the conflict. Thus, in considering this potential issue, the Department looks to principles and statements from analogous contexts.

The Department has not found any authority for the proposition that when one of the parties to an armed conflict plans and executes operations from a base in a new nation, an operation to engage the enemy in that location cannot be part of the original armed conflict, and thus subject to the laws of war governing that conflict, unless the hostilities become sufficiently intense and protracted in the new location. That does not appear to be the rule of the historical practice, for instance, even in a traditional international conflict. *See* John R. Stevenson, Legal Adviser, Department of State, United States Military Action in Cambodia: Questions of International Law, Address before the Hammarskjold Forum of the Association of the Bar of the City of New York (May 28, 1970), *in* 3 *The Vietnam War and International Law: The Widening Context* 23, 28-30 (Richard A. Falk, ed. 1972) (arguing that in an international armed conflict, if a neutral state has been unable for any reason to prevent violations of its neutrality by the troops of one belligerent using its territory as a base of operations, the other belligerent has historically been justified in attacking those enemy forces in that state). Particularly in a non-international armed conflict, where terrorist organizations may move their base of operations from one country to another, the determination of whether a particular operation would be part of an ongoing armed conflict would require consideration of the particular facts and circumstances in each case, including the fact that transnational non-state organizations such as al-Qa'ida may have no single site serving as their base of

operations. *See also*, *e.g.*, Geoffrey S. Corn & Eric Talbot Jensen, *Untying the Gordian Knot: A Proposal for Determining Applicability of the Laws of War to the War on Terror*, 81 Temp. L. Rev. 787, 799 (2008) ("If . . . the ultimate purpose of the drafters of the Geneva Conventions was to prevent 'law avoidance' by developing de facto law triggers—a purpose consistent with the humanitarian foundation of the treaties—then the myopic focus on the geographic nature of an armed conflict in the context of transnational counterterrorist combat operations serves to frustrate that purpose.").[2]

If an operation of the kind discussed in this paper were to occur in a location where al-Qa'ida or an associated force has a significant and organized presence and from which al-Qa'ida or an associated force, including its senior operational leaders, plan attacks against U.S. persons and interests, the operation would be part of the non-international armed conflict between the United States and al-Qa'ida that the Supreme Court recognized in *Hamdan*. Moreover, such an operation would be consistent with international legal principles of sovereignty and neutrality if it were conducted, for example, with the consent of the host nation's government or after a determination that the host nation is unable or unwilling to suppress the threat posed by the individual targeted. In such circumstances, targeting a U.S. citizen of the kind described in this paper would be authorized under the AUMF and the inherent right to national self-defense. Given this authority, the question becomes whether and what further restrictions may limit its exercise.

II.

The Department assumes that the rights afforded by Fifth Amendment's Due Process Clause, as well as the Fourth Amendment, attach to a U.S. citizen even while he is abroad. *See Reid v. Covert*, 354 U.S. 1, 5-6 (1957) (plurality opinion); *United States v. Verdugo-Urquidez*, 494 U.S. 259, 269-70 (1990); *see also In re Terrorist Bombings of U.S. Embassies in East Africa*, 552 F.3d 157, 170 n.7 (2d Cir. 2008). The U.S. citizenship of a leader of al-Qa'ida or its associated forces, however, does not give that person constitutional immunity from attack. This paper next considers whether and in what circumstances a lethal operation would violate any possible constitutional protections of a U.S. citizen.

A.

The Due Process Clause would not prohibit a lethal operation of the sort contemplated here. In *Hamdi*, a plurality of the Supreme Court used the *Mathews v. Eldridge* balancing test to analyze the Fifth Amendment due process rights of a U.S. citizen who had been captured on the battlefield in Afghanistan and detained in the

[2] *See Prosecutor v. Tadic*, Case No. IT-94-1AR72, Submission of the Government of the United States of America Concerning Certain Arguments Made by Counsel for the Accused, at 27-28 (Int'l Crim. Trib. For the Former Yugoslavia, App. Chamber July 17, 1995) (in determining which body of law applies in a particular conflict, "the conflict must be considered as a whole, and "it is artificial and improper to attempt to divide it into isolated segments, either geographically or chronologically").

United States, and who wished to challenge the government's assertion that he was part of enemy forces. The Court explained that the "process due in any given instance is determined by weighing 'the private interest that will be affected by the official action' against the Government's asserted interest, 'including the function involved' and the burdens the Government would face in providing greater process." *Hamdi*, 542 U.S. at 529 (plurality opinion) (quoting *Mathews v. Eldridge*, 424 U.S. 319, 335 (1976)). The due process balancing analysis applied to determine the Fifth Amendment rights of a U.S. citizen with respect to law-of-war detention supplies the framework for assessing the process due a U.S. citizen who is a senior operational leader of an enemy force planning violent attacks against Americans before he is subjected to lethal targeting.

In the circumstances considered here, the interests on both sides would be weighty. *See Hamdi*, 542 U.S. at 529 (plurality opinion) ("It is beyond question that substantial interests lie on both sides of the scale in this case."). An individual's interest in avoiding erroneous deprivation of his life is "uniquely compelling." *See Ake v. Oklahoma*, 470 U.S. 68, 178 (1985) ("The private interest in the accuracy of a criminal proceeding that places an individual's life or liberty at risk is almost uniquely compelling."). No private interest is more substantial. At the same time, the government's interest in waging war, protecting its citizens, and removing the threat posed by members of enemy forces is also compelling. *Cf. Hamdi*, 542 U.S. at 531 (plurality opinion) ("On the other side of the scale are the weighty and sensitive governmental interests in ensuring that those who have in fact fought with the enemy during a war do not return to battle against the United States."). As the *Hamdi* plurality observed, in the "circumstances of war," "the risk of erroneous deprivation of a citizen's liberty in the absence of sufficient process . . . is very real," *id.* at 530 (plurality opinion), and, of course, the risk of an erroneous deprivation of a citizen's life is even more significant. But, "the realities of combat" render certain uses of force "necessary and appropriate," including force against U.S. citizens who have joined enemy forces in the armed conflict against the United States and whose activities pose an imminent threat of violent attack against the United States—and "due process analysis need not blink at those realities." *Id.* at 531 (plurality opinion). These same realities must also be considered in assessing "the burdens the Government would face in providing greater process" to a member of enemy forces. *Id.* at 529, 531 (plurality opinion).

In view of these interests and practical considerations, the United States would be able to use lethal force against a U.S. citizen, who is located outside the United States and is an operational leader continually planning attacks against U.S. persons and interests, in at least the following circumstances: (1) where an informed, high-level official of the U.S. government has determined that the targeted individual poses an imminent threat of violent attack against the United States; (2) where a capture operation would be infeasible—and where those conducting the operation continue to monitor whether capture becomes feasible; and (3) where such an operation would be conducted consistent with applicable law of war principles. In these circumstances, the "realities" of the conflict and the weight of the government's interest in protecting its citizens from an imminent attack are such that the Constitution would not require the government to provide further process to such a U.S. citizen before using lethal force. *Cf. Hamdi*, 542

U.S. at 535 (plurality opinion) (noting that the Court "accord[s] the greatest respect and consideration to the judgments of military authorities in matters relating to the actual prosecution of war, and . . . the scope of that discretion necessarily is wide"); *id.* at 534 (plurality opinion) ("The parties agree that initial captures on the battlefield need not receive the process we have discussed here; that process is due only when the determination is made to continue to hold those who have been seized.") (emphasis omitted).

Certain aspects of this legal framework require additional explication. *First*, the condition that an operational leader present an "imminent" threat of violent attack against the United States does not require the United States to have clear evidence that a specific attack on U.S. persons and interests will take place in the immediate future. Given the nature of, for example, the terrorist attacks on September 11, in which civilian airliners were hijacked to strike the World Trade Center and the Pentagon, this definition of imminence, which would require the United States to refrain from action until preparations for an attack are concluded, would not allow the United States sufficient time to defend itself. The defensive options available to the United States may be reduced or eliminated if al-Qa'ida operatives disappear and cannot be found when the time of their attack approaches. Consequently, with respect to al-Qa'ida leaders who are continually planning attacks, the United States is likely to have only a limited window of opportunity within which to defend Americans in a manner that has both a high likelihood of success and sufficiently reduces the probabilities of civilian causalities. *See* Michael N. Schmitt, *State-Sponsored Assassination in International and Domestic Law*, 17 Yale J. Int'l L. 609, 648 (1992). Furthermore, a "terrorist 'war' does not consist of a massive attack across an international border, nor does it consist of one isolated incident that occurs and is then past. It is a drawn out, patient, sporadic pattern of attacks. It is very difficult to know when or where the next incident will occur." Gregory M. Travalio, *Terrorism, International Law, and the Use of Military Force*, 18 Wis. Int'l L.J. 145, 173 (2000); *see also* Testimony of Attorney-General Lord Goldsmith, 660 Hansard. H.L. (April 21, 2004) 370 (U.K.), *available at* http://www.publications.parliament.uk/pa/ld200304/ldhansrd/vo040421/text/40421-07.htm (what constitutes an imminent threat "will develop to meet new circumstances and new threats . . . . It must be right that states are able to act in self-defense in circumstances where there is evidence of further imminent attacks by terrorist groups, even if there is no specific evidence of where such an attack will take place or of the precise nature of the attack."). Delaying action against individuals continually planning to kill Americans until some theoretical end stage of the planning for a particular plot would create an unacceptably high risk that the action would fail and that American casualties would result.

By its nature, therefore, the threat posed by al-Qa'ida and its associated forces demands a broader concept of imminence in judging when a person continually planning terror attacks presents an imminent threat, making the use of force appropriate. In this context, imminence must incorporate considerations of the relevant window of opportunity, the possibility of reducing collateral damage to civilians, and the likelihood of heading off future disastrous attacks on Americans. Thus, a decision maker

determining whether an al-Qa'ida operational leader presents an imminent threat of violent attack against the United States must take into account that certain members of al-Qa'ida (including any potential target of lethal force) are continually plotting attacks against the United States; that al-Qa'ida would engage in such attacks regularly to the extent it were able to do so; that the U.S. government may not be aware of all al-Qa'ida plots as they are developing and thus cannot be confident that none is about to occur; and that, in light of these predicates, the nation may have a limited window of opportunity within which to strike in a manner that both has a high likelihood of success and reduces the probability of American casualties.

With this understanding, 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 and 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.

Second, regarding the feasibility of capture, capture would not be feasible if it could not be physically effectuated during the relevant window of opportunity or if the relevant country were to decline to consent to a capture operation. Other factors such as undue risk to U.S. personnel conducting a potential capture operation also could be relevant. Feasibility would be a highly fact-specific and potentially time-sensitive inquiry.

Third, it is a premise here that any such lethal operation by the United States would comply with the four fundamental law-of-war principles governing the use of force: necessity, distinction, proportionality, and humanity (the avoidance of unnecessary suffering). *See, e.g.*, United States Air Force, Targeting, Air Force Doctrine Document 2-1.9, at 88 (June 8, 2006); Dinstein, *Conduct of Hostilities* at 16-20, 115-16, 119-23; *see also 2010 Koh ASIL Speech*. For example, it would not be consistent with those principles to continue an operation if anticipated civilian casualties would be excessive in relation to the anticipated military advantage. Chairman of the Joint Chiefs of Staff Instruction 5810.01D, Implementation of the DoD Law of War Program ¶ 4.a, at 1 (Apr. 30, 2010). An operation consistent with the laws of war could not violate the prohibitions against treachery and perfidy, which address a breach of confidence by the assailant. *See, e.g.*, Hague Convention IV, Annex, art. 23(b), Oct. 18, 1907, 36 Stat. 2277, 2301-02 ("[I]t is especially forbidden . . . [t]o kill or wound treacherously individuals belonging to the hostile nation or army . . . ."). These prohibitions do not, however, categorically forbid the use of stealth or surprise, nor forbid attacks on identified individual soldiers or officers. *See* U.S. Army Field Manual 27-10, *The Law of Land Warfare*, ¶ 31 (1956) (article 23(b) of the Annex to the Hague Convention IV does not "preclude attacks on individual soldiers or officers of the enemy whether in the zone of hostilities, occupied territory, or else-where"). And the Department is not aware of

any other law-of-war grounds precluding use of such tactics. *See* Dinstein, *Conduct of Hostilities* at 94-95, 199; Abraham D. Sofaer, *Terrorism, the Law, and the National Defense*, 126 Mil. L. Rev. 89, 120-21 (1989). Relatedly, "there is no prohibition under the laws of war on the use of technologically advanced weapons systems in armed conflict—such as pilotless aircraft or so-called smart bombs—as long as they are employed in conformity with applicable laws of war." *2010 Koh ASIL Speech*. Further, under this framework, the United States would also be required to accept a surrender if it were feasible to do so.

In sum, an operation in the circumstances and under the constraints described above would not result in a violation of any due process rights.

B.

Similarly, assuming that a lethal operation targeting a U.S. citizen abroad who is planning attacks against the United States would result in a "seizure" under the Fourth Amendment, such an operation would not violate that Amendment in the circumstances posited here. The Supreme Court has made clear that the constitutionality of a seizure is determined by "balanc[ing] the nature and quality of the intrusion on the individual's Fourth Amendment interests against the importance of the governmental interests alleged to justify the intrusion." *Tennessee v. Garner*, 471 US. 1, 8 (1985) (internal quotation marks omitted); *accord Scott v. Harris*, 550 U.S. 372, 383 (2007). Even in domestic law enforcement operations, the Court has noted that "[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." *Garner*, 471 U.S. at 11. Thus, "if the suspect threatens the officer with a weapon or there is probable cause to believe that he has committed a crime involving the infliction or threatened infliction of serious physical harm, deadly force may be used if necessary to prevent escape, and if, where feasible, some warning has been given." *Id.* at 11-12.

The Fourth Amendment "reasonableness" test is situation-dependent. *Cf. Scott*, 550 U.S. at 382 ("*Garner* did not establish a magical on/off switch that triggers rigid preconditions whenever an officer's actions constitute 'deadly force.'"). What would constitute a reasonable use of lethal force for purposes of domestic law enforcement operations differs substantially from what would be reasonable in the situation and circumstances discussed in this white paper. But at least in circumstances where the targeted person is an operational leader of an enemy force and an informed, high-level government official has determined that he poses an imminent threat of violent attack against the United States, and those conducting the operation would carry out the operation only if capture were infeasible, the use of lethal force would not violate the Fourth Amendment. Under such circumstances, the intrusion on any Fourth Amendment interests would be outweighed by the "importance of the governmental interests [that] justify the intrusion," *Garner*, 471 U.S. at 8—the interests in protecting the lives of Americans.

C.

Finally, the Department notes that under the circumstances described in this paper, there exists no appropriate judicial forum to evaluate these constitutional considerations. It is well-established that "[m]atters intimately related to foreign policy and national security are rarely proper subjects for judicial intervention," *Haig v. Agee*, 453 U.S. 280, 292 (1981), because such matters "frequently turn on standards that defy judicial application," or "involve the exercise of a discretion demonstrably committed to the executive or legislature," *Baker v. Carr*, 369 U.S. 186, 211 (1962). Were a court to intervene here, it might be required inappropriately to issue an ex ante command to the President and officials responsible for operations with respect to their specific tactical judgment to mount a potential lethal operation against a senior operational leader of al-Qa'ida or its associated forces. And judicial enforcement of such orders would require the Court to supervise inherently predictive judgments by the President and his national security advisors as to when and how to use force against a member of an enemy force against which Congress has authorized the use of force.

III.

Section 1119(b) of title 18 provides that a "person who, being a national of the United States, kills or attempts to kill a national of the United States while such national is outside the United States but within the jurisdiction of another country shall be punished as provided under sections 1111, 1112, and 1113." 18 U.S.C. § 1119(b) (2006).[3] Because the person who would be the target of the kind of operation discussed here would be a U.S. citizen, it might be suggested that section 1119(b) would prohibit such an operation. Section 1119, however, incorporates the federal murder and manslaughter statutes, and thus its prohibition extends only to "unlawful killing[s]," 18 U.S.C. §§ 1111(a), 1112(a) (2006). Section 1119 is best construed to incorporate the "public authority" justification, which renders lethal action carried out by a government official lawful in some circumstances. As this paper explains below, a lethal operation of the kind discussed here would fall within the public authority exception under the circumstances and conditions posited because it would be conducted in a manner consistent with applicable law of war principles governing the non-international conflict between the United States and al-Qa'ida and its associated forces. It therefore would not result in an unlawful killing.[4]

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[3] *See also* 18 U.S.C. § 1119(a) (2006) (providing that "'national of the United States' has the meaning stated in section 101(a)(22) of the Immigration and Nationality Act," 8 U.S.C. § 1101(a)(22) (2006)).

[4] In light of the conclusion that section 1119 and the statutes it cross-references incorporate this justification, and that the justification would cover an operation of the sort discussed here, this discussion does not address whether an operation of this sort could be lawful on any other grounds.

A.

Although section 1119(b) refers only to the "punish[ments]" provided under sections 1111, 1112, and 1113, courts have held that section 1119(b) incorporates the substantive elements of those cross-referenced provisions of title 18. *See, e.g., United States v. Wharton*, 320 F.3d 526, 533 (5th Cir. 2003); *United States v. White*, 51 F. Supp. 2d 1008, 1013-14 (E.D. Cal. 1997). Section 1111 of title 18 sets forth criminal penalties for "murder," and provides that "[m]urder is the unlawful killing of a human being with malice aforethought." 18 U.S.C. § 1111(a). Section 1112 similarly provides criminal sanctions for "[m]anslaughter," and states that "[m]anslaughter is the unlawful killing of a human being without malice." *Id.* § 1112(a). Section 1113 provides criminal penalties for "attempts to commit murder or manslaughter." *Id.* § 1113. It is therefore clear that section 1119(b) bars only "unlawful killing."

Guidance as to the meaning of the phrase "unlawful killing" in sections 1111 and 1112—and thus for purposes of section 1119(b)—can be found in the historical understandings of murder and manslaughter. That history shows that states have long recognized justifications and excuses to statutes criminalizing "unlawful" killings.[5] One state court, for example, in construing that state's murder statute, explained that "the word 'unlawful' is a term of art" that "connotes a homicide with the absence of factors of excuse or justification." *People v. Frye*, 10 Cal. Rptr. 2d 217, 221 (Cal. Ct. App. 1992). That court further explained that the factors of excuse or justification in question include those that have traditionally been recognized. *Id.* at 221 n.2. Other authorities support the same conclusion. *See, e.g., Mullaney v. Wilbur*, 421 U.S. 684, 685 (1975) (requirement of "unlawful" killing in Maine murder statute meant that killing was "neither justifiable nor excusable"); *cf. also* Rollin M. Perkins & Ronald N. Boyce, *Criminal Law* 56 (3d ed. 1982) ("Innocent homicide is of two kinds, (1) justifiable and (2) excusable."). Accordingly, section 1119 does not proscribe killings covered by a justification traditionally recognized under the common law or state and federal murder statutes. "Congress did not intend [section 1119] to criminalize justifiable or excusable killings." *White*, 51 F. Supp. 2d at 1013.

B.

The public authority justification is well-accepted, and it may be available even in cases where the particular criminal statute at issue does not expressly refer to a public

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[5] The same is true with respect to other statutes, including federal laws, that modify a prohibited act other than murder or manslaughter with the term "unlawfully." *See, e.g., Territory v. Gonzales*, 89 P. 250, 252 (N.M. 1907) (construing the term "unlawful" in statute criminalizing assault with a deadly weapon as "clearly equivalent" to "without excuse or justification"). For example, 18 U.S.C. § 2339C(a)(1) (2006) makes it unlawful, *inter alia*, to "unlawfully and willfully provide[] or collect[] funds" with the intention that they may be used (or knowledge they are to be used) to carry out an act that is an offense within certain specified treaties, or to engage in certain other terrorist acts. The legislative history of section 2339C makes clear that "[t]he term 'unlawfully' is intended to embody common law defenses." H.R. Rep. No. 107-307, at 12 (2001).

authority justification. Prosecutions where such a "public authority" justification is invoked are understandably rare, *see* American Law Institute Model Penal Code and Commentaries § 3.03 Comment 1, at 23-24 (1985); *cf. Visa Fraud Investigation*, 8 Op. O.L.C. 284, 285 n.2, 286 (1984), and thus there is little case law in which courts have analyzed the scope of the justification with respect to the conduct of government officials. Nonetheless, discussions in the leading treatises and in the Model Penal Code demonstrate its legitimacy. *See* 2 Wayne R. LaFave, *Substantive Criminal Law* § 10.2(b), at 135 (2d ed. 2003); Perkins & Boyce, *Criminal Law* at 1093 ("Deeds which otherwise would be criminal, such as taking or destroying property, taking hold of a person by force and against his will, placing him in confinement, or even taking his life, are not crimes if done with proper public authority."); *see also* Model Penal Code § 3.03(1)(a), (d), (e), at 22-23 (proposing codification of justification where conduct is "required or authorized by," *inter alia*, "the law defining the duties or functions of a public officer," "the law governing the armed services or the lawful conduct of war," or "any other provision of law imposing a public duty"); National Commission on Reform of Federal Criminal Laws, *A Proposed New Federal Criminal Code* § 602(1) (1971) ("Conduct engaged in by a public servant in the course of his official duties is justified when it is required or authorized by law."). And the Department's Office of Legal Counsel ("OLC") has invoked analogous rationales when it has analyzed whether Congress intended a particular criminal statute to prohibit specific conduct that otherwise falls within a government agency's authorities. *See, e.g.*, *Visa Fraud Investigation*, 8 Op. O.L.C. at 287-88 (concluding that a civil statute prohibiting issuance of visa to an alien known to be ineligible did not prohibit State Department from issuing such a visa where "necessary" to facilitate an important Immigration and Naturalization Service undercover operation carried out in a "reasonable" fashion).

The public authority justification would not excuse all conduct of public officials from all criminal prohibitions. The legislature may design some criminal prohibitions to place bounds on the kinds of governmental conduct that can be authorized by the Executive. Or the legislature may enact a criminal prohibition in order to limit the scope of the conduct that the legislature has otherwise authorized the Executive to undertake pursuant to another statute. *See, e.g.*, *Nardone v. United States*, 302 U.S. 379, 384 (1937) (federal statute proscribed government wiretapping). But the generally recognized public authority justification reflects that it would not make sense to attribute to Congress the intent to criminalize all covered activities undertaken by public officials in the legitimate exercise of their otherwise lawful authorities, even if Congress clearly intends to make those same actions a crime when committed by persons not acting pursuant to public authority. In some instances, therefore, the best interpretation of a criminal prohibition is that Congress intended to distinguish persons who are acting pursuant to public authority from those who are not, even if the statute does not make that distinction express. *Cf. id.* at 384 (federal criminal statutes should be construed to exclude authorized conduct of public officers where such a reading "would work obvious absurdity as, for example, the

application of a speed law to a policeman pursuing a criminal or the driver of a fire engine responding to an alarm").[6]

The touchstone for the analysis whether section 1119 incorporates not only justifications generally, but also the public authority justification in particular, is the legislative intent underlying this statute. Here, the statute should be read to exclude from its prohibitory scope killings that are encompassed by traditional justifications, which include the public authority justification. The statutory incorporation of two other criminal statutes expressly referencing "unlawful" killings is one indication. *See supra* at 10-11. Moreover, there are no indications that Congress had a contrary intention. Nothing in the text or legislative history of sections 1111-1113 of title 18 suggests that Congress intended to exclude the established public authority justification from those justifications that Congress otherwise must be understood to have imported through the use of the modifier "unlawful" in those statutes. Nor is there anything in the text or legislative history of section 1119 itself to suggest that Congress intended to abrogate or otherwise affect the availability of this traditional justification for killings. On the contrary, the relevant legislative materials indicate that, in enacting section 1119, Congress was merely closing a gap in a field dealing with entirely different kinds of conduct from that at issue here.[7]

The Department thus concludes that section 1119 incorporates the public authority justification.[8] This paper turns next to the question whether a lethal operation

[6] Each potentially applicable statute must be carefully and separately examined to discern Congress's intent in this respect. *See generally, e.g., Nardone*, 302 U.S. 379; *United States Assistance to Countries that Shoot Down Civil Aircraft Involved in Drug Trafficking*, 18 Op. O.L.C. 148 (1994); *Application of Neutrality Act to Official Government Activities*, 8 Op. O.L.C. 58 (1984).

[7] Section 1119 was designed to close a jurisdictional loophole—exposed by a murder that had been committed abroad by a private individual—to ensure the possibility of prosecuting U.S. nationals who murdered other U.S. nationals in certain foreign countries that lacked the ability to lawfully secure the perpetrator's appearance at trial. *See* 137 Cong. Rec. 8675-76 (1991) (statement of Sen. Thurmond). This loophole is unrelated to the sort of authorized operation at issue here. Indeed, prior to the enactment of section 1119, the only federal statute expressly making it a crime to kill U.S. nationals abroad (outside the United States' special and maritime jurisdiction) reflected what appears to have been a particular concern with the protection of Americans from terrorist attacks. *See* 18 U.S.C. § 2332(a), (d) (2006) (criminalizing unlawful killings of U.S. nationals abroad where the Attorney General or his subordinate certifies that the "offense was intended to coerce, intimidate, or retaliate against a government or a civilian population").

[8] 18 U.S.C. § 956(a)(1) (2006) makes it a crime to conspire within the jurisdiction of the United States "to commit at any place outside the United States an act that would constitute the offense of murder, kidnapping, or maiming if committed in the special maritime and territorial jurisdiction of the United States" if any conspirator acts within the United States to effect any object of the conspiracy. Like section 1119(b), section 956(a) incorporates the public authority justification. In addition, the legislative history of section 956(a) indicates that the provision was "not intended to apply to duly authorized actions undertaken on behalf of the United States Government." 141 Cong. Rec. 4491, 4507 (1995) (section-by-section analysis of bill submitted by Sen. Biden, who introduced the provision at the behest of the President); *see also id.* at 11,960 (section-by-section analysis of bill submitted by Sen. Daschle, who introduced the identical provision in a different version of the anti-terrorism legislation a few months later). Thus, for the reasons that section 1119(b) does not prohibit the United States from conducting a lethal operation against a U.S. citizen, section 956(a) also does not prohibit such an operation.

could be encompassed by that justification and, in particular, whether that justification would apply when the target is a U.S. citizen. The analysis here leads to the conclusion that it would.

C.

A lethal operation against an enemy leader undertaken in national self-defense or during an armed conflict that is authorized by an informed, high-level official and carried out in a manner that accords with applicable law of war principles would fall within a well established variant of the public authority justification and therefore would not be murder. *See*, *e.g.*, 2 Paul H. Robinson, *Criminal Law Defenses* § 148(a), at 208 (1984) (conduct that would violate a criminal statute is justified and thus not unlawful "[w]here the exercise of military authority relies upon the law governing the armed forces or upon the conduct of war"); 2 LaFave, *Substantive Criminal Law* § 10.2(c) at 136 ("another aspect of the public duty defense is where the conduct was required or authorized by 'the law governing the armed services or the lawful conduct of war'"); Perkins & Boyce, *Criminal Law* at 1093 (noting that a "typical instance[] in which even the extreme act of taking human life is done by public authority" involves "the killing of an enemy as an act of war and within the rules of war").[9]

The United States is currently in the midst of a congressionally authorized armed conflict with al-Qa'ida and associated forces, and may act in national self-defense to protect U.S. persons and interests who are under continual threat of violent attack by certain al-Q'aida operatives planning operations against them. The public authority justification would apply to a lethal operation of the kind discussed in this paper if it were conducted in accord with applicable law of war principles. As one legal commentator has explained, "if a soldier intentionally kills an enemy combatant in time of war and within the rules of warfare, he is not guilty of murder," whereas, for example, if that soldier intentionally kills a prisoner of war—a violation of the laws of war—"then he commits murder." 2 LaFave, *Substantive Criminal Law* § 10.2(c), at 136; *see also State v. Gut*, 13 Minn. 341, 357 (1868) ("That it is legal to kill an alien enemy in the heat and exercise of war, is undeniable; but to kill such an enemy after he has laid down his arms, and especially when he is confined in prison, is murder."); Perkins & Boyce, *Criminal Law* at 1093 ("Even in time of war an alien enemy may not be killed needlessly after he has been disarmed and securely imprisoned . . . ."). Moreover, without invoking the public authority justification by its terms, this Department's OLC has relied on the same notion in an opinion addressing the intended scope of a federal criminal statute that concerned the use of potentially lethal force. *See United States Assistance to Countries*

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[9] *See also Frye,* 10 Cal. Rptr. 2d at 221 n.2 (identifying "homicide done under a valid public authority, such as execution of a death sentence or killing an enemy in a time of war," as examples of justifiable killing that would not be "unlawful" under the California statute describing murder as an "unlawful" killing); Model Penal Code § 3.03(2)(b), at 22 (proposing that criminal statutes expressly recognize a public authority justification for a killing that "occurs in the lawful conduct of war" notwithstanding the Code recommendation that the use of deadly force generally should be justified only if expressly prescribed by law).

that Shoot Down Civil Aircraft Involved in Drug Trafficking, 18 Op. O.L.C. 148, 164 (1994) (concluding that the Aircraft Sabotage Act of 1984, 18 U.S.C. § 32(b)(2) (2006), which prohibits the willful destruction of a civil aircraft and otherwise applies to U.S. government conduct, should not be construed to have "the surprising and almost certainly unintended effect of criminalizing actions by military personnel that are lawful under international law and the laws of armed conflict").

The fact that an operation may target a U.S. citizen does not alter this conclusion. As explained above, *see supra* at 3, the Supreme Court has held that the military may constitutionally use force against a U.S. citizen who is part of enemy forces. *See Hamdi*, 542 U.S. at 518 (plurality opinion); *id.* at 587, 597 (Thomas, J., dissenting); *Ex parte Quirin*, 317 U.S. at 37-38 ("Citizens who associate themselves with the military arm of the enemy government, and with its aid, guidance and direction enter [the United States] bent on hostile acts," may be treated as "enemy belligerents" under the law of war.). Similarly, under the Constitution and the inherent right to national self-defense recognized in international law, the President may authorize the use of force against a U.S. citizen who is a member of al-Qa'ida or its associated forces and who poses an imminent threat of violent attack against the United States.

In light of these precedents, the Department believes that the use of lethal force addressed in this white paper would constitute a lawful killing under the public authority doctrine if conducted in a manner consistent with the fundamental law of war principles governing the use of force in a non-international armed conflict. Such an operation would not violate the assassination ban in Executive Order No. 12333. Section 2.11 of Executive Order No. 12333 provides that "[n]o person employed by or acting on behalf of the United States Government shall engage in, or conspire to engage in, assassination." 46 Fed. Reg. 59,941, 59, 952 (Dec. 4, 1981). A lawful killing in self-defense is not an assassination. In the Department's view, a lethal operation conducted against a U.S. citizen whose conduct poses an imminent threat of violent attack against the United States would be a legitimate act of national self-defense that would not violate the assassination ban. Similarly, the use of lethal force, consistent with the laws of war, against an individual who is a legitimate military target would be lawful and would not violate the assassination ban.

IV.

The War Crimes Act, 18 U.S.C. § 2441 (2006) makes it a federal crime for a member of the Armed Forces or a national of the United States to "commit[] a war crime." *Id.* § 2441(a). The only potentially applicable provision of section 2441 to operations of the type discussed herein makes it a war crime to commit a "grave breach" of Common Article 3 of the Geneva Conventions when that breach is committed "in the context of and in association with an armed conflict not of an international character."[10]

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[10] The statute also defines "war crime" to include any conduct that is defined as a grave breach in any of the Geneva Conventions (or any Geneva protocol to which the United States is a party); that is prohibited by four specified articles of the Fourth Hague Convention of 1907; or that is a willful killing or

Id. § 2441(c)(3). As defined by the statute, a "grave breach" of Common Article 3 includes "[m]urder," described in pertinent part as "[t]he act of a person who intentionally kills, or conspires or attempts to kill . . . one or more persons taking no active part in the hostilities, including those placed out of combat by sickness, wounds, detention, or any other cause." *Id.* § 2441(d)(1)(D).

Whatever might be the outer bounds of this category of covered persons, Common Article 3 does not alter the fundamental law of war principle concerning a belligerent party's right in an armed conflict to target individuals who are part of an enemy's armed forces or eliminate a nation's authority to take legitimate action in national self-defense. The language of Common Article 3 "makes clear that members of such armed forces [of both the state and non-state parties to the conflict] . . . are considered as 'taking no active part in the hostilities' only once they have disengaged from their fighting function ('have laid down their arms') or are placed *hors de combat*; mere suspension of combat is insufficient." International Committee of the Red Cross, *Interpretive Guidance on the Notion of Direct Participation in Hostilities Under International Humanitarian Law* 28 (2009). An operation against a senior operational leader of al-Qa'ida or its associated forces who poses an imminent threat of violent attack against the United States would target a person who is taking "an active part in hostilities" and therefore would not constitute a "grave breach" of Common Article 3.

V.

In conclusion, it would be lawful for the United States to conduct a lethal operation outside the United States against a U.S. citizen who is a senior, operational leader of al-Qa'ida or an associated force of al-Qa'ida without violating the Constitution or the federal statutes discussed in this white paper under the following conditions: (1) an informed, high-level official of the U.S. government has determined that the targeted individual poses an imminent threat of violent attack against the United States; (2) capture is infeasible, and the United States continues to monitor whether capture becomes feasible; and (3) the operation is conducted in a manner consistent with the four fundamental principles of the laws of war governing the use of force. As stated earlier, this paper does not attempt to determine the minimum requirements necessary to render such an operation lawful, nor does it assess what might be required to render a lethal operation against a U.S. citizen lawful in other circumstances. It concludes only that the stated conditions would be sufficient to make lawful a lethal operation in a foreign country directed against a U.S. citizen with the characteristics described above.

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infliction of serious injury in violation of the 1996 Protocol on Prohibitions or Restrictions on the Use of Mines, Booby-Traps and Other Devices. 18 U.S.C. § 2441(c).

Exhibit 16

February 2012 Johnson Speech

COUNCIL on FOREIGN RELATIONS

Jeh Johnson's Speech on "National Security Law, Lawyers and Lawyering in the Obama Administration"

Speaker: Jeh Johnson
Published February 22, 2012

Jeh Charles Johnson, General Counsel of the Department of Defense, gave this speech on "National security law, lawyers and lawyering in the Obama Administration" at Yale Law School on February 22, 2012.

Thank you for this invitation, and thank you, in particular, Professor Hathaway for your work in the national security legal field. Since we first met last fall I have appreciated your scholarship and our growing friendship. I was pleased to welcome you to the Pentagon in December to introduce you to a number of my civilian and military colleagues there. I would like to count on you as someone with whom I can consult from time to time on the very difficult legal issues we wrestle with in national security.

I am a student of history and, as you will hear throughout my remarks tonight, I like to try to put things in the broader perspective.

I have been General Counsel of the Department of Defense now for exactly 3 years and 12 days, having been appointed to that position by President Obama on February 10, 2009. I have been on an incredible journey with Barack Obama for longer than that, over five years, going back to November 2006, when he recruited me to the presidential campaign he was about to launch. I remember thinking then, "this is a long-shot, but it will be exciting, historic, and how many times in my life will someone personally ask me to help him become President." For the young people here, no matter your political affiliation, I can tell you that involvement in a presidential campaign was exciting — not for the chance

to personally interact with the candidate or help develop his positions on issues; the best experiences were canvassing door to door with my kids in northwest Des Moines and northeast Philadelphia; personally observing the Iowa caucus take place in a high school cafeteria; and passing out leaflets at the train station in my hometown of Montclair, New Jersey.

Involvement in the Obama campaign in 2007-08 was one of the highlights of my personal life.

Involvement in the Obama Administration has been the highlight of my professional life. Day to day, the job I occupy is all at once interesting, challenging, and frustrating. But, when I take a step back and look at the larger picture, I realize that I have witnessed many transformative events in national security over the last three years:

We have focused our efforts on Al Qaeda, and put that group on a path to defeat. We found bin Laden. Scores of other senior members of Al Qaeda have been killed or captured. We have taken the fight to Al Qaeda: where they plot, where they meet, where they plan, and where they train to export terrorism to the United States. Though the fight against Al Qaeda is not over, and multiple arms of our government remain vigilant in the effort to hunt down those who want to do harm to Americans, counterterrorism experts state publicly that Al Qaeda senior leadership is today severely crippled and degraded.

Thanks to the extraordinary sacrifices of our men and women in uniform, we have responsibly ended the combat mission in Iraq.

We are making significant progress in Afghanistan, and have begun a transition to Afghan-led responsibility for security there.

We have applied the standards of the Army Field Manual to all interrogations conducted by the federal government in the context of armed conflict.

We worked with the Congress to bring about a number of reforms to military commission, reflected in the Military Commissions Act of 2009 and the new Manual for Military Commissions. By law, use of statements obtained by cruel, inhuman and degrading treatment – what was once the most controversial aspect of military commissions – is now prohibited.

We are working to make that system a more transparent one, by reforming the rules for press access to

military commissions proceedings, establishing close circuit TV, and a new public website for the commissions system.

We have ended Don't Ask, Don't Tell, which I discussed last time I was here.

Finally, we have, in these times of fiscal austerity, embarked upon a plan to transform the military to a more agile, flexible, rapidly deployable and technologically advanced force, that involves reducing the size of the active duty Army and Marine Corps, and the defense budget by $487 billion over 10 years.

Perhaps the best part of my job is I work in the national security field with, truly, some of the best and brightest lawyers in the country. In this illustrious and credentialed group, I often ask myself "how did I get here?"

Many in this group are graduates of this law school: My special assistant and Navy reservist Brodi Kemp, who is here with me today (class of '04); Caroline Krass at OLC (class of '93); Dan Koffsky at OLC (class of '78); Marty Lederman, formerly of OLC (class of '88); Greg Craig, the former White House Counsel (class of '72); Bob Litt, General Counsel of ODNI (class of '76); Retired Marine Colonel Bill Lietzau (class of '89); Beth Brinkman at DOJ (class of '85); Sarah Cleveland, formerly at State Legal (class of '92); David Pozen at State Legal (class of '08); Steve Pomper (class of '93) and my Deputy Bob Easton (class of '90). I also benefit from working with a number of Yale law students as part of my office's internship and externship programs.

Last but not least — your former Dean. Like many in this room, I count myself a student of Harold Koh's. Within the Administration, Harold often reminds us of many of the things Barack Obama campaigned on in 2007-08. As I wrote these remarks, I asked myself to settle on the one theme from the 2008 campaign that best represents what Harold has carried forward in his position as lawyer for the State Department. The answer was easy: "The United States must lead by the power of our example and not by the example of our power."

There have been press reports that, occasionally, Harold and I, and other lawyers within the Obama Administration, disagree from time to time on national security legal issues. I confess this is true, but it is also true that we actually agree on issues most of the time.

The public should be reassured, not alarmed, to learn there is occasional disagreement and debate

among lawyers within the Executive Branch of government.

From 2001 to 2004, while I was in private practice in New York City, I also chaired the Judiciary Committee of the New York City Bar Association, which rates all the nominees and candidates for federal, state and local judicial office in New York City. In June 2002, our bar committee was in the awkward position of rejecting the very first candidate the new Mayor's judicial screening committee had put forth to the Mayor for the Family Court in New York City. On very short notice, I was summoned to City Hall for a meeting with Mayor Michael Bloomberg and the chair of his judicial screening committee, who was called on to defend his committee's recommendation of the judge. The Mayor wanted to know why our committees had come out differently. The meeting was extremely awkward, but I'll never forget what Mayor Bloomberg said to us: "if you guys always agree, somebody's not doing their job."

Knowing that we must subject our national security legal positions to other very smart lawyers who will scrutinize and challenge them has made us all work a lot harder to develop and refine those positions. On top of that, our clients are sophisticated consumers of legal advice. The President, the Vice President, the National Security Adviser, the Vice President's national security adviser, the Secretary of State, the Secretary of Defense, the Secretary of Homeland Security — are themselves all lawyers. They are not engaged in the practice of law, but in the presentation to them of our legal advice, any weakness in the logic chain will be seized upon and questioned immediately, usually with a statement that begins with the ominous preface: "I know I'm not supposed to play lawyer here, but . . . "

By contrast, "group think" among lawyers is dangerous, because it makes us lazy and complacent in our thinking, and can lead to bad results. Likewise, shutting your eyes and ears to the legal dissent and concerns of others can also lead to disastrous consequences.

Before I was confirmed by the Senate for this job Senator Carl Levin, the chairman of the Armed Services Committee, made sure that I read the Committee's November 2008 report on the treatment and interrogation of detainees at Guantanamo.

The report chronicles the failure of my predecessor in the Bush Administration to listen to the objections of the JAG leadership about enhanced interrogation techniques, the result of which was that the legal opinion of one Lieutenant Colonel, without more, carried the day as the legal endorsement for

stress positions, removal of clothing, and use of phobias to interrogate detainees at Guantanamo Bay, [1]

Just before becoming President, Barack Obama told his transition team that the rule of law should be one of the cornerstones of national security in his Administration. In retrospect, I believe that President Obama made a conscious decision three years ago to bring in to his Administration a group of strong lawyers who would reflect differing points of view. And, though it has made us all work a lot harder, I believe that over the last three years the President has benefited from healthy and robust debate among the lawyers on his national security team, which has resulted in carefully delineated, pragmatic, credible and sustainable judgments on some very difficult legal issues in the counterterrorism realm – judgments that, for the most part, are being accepted within the mainstream legal community and the courts.

Tonight I want to summarize for you, in this one speech, some of the basic legal principles that form the basis for the U.S. military's counterterrorism efforts against Al Qaeda and its associated forces. These are principles with which the top national security lawyers in our Administration broadly agree. My comments are general in nature about the U.S. military's legal authority, and I do not comment on any operation in particular.

First: in the conflict against an *unconventional* enemy such as al Qaeda, we must consistently apply *conventional* legal principles. We must apply, and we have applied, the law of armed conflict, including applicable provisions of the Geneva Conventions and customary international law, core principles of distinction and proportionality, historic precedent, and traditional principles of statutory construction. Put another way, we must not make it up to suit the moment.

Against an unconventional enemy that observes no borders and does not play by the rules, we must guard against aggressive interpretations of our authorities that will discredit our efforts, provoke controversy and invite challenge. As I told the Heritage Foundation last October, over-reaching with military power can result in national security setbacks, not gains. Particularly when we attempt to extend the reach of the military on to U.S. soil, the courts resist, consistent with our core values and our American heritage – reflected, no less, in places such as the Declaration of Independence, the Federalist Papers, the Third Amendment, and in the 1878 federal criminal statute, still on the books today, which prohibits willfully using the military as a posse comitatus unless expressly authorized by Congress or the Constitution.

Second: in the conflict against al Qaeda and associated forces, the bedrock of the military's domestic legal authority continues to be the Authorization for the Use of Military Force passed by the Congress one week after 9/11.[2] "The AUMF," as it is often called, is Congress' authorization to the President to:

use all necessary and appropriate force against those nations, organizations, or persons he determines planned, authorized, committed, or aided the terrorist attacks that occurred on September 11, 2001, or harbored such organizations or persons, in order to prevent any future acts of international terrorism against the United States by such nations, organizations or persons.

Ten years later, the AUMF remains on the books, and it is still a viable authorization today.

In the detention context, we in the Obama Administration have interpreted this authority to include:

those persons who were part of, or substantially supported, Taliban or al-Qaeda forces or associated forces that are engaged in hostilities against the United States or its coalition partners.[3]

This interpretation of our statutory authority has been adopted by the courts in the habeas cases brought by Guantanamo detainees,[4] and in 2011 Congress joined the Executive and Judicial branches of government in embracing this interpretation when it codified it almost word-for-word in Section 1021 of this year's National Defense Authorization Act, 10 years after enactment of the original AUMF.[5] (A point worth noting here: contrary to some reports, neither Section 1021 nor any other detainee-related provision in this year's Defense Authorization Act creates or expands upon the authority for the military to detain a U.S. citizen.)

But, the AUMF, the statutory authorization from 2001, is not open-ended. It does not authorize military force against anyone the Executive labels a "terrorist." Rather, it encompasses only those groups or people with a link to the terrorist attacks on 9/11, or associated forces.

Nor is the concept of an "associated force" an open-ended one, as some suggest. This concept, too, has been upheld by the courts in the detention context,[6] and it is based on the well-established concept of co-belligerency in the law of war. The concept has become more relevant over time, as al Qaeda has, over the last 10 years, become more de-centralized, and relies more on associates to carry out its terrorist aims.

An "associated force," as we interpret the phrase, has two characteristics to it: (1) an organized, armed group that has entered the fight alongside al Qaeda, and (2) is a co-belligerent with al Qaeda in hostilities against the United States or its coalition partners. In other words, the group must not only be aligned with al Qaeda. It must have also entered the fight against the United States or its coalition partners. Thus, an "associated force" is not any terrorist group in the world that merely embraces the al Qaeda ideology. More is required before we draw the legal conclusion that the group fits within the statutory authorization for the use of military force passed by the Congress in 2001.

Third: there is nothing in the wording of the 2001 AUMF or its legislative history that restricts this statutory authority to the "hot" battlefields of Afghanistan. Afghanistan was plainly the focus when the authorization was enacted in September 2001, but the AUMF authorized the use of necessary and appropriate force against the organizations and persons connected to the September 11th attacks – al Qaeda and the Taliban — without a geographic limitation.

The legal point is important because, in fact, over the last 10 years al Qaeda has not only become more decentralized, it has also, for the most part, migrated away from Afghanistan to other places where it can find safe haven.

However, this legal conclusion too has its limits. It should not be interpreted to mean that we believe we are in any "Global War on Terror," or that we can use military force whenever we want, wherever we want. International legal principles, including respect for a state's sovereignty and the laws of war, impose important limits on our ability to act unilaterally, and on the way in which we can use force in foreign territories.

Fourth: I want to spend a moment on what some people refer to as "targeted killing." Here I will largely repeat Harold's much-quoted address to the American Society of International Law in March 2010. In an armed conflict, lethal force against known, individual members of the enemy is a long-standing and long-legal practice. What is new is that, with advances in technology, we are able to target military objectives with much more precision, to the point where we can identify, target and strike a single military objective from great distances.

Should the legal assessment of targeting a single identifiable military objective be any different in 2012 than it was in 1943, when the U.S. Navy targeted and shot down over the Pacific the aircraft flying

Admiral Yamamoto, the commander of the Japanese navy during World War Two, with the specific intent of killing him? Should we take a dimmer view of the legality of lethal force directed against individual members of the enemy, because modern technology makes our weapons more precise? As Harold stated two years ago, the rules that govern targeting do not turn on the type of weapon system used, and there is no prohibition under the law of war on the use of technologically advanced weapons systems in armed conflict, so long as they are employed in conformity with the law of war. Advanced technology can ensure both that the best intelligence is available for planning operations, and that civilian casualties are minimized in carrying out such operations.

On occasion, I read or hear a commentator loosely refer to lethal force against a valid military objective with the pejorative term "assassination." Like any American shaped by national events in 1963 and 1968, the term is to me one of the most repugnant in our vocabulary, and it should be rejected in this context. Under well-settled legal principles, lethal force against a valid *military* objective, in an armed conflict, is consistent with the law of war and does not, by definition, constitute an "assassination."

Fifth: as I stated at the public meeting of the ABA Standing Committee on Law and National Security, belligerents who also happen to be U.S. citizens do not enjoy immunity where non-citizen belligerents are valid military objectives. Reiterating principles from *Ex Parte Quirin* in 1942,[7] the Supreme Court in 2004, in *Hamdi* v. *Rumsfeld*,[8] stated that "[a] citizen, no less than an alien, can be 'part of or supporting forces hostile to the United States or coalition partners' and 'engaged in an armed conflict against the United States.'"

Sixth: contrary to the view of some, targeting decisions are not appropriate for submission to a court. In my view, they are core functions of the Executive Branch, and often require real-time decisions based on an evolving intelligence picture that only the Executive Branch may timely possess. I agree with Judge Bates of the federal district court in Washington, who ruled in 2010 that the judicial branch of government is simply not equipped to become involved in targeting decisions.[9]

As I stated earlier in this address, within the Executive Branch the views and opinions of the lawyers on the President's national security team are debated and heavily scrutinized, and a legal review of the application of lethal force is the weightiest judgment a lawyer can make. (And, when these judgments start to become easy, it is time for me to return to private law practice.)

Finally: as a student of history I believe that those who govern today must ask ourselves how we will be

judged 10, 20 or 50 years from now. Our applications of law must stand the test of time, because, over the passage of time, what we find tolerable today may be condemned in the permanent pages of history tomorrow.

I'm going to tell one more story. There's a movie out now called "Red Tails," that remind us all about the exploits and courage of the famed Tuskegee Airmen of World War Two. In March 1945 about 100 Tuskegee Airmen were sent to train at Freeman Field in Indiana. At the time Army Regulation 210-10 prohibited segregated officers' clubs in the Army. Determined to continue a system of segregation despite this rule, the base commander devised two different officers' clubs: one for all the Tuskegee airmen "instructors" (all of whom happened to be white), and another for the Tuskegee airmen "trainees" (all of whom happened to be black). Over the course of two days in April 1945, 61 Tuskegee airmen were arrested for challenging the segregated clubs, in what is now known in the history books as the "Freeman Field Mutiny." Several days later, all the Tuskegee Airmen on the base were rounded up, read the base regulation, and told to sign a certification that they had read it and understood it. Every one of them refused to sign. Next, with the legal help of a JAG from First Air Force, every Tuskegee airman on base was interviewed one by one in the base legal office and given three choices: (1) sign the certification, (2) write and sign your own certification, or (3) be arrested for disobeying a direct order.[10] Almost all of them, again, refused to sign.

As a result, my uncle 2dLt Robert B. Johnson and over 100 other Tuskegee airmen became detainees of the U.S. military, arrested and charged with a violation of Article 64 of the Articles of War, disobeying a direct order in a time of war, a capital offense. Eventually, once the public learned of the episode, the Tuskegee airmen were released, but Lt Johnson was denied the opportunity to serve in combat and given a letter of reprimand from the U.S. Army. But, he never regretted his actions.

My legal colleagues and I who serve in government today will not surrender to the national security pressures of the moment. History shows that, under the banner of "national security," much damage can be done – to human beings, to our laws, to our credibility, and to our values. As I have said before, we must adopt legal positions that comport with common sense, and fit well within the mainstream of legal thinking in the area, consistent with who we are as Americans.

I have talked today about legally sustainable and credible ways to wage war, not to win peace. All of us recognize this should not be the normal way of things, and that the world is a better place when the United States does indeed lead by the power of an example, and not by the example of its power.

In addition to my uncle, one of my personal heroes is my former law partner Ted Sorensen, who died a little over a year ago. Ted was John F. Kennedy's speechwriter, one of his closest advisors, and himself one of the most eloquent communicators of our time.

In May 2004 Ted Sorensen gave one of the best speeches I've ever heard. It was right after the Abu Ghraib scandal broke. He said this, which I will never forget:

Last week a family friend of an accused American guard in Iraq recited the atrocities inflicted by our enemies on Americans and asked: Must we be held to a different standard? My answer is YES. Not only because others expect it. We must hold ourselves to a different standard. Not only because God demands it, but because it serves our security. Our greatest strength has long been not merely our military might but our moral authority. Our surest protection against assault from abroad has been not all our guards, gates and guns or even our two oceans, but our essential goodness as a people.

My goal here tonight was to inform and to educate. My other reason for being here is to appeal directly to the students, to ask that you think about public service in your career. Law students become trained in the law for many different reasons, with many different traits and interests. Some are naturally suited for transactions, to help structure deals. Others want to be in the courtroom, and love advocacy. There are so many facets of the law — and people who want to pursue them — that help make our profession great.

Over the years, one of my big disappointments is to see a law student or young lawyer who went to law school motivated by a desire for public service, but who gave up the pursuit because of student loans, lack of a readily available opportunity, or the lure of a large law firm and a large starting salary.

To those law students who are interested in public service, I hope you do not lose that interest as your career progresses. We need talented lawyers serving in government at all levels, you will find every day interesting and rewarding, and, in the end, you and others will assess the sum total of your legal career, not by what you got, but by what you gave.

Thank you for listening.

[1] *See Inquiry into the Treatment of Detainees in U.S. Custody,* Report of the Committee on Armed Services, United States Senate (110th Congress, 2d Session, Nov. 20, 2008).

[2] Pub. L. No. 107-40, 115 Stat. 224 (2001).

[3] *See* Respondent's Memorandum Regarding the Government's Detention Authority Relative to Detainees Held at Guantanamo Bay, *In re: Guantanamo Bay Detainee Litig*., Misc. No. 08-0442, at 1 (D.D.C. March 13, 2009).

[4] *See e.g., Al-Adahi* v. *Obama*, 613 F.3d 1102, 1103 (D.C. Cir. 2010), *cert. denied*, 131 S. Ct. 1001 (2011); *Awad* v. *Obama*, 608 F.3d 1, 11-12 (D.C. Cir. 2010), *cert. denied*, 131 S. Ct. 1814 (2011).

[5] Section 1021 of the National Defense Authorization Act for Fiscal Year 2012, Pub. L. 112-81 (December 31, 2011).

[6] *See, e.g., Barhoumi* v. *Obama*, 609 F.3d 416, 432 (D.C. Cir. 2010); *Hamlily* v. *Obama*, 616 F. Supp. 2d 63, 74-75 (D.D.C. 2009); *Gherebi* v. *Obama*, 609 F. Supp. 2d 43, 69 (D.D.C. 2009).

[7] 317 U.S. 1 (1942).

[8] 542 U.S. 507 (2004).

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

[10] *See* "The Freeman Field Mutiny: A Study in Leadership," A Research Paper Presented to the Research Department Air Command and Staff College by Major John D. Murphy (March 1997).

Exhibit 17

March 2012 Holder Speech

JUSTICE NEWS

Attorney General Eric Holder Speaks at Northwestern University School of Law

Chicago, IL, United States ~

Monday, March 5, 2012

As prepared for delivery

Thank you, Dean [Daniel] Rodriguez, for your kind words, and for the outstanding leadership that you provide – not only for this academic campus, but also for our nation's legal community. It is a privilege to be with you today – and to be among the distinguished faculty members, staff, alumni, and students who make Northwestern such an extraordinary place.

For more than 150 years, this law school has served as a training ground for future leaders; as a forum for critical, thoughtful debate; and as a meeting place to consider issues of national concern and global consequence. This afternoon, I am honored to be part of this tradition. And I'm grateful for the opportunity to join with you in discussing a defining issue of our time – and a most critical responsibility that we share: how we will stay true to America's founding – and enduring – promises of security, justice and liberty.

Since this country's earliest days, the American people have risen to this challenge – and all that it demands. But, as we have seen – and as President John F. Kennedy may have described best – "In the long history of the world, only a few generations have been granted the role of defending freedom in its hour of maximum danger."

Half a century has passed since those words were spoken, but our nation today confronts grave national security threats that demand our constant attention and steadfast commitment. It is clear that, once again, we have reached an "hour of danger."

We are a nation at war. And, in this war, we face a nimble and determined enemy that cannot be underestimated.

Like President Obama – and my fellow members of his national security team – I begin each day with a briefing on the latest and most urgent threats made against us in the preceding 24 hours. And, like scores of attorneys and agents at the Justice Department, I go to sleep each night thinking of how best to keep our people safe.

I know that – more than a decade after the September 11th attacks; and despite our recent national security successes, including the operation that brought to justice Osama bin Laden last year – there are people currently plotting to murder Americans, who reside in distant countries as well as within our own borders. Disrupting and preventing these plots – and using every available and appropriate tool to keep the American people safe – has been, and will remain, this Administration's top priority.

But just as surely as we are a nation at war, we also are a nation of laws and values. Even when under attack, our actions must always be grounded on the bedrock of the Constitution – and must always be consistent with statutes, court precedent, the rule of law and our founding ideals. Not only is this the right thing to do – history has shown that it is also the most effective approach we can take in combating those who seek to do us harm.

This is not just my view. My judgment is shared by senior national security officials across the government. As the

President reminded us in 2009, at the National Archives where our founding documents are housed, "[w]e uphold our most cherished values not only because doing so is right, but because it strengthens our country and it keeps us safe. Time and again, our values have been our best national security asset." Our history proves this. We do not have to choose between security and liberty – and we will not.

Today, I want to tell you about the collaboration across the government that defines and distinguishes this Administration's national security efforts. I also want to discuss some of the legal principles that guide – and strengthen – this work, as well as the special role of the Department of Justice in protecting the American people and upholding the Constitution.

Before 9/11, today's level of interagency cooperation was not commonplace. In many ways, government lacked the infrastructure – as well as the imperative – to share national security information quickly and effectively. Domestic law enforcement and foreign intelligence operated in largely independent spheres. But those who attacked us on September 11th chose both military and civilian targets. They crossed borders and jurisdictional lines. And it immediately became clear that no single agency could address these threats, because no single agency has all of the necessary tools.

To counter this enemy aggressively and intelligently, the government had to draw on all of its resources – and radically update its operations. As a result, today, government agencies are better postured to work together to address a range of emerging national security threats. Now, the lawyers, agents and analysts at the Department of Justice work closely with our colleagues across the national security community to detect and disrupt terrorist plots, to prosecute suspected terrorists, and to identify and implement the legal tools necessary to keep the American people safe. Unfortunately, the fact and extent of this cooperation are often overlooked in the public debate – but it's something that this Administration, and the previous one, can be proud of.

As part of this coordinated effort, the Justice Department plays a key role in conducting oversight to ensure that the intelligence community's activities remain in compliance with the law, and, together with the Foreign Intelligence Surveillance Court, in authorizing surveillance to investigate suspected terrorists. We must – and will continue to – use the intelligence-gathering capabilities that Congress has provided to collect information that can save and protect American lives. At the same time, these tools must be subject to appropriate checks and balances – including oversight by Congress and the courts, as well as within the Executive Branch – to protect the privacy and civil rights of innocent individuals. This Administration is committed to making sure that our surveillance programs appropriately reflect all of these interests.

Let me give you an example. Under section 702 of the Foreign Intelligence Surveillance Act, the Attorney General and the Director of National Intelligence may authorize annually, with the approval of the Foreign Intelligence Surveillance Court, collection directed at identified categories of foreign intelligence targets, without the need for a court order for each individual subject. This ensures that the government has the flexibility and agility it needs to identify and to respond to terrorist and other foreign threats to our security. But the government may not use this authority intentionally to target a U.S. person, here or abroad, or anyone known to be in the United States.

The law requires special procedures, reviewed and approved by the Foreign Intelligence Surveillance Court, to make sure that these restrictions are followed, and to protect the privacy of any U.S. persons whose nonpublic information may be incidentally acquired through this program. The Department of Justice and the Office of the Director of National Intelligence conduct extensive oversight reviews of section 702 activities at least once every sixty days, and we report to Congress on implementation and compliance twice a year. This law therefore establishes a comprehensive regime of oversight by all three branches of government. Reauthorizing this authority before it expires at the end of this year is the top legislative priority of the Intelligence Community.

But surveillance is only the first of many complex issues we must navigate. Once a suspected terrorist is captured, a decision must be made as to how to proceed with that individual in order to identify the disposition that best serves the interests of the American people and the security of this nation.

Much has been made of the distinction between our federal civilian courts and revised military commissions. The reality is that both incorporate fundamental due process and other protections that are essential to the effective administration of justice – and we should not deprive ourselves of any tool in our fight against al Qaeda.

Our criminal justice system is renowned not only for its fair process; it is respected for its results. We are not the first Administration to rely on federal courts to prosecute terrorists, nor will we be the last. Although far too many choose to ignore this fact, the previous Administration consistently relied on criminal prosecutions in federal court to bring terrorists to justice. John Walker Lindh, attempted shoe bomber Richard Reid, and 9/11 conspirator Zacarias Moussaoui were among the hundreds of defendants convicted of terrorism-related offenses – without political controversy – during the last administration.

Over the past three years, we've built a remarkable record of success in terror prosecutions. For example, in October, we secured a conviction against Umar Farouk Abdulmutallab for his role in the attempted bombing of an airplane traveling from Amsterdam to Detroit on Christmas Day 2009. He was sentenced last month to life in prison without the possibility of parole. While in custody, he provided significant intelligence during debriefing sessions with the FBI. He described in detail how he became inspired to carry out an act of jihad, and how he traveled to Yemen and made contact with Anwar al-Aulaqi, a U.S. citizen and a leader of al Qaeda in the Arabian Peninsula. Abdulmutallab also detailed the training he received, as well as Aulaqi's specific instructions to wait until the airplane was over the United States before detonating his bomb.

In addition to Abdulmutallab, Faizal Shahzad, the attempted Times Square bomber, Ahmed Ghailani, a conspirator in the 1998 U.S. embassy bombings in Kenya and Tanzania, and three individuals who plotted an attack against John F. Kennedy Airport in 2007, have also recently begun serving life sentences. And convictions have been obtained in the cases of several homegrown extremists, as well. For example, last year, United States citizen and North Carolina resident Daniel Boyd pleaded guilty to conspiracy to provide material support to terrorists and conspiracy to murder, kidnap, maim, and injure persons abroad; and U.S. citizen and Illinois resident Michael Finton pleaded guilty to attempted use of a weapon of mass destruction in connection with his efforts to detonate a truck bomb outside of a federal courthouse.

I could go on. Which is why the calls that I've heard to ban the use of civilian courts in prosecutions of terrorism-related activity are so baffling, and ultimately are so dangerous. These calls ignore reality. And if heeded, they would significantly weaken – in fact, they would cripple – our ability to incapacitate and punish those who attempt to do us harm.

Simply put, since 9/11, hundreds of individuals have been convicted of terrorism or terrorism-related offenses in Article III courts and are now serving long sentences in federal prison. Not one has ever escaped custody. No judicial district has suffered any kind of retaliatory attack. These are facts, not opinions. There are not two sides to this story. Those who claim that our federal courts are incapable of handling terrorism cases are not registering a dissenting opinion — they are simply wrong.

But federal courts are not our only option. Military commissions are also appropriate in proper circumstances, and we can use them as well to convict terrorists and disrupt their plots. This Administration's approach has been to ensure that the military commissions system is as effective as possible, in part by strengthening the procedural protections on which the commissions are based. With the President's leadership, and the bipartisan backing of Congress, the Military Commissions Act of 2009 was enacted into law. And, since then, meaningful improvements

have been implemented.

It's important to note that the reformed commissions draw from the same fundamental protections of a fair trial that underlie our civilian courts. They provide a presumption of innocence and require proof of guilt beyond a reasonable doubt. They afford the accused the right to counsel – as well as the right to present evidence and cross-examine witnesses. They prohibit the use of statements obtained through torture or cruel, inhuman, or degrading treatment. And they secure the right to appeal to Article III judges – all the way to the United States Supreme Court. In addition, like our federal civilian courts, reformed commissions allow for the protection of sensitive sources and methods of intelligence gathering, and for the safety and security of participants.

A key difference is that, in military commissions, evidentiary rules reflect the realities of the battlefield and of conducting investigations in a war zone. For example, statements may be admissible even in the absence of Miranda warnings, because we cannot expect military personnel to administer warnings to an enemy captured in battle. But instead, a military judge must make other findings – for instance, that the statement is reliable and that it was made voluntarily.

I have faith in the framework and promise of our military commissions, which is why I've sent several cases to the reformed commissions for prosecution. There is, quite simply, no inherent contradiction between using military commissions in appropriate cases while still prosecuting other terrorists in civilian courts. Without question, there are differences between these systems that must be – and will continue to be – weighed carefully. Such decisions about how to prosecute suspected terrorists are core Executive Branch functions. In each case, prosecutors and counterterrorism professionals across the government conduct an intensive review of case-specific facts designed to determine which avenue of prosecution to pursue.

Several practical considerations affect the choice of forum.

First of all, the commissions only have jurisdiction to prosecute individuals who are a part of al Qaeda, have engaged in hostilities against the United States or its coalition partners, or who have purposefully and materially supported such hostilities. This means that there may be members of certain terrorist groups who fall outside the jurisdiction of military commissions because, for example, they lack ties to al Qaeda and their conduct does not otherwise make them subject to prosecution in this forum. Additionally, by statute, military commissions cannot be used to try U.S. citizens.

Second, our civilian courts cover a much broader set of offenses than the military commissions, which can only prosecute specified offenses, including violations of the laws of war and other offenses traditionally triable by military commission. This means federal prosecutors have a wider range of tools that can be used to incapacitate suspected terrorists. Those charges, and the sentences they carry upon successful conviction, can provide important incentives to reach plea agreements and convince defendants to cooperate with federal authorities.

Third, there is the issue of international cooperation. A number of countries have indicated that they will not cooperate with the United States in certain counterterrorism efforts — for instance, in providing evidence or extraditing suspects – if we intend to use that cooperation in pursuit of a military commission prosecution. Although the use of military commissions in the United States can be traced back to the early days of our nation, in their present form they are less familiar to the international community than our time-tested criminal justice system and Article III courts. However, it is my hope that, with time and experience, the reformed commissions will attain similar respect in the eyes of the world.

Where cases are selected for prosecution in military commissions, Justice Department investigators and prosecutors work closely to support our Department of Defense colleagues. Today, the alleged mastermind of the

bombing of the U.S.S. Cole is being prosecuted before a military commission. I am proud to say that trial attorneys from the Department of Justice are working with military prosecutors on that case, as well as others.

And we will continue to reject the false idea that we must choose between federal courts and military commissions, instead of using them both. If we were to fail to use all necessary and available tools at our disposal, we would undoubtedly fail in our fundamental duty to protect the Nation and its people. That is simply not an outcome we can accept.

This Administration has worked in other areas as well to ensure that counterterrorism professionals have the flexibility that they need to fulfill their critical responsibilities without diverging from our laws and our values. Last week brought the most recent step, when the President issued procedures under the National Defense Authorization Act. This legislation, which Congress passed in December, mandated that a narrow category of al Qaeda terrorist suspects be placed in temporary military custody.

Last Tuesday, the President exercised his authority under the statute to issue procedures to make sure that military custody will not disrupt ongoing law enforcement and intelligence operations — and that an individual will be transferred from civilian to military custody only after a thorough evaluation of his or her case, based on the considered judgment of the President's senior national security team. As authorized by the statute, the President waived the requirements for several categories of individuals where he found that the waivers were in our national security interest. These procedures implement not only the language of the statute but also the expressed intent of the lead sponsors of this legislation. And they address the concerns the President expressed when he signed this bill into law at the end of last year.

Now, I realize I have gone into considerable detail about tools we use to identify suspected terrorists and to bring captured terrorists to justice. It is preferable to capture suspected terrorists where feasible – among other reasons, so that we can gather valuable intelligence from them – but we must also recognize that there are instances where our government has the clear authority – and, I would argue, the responsibility – to defend the United States through the appropriate and lawful use of lethal force.

This principle has long been established under both U.S. and international law. In response to the attacks perpetrated – and the continuing threat posed – by al Qaeda, the Taliban, and associated forces, Congress has authorized the President to use all necessary and appropriate force against those groups. 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.

Our legal authority is not limited to the battlefields in Afghanistan. Indeed, neither Congress nor our federal courts has 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 responsibility and a right to protect this nation and its people from such threats.

This does not mean that we can use military force whenever or wherever we want. International legal principles, including respect for another nation's sovereignty, constrain our ability to act unilaterally. But the use of force in foreign territory would be consistent with these international legal principles if conducted, for example, with the consent of the nation involved – or after a determination that the nation is unable or unwilling to deal effectively with a threat to the United States.

Furthermore, it is entirely lawful – under both United States law and applicable law of war principles – to target specific senior operational leaders of al Qaeda and associated forces. This is not a novel concept. In fact, during World War II, the United States tracked the plane flying Admiral Isoroku Yamamoto – the commander of Japanese forces in the attack on Pearl Harbor and the Battle of Midway – and shot it down specifically because he was on board. As I explained to the Senate Judiciary Committee following the operation that killed Osama bin Laden, the same rules apply today.

Some have called such operations "assassinations." They are not, and the use of that loaded term is misplaced. Assassinations are unlawful killings. Here, for the reasons I have given, the U.S. government's use of lethal force in self defense against a leader of al Qaeda or an associated force who presents an imminent threat of violent attack would not be unlawful — and therefore would not violate the Executive Order banning assassination or criminal statutes.

Now, it is an unfortunate but undeniable fact that some of the threats we face come from a small number of United States citizens who have decided to commit violent attacks against their own country from abroad. Based on generations-old legal principles and Supreme Court decisions handed down during World War II, as well as during this current conflict, it's clear that United States citizenship alone does not make such individuals immune from being targeted. But it does mean that the government must take into account all relevant constitutional considerations with respect to United States citizens – even those who are leading efforts to kill innocent Americans. Of these, the most relevant is the Fifth Amendment's Due Process Clause, which says that the government may not deprive a citizen of his or her life without due process of law.

The Supreme Court has made clear that the Due Process Clause does not impose one-size-fits-all requirements, but instead mandates procedural safeguards that depend on specific circumstances. In cases arising under the Due Process Clause – including in a case involving a U.S. citizen captured in the conflict against al Qaeda – the Court has applied a balancing approach, weighing the private interest that will be affected against the interest the government is trying to protect, and the burdens the government would face in providing additional process. Where national security operations are at stake, due process takes into account the realities of combat.

Here, the interests on both sides of the scale are extraordinarily weighty. An individual's interest in making sure that the government does not target him erroneously could not be more significant. Yet it is imperative for the government to counter threats posed by senior operational leaders of al Qaeda, and to protect the innocent people whose lives could be lost in their attacks.

Any decision to use lethal force against a United States citizen – even one intent on murdering Americans and who has become an operational leader of al-Qaeda in a foreign land – is among the gravest that government leaders can face. The American people can be – and deserve to be – assured that actions taken in their defense are consistent with their values and their laws. So, although I cannot discuss or confirm any particular program or operation, I believe it is important to explain these legal principles publicly.

Let me be clear: 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.

The evaluation of whether an individual presents an "imminent threat" incorporates considerations of the relevant window of opportunity to act, the possible harm that missing the window would cause to civilians, and the likelihood

of heading off future disastrous attacks against the United States. As we learned on 9/11, al Qaeda has demonstrated the ability to strike with little or no notice – and to cause devastating casualties. Its leaders are continually planning attacks against the United States, and they do not behave like a traditional military – wearing uniforms, carrying arms openly, or massing forces in preparation for an attack. Given these facts, the Constitution 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.

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.

Of course, any such use of lethal force by the United States will comply with the four fundamental law of war principles governing the use of force. The principle of necessity requires that the target have definite military value. The principle of distinction requires that only lawful targets – such as combatants, civilians directly participating in hostilities, and military objectives – may be targeted intentionally. Under the principle of proportionality, the anticipated collateral damage must not be excessive in relation to the anticipated military advantage. Finally, the principle of humanity requires us to use weapons that will not inflict unnecessary suffering.

These principles do not forbid the use of stealth or technologically advanced weapons. In fact, the use of advanced weapons may help to ensure that the best intelligence is available for planning and carrying out operations, and that the risk of civilian casualties can be minimized or avoided altogether.

Some have argued that the President is required to get permission from a federal court before taking action against a United States citizen who is a senior operational leader of al Qaeda or associated forces. This is simply not accurate. “Due process” and “judicial process” are not one and the same, particularly when it comes to national security. The Constitution guarantees due process, not judicial process.

The conduct and management of national security operations are core functions of the Executive Branch, as courts have recognized throughout our history. Military and civilian officials must often make real-time decisions that balance the need to act, the existence of alternative options, the possibility of collateral damage, and other judgments – all of which depend on expertise and immediate access to information that only the Executive Branch may possess in real time. The Constitution’s guarantee of due process is ironclad, and it is essential – but, as a recent court decision makes clear, it does not require judicial approval before the President may use force abroad against a senior operational leader of a foreign terrorist organization with which the United States is at war – even if that individual happens to be a U.S. citizen.

That is not to say that the Executive Branch has – or should ever have – the ability to target any such individuals without robust oversight. Which is why, in keeping with the law and our constitutional system of checks and balances, the Executive Branch regularly informs the appropriate members of Congress about our counterterrorism activities, including the legal framework, and would of course follow the same practice where lethal force is used against United States citizens.

Now, 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.

The unfortunate reality is that our nation will likely continue to face terrorist threats that – at times – originate with our own citizens. When such individuals take up arms against this country – and join al Qaeda in plotting attacks designed to kill their fellow Americans – there may be only one realistic and appropriate response. We must take steps to stop them – in full accordance with the Constitution. In this hour of danger, we simply cannot afford to wait until deadly plans are carried out – and we will not.

This is an indicator of our times – not a departure from our laws and our values. For this Administration – and for this nation – our values are clear. We must always look to them for answers when we face difficult questions, like the ones I have discussed today. As the President reminded us at the National Archives, "our Constitution has endured through secession and civil rights, through World War and Cold War, because it provides a foundation of principles that can be applied pragmatically; it provides a compass that can help us find our way."

Our most sacred principles and values – of security, justice and liberty for all citizens – must continue to unite us, to guide us forward, and to help us build a future that honors our founding documents and advances our ongoing – uniquely American – pursuit of a safer, more just, and more perfect union. In the continuing effort to keep our people secure, this Administration will remain true to those values that inspired our nation's founding and, over the course of two centuries, have made America an example of strength and a beacon of justice for all the world. This is our pledge.

Thank you for inviting me to discuss these important issues with you today.

Topic:
Criminal Justice

Office of the Attorney General

Speaker:
Speeches of Attorney General Eric H. Holder, Jr.

Updated August 18, 2015

Exhibit 18

April 2012 Brennan Speech

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The Efficacy and Ethics of U.S. Counterterrorism Strategy

April 30, 2012 // 12:00pm — 1:15pm

Webcast

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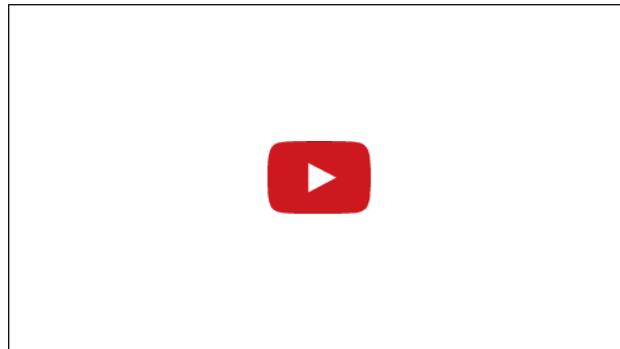

- **Event Speakers**

Transcript of Remarks by John O. Brennan

Assistant to the President for Homeland Security and Counterterrorism

"The Ethics and Efficacy of the President's Counterterrorism Strategy"

Jane Harman:
Good afternoon, everyone. Welcome to the Wilson Center, and a special welcome to our chairman of the board Joe Gildenhorn and his wife Alma, who are very active on the Wilson -- who is very active on the Wilson council. This afternoon's conversation is, as I see it, a great tribute to the kind of work we do here. We care intensely about having our most important policymakers here, and in getting objective accounts of what the United States government and other governments around the world are doing. On September 10th, 2001, I had lunch with L. Paul Bremer. Jerry Bremer, as he is known, had chaired the congressionally chartered Commission on Terrorism on which I served.

It was one of three task forces to predict a major terror attack on U.S. soil. At that lunch, we lamented that no one was taking our report seriously. The next day, the world changed. In my capacity as a senior Democrat on the House intelligence committee, I was headed to the U.S. Capitol at 9:00 a m. on 9/11 when an urgent call from my staff turned me around. To remind, most think that the Capitol, in which the intelligence committee offices were then located was the intended target of the fourth hijacked plane. Congress shut down. A terrible move, I thought, and 250 or so members mingled on the Capitol lawn, obvious targets if that plane had arrived. I frantically tried to reach my youngest child, then at a D.C. high school, but the cell towers were down.

I don't know where John Brennan was that day, but I do know that the arch of our lives came together after that when he served as deputy executive director of the CIA, when I became the ranking member on the House intelligence committee, when he became the first director of the Terrorist Threat Integration Center, an organization that was set up by then-President Bush 43, when I was the principle author of legislation which became the Intelligence Reform and Terrorism Prevention Act, a statute which we organized our intelligence community for the first time since 1947, and renamed TTIC, the organization that John had headed, the National Counter Terrorism Center, when he served as the first director of the NCTC, when I chaired the intelligence subcommittee of the homeland security committee, when he

moved into the White House as deputy national security advisor for homeland security and counterterrorism, and assistant to the president, and when I succeeded Lee Hamilton here at the Wilson Center last year.

Finally, when he became President Obama's point person on counterterrorism strategy, and when the Wilson Center commenced a series of programs which as still ongoing, the first of which we held on 9/12/2011 to ask what the next 10 years should look like, and whether this country needs a clearer legal framework around domestic intelligence.

Clearly, the success story of the past decade is last May's takedown of Osama bin Laden. At the center of that effort were the senior security leadership of our country. I noticed Denis McDonough in the audience, right here in the front row, and certainly it included President Obama and John Brennan. They made the tough calls.

But I also know, and we all know, how selfless and extraordinary were the actions of unnamed intelligence officials and Navy SEALs. The operation depended on their remarkable skills and personal courage. They performed the mission. The Wilson Center is honored to welcome John Brennan here today on the eve of this first anniversary of the bin Laden raid. President Obama will headline events tomorrow, but today we get an advance peek from the insider's insider, one of President Obama's most influential aides with a broad portfolio to manage counterterrorism strategy in far-flung places like Pakistan, Yemen, and Somalia. Activities in this space, as I mentioned, at the Wilson Center are ongoing, as are terror threats against our country.

I often say we won't defeat those threats by military might alone, we must win the argument. No doubt our speaker today agrees that security and liberty are not a zero sum game. We either get more of both, or less. As Ben Franklin said, "Those who would give up essential liberty to purchase a little temporary safety deserve neither liberty nor safety." So, as we welcome John Brennan, I also want to congratulate him and President Obama for nominating the full complement of members to the Privacy and Civil Liberties Board, another part of the 2004 intelligence reform law, and a key part of assuring that America's counterterrorism efforts also protect our constitution and our values. At the end of today's event, we would appreciate it if everyone would please remain seated, while Mr. Brennan departs the building. Thank you for coming, please welcome John Brennan.

[applause]

John Brennan:
Thank you so much Jane for the very kind introduction, and that very nice and memorable walk down memory lane as our paths did cross so many times over the years, but thank you also for your leadership of the Wilson Center. It is a privilege for me to be here today, and to speak at this group. And you have spent many years in public service, and it continues here at the Wilson Center today, and there are few individuals in this country who can match the range of Jane's expertise from the armed services to intelligence to homeland security, and anyone who has appeared before her committee knew firsthand just how extensive and deep that expertise was. So Jane, I'll just say that I'm finally glad to be sharing the stage with you instead of testifying before you. It's a privilege to be next to you. So to you and everyone here at the Woodrow Wilson Center, thank you for your invaluable contributions, your research, your scholarship, which help further our national security every day.
I very much appreciate the opportunity to discuss President Obama's counterterrorism strategy, in particular its ethics and its efficacy.

It is fitting that we have this discussion here today at the Woodrow Wilson Center. It was here in August of 2007 that then-Senator Obama described how he would bring the war in Iraq to a responsible end and refocus our efforts on "the war that has to be won," the war against al-Qaeda, particularly in the tribal regions of Afghanistan and Pakistan.

He said that we would carry on this fight while upholding the laws and our values, and that we would work with allies and partners whenever possible. But he also made it clear that he would not hesitate to use military force against terrorists who pose a direct threat to America. And he said that if he had actionable intelligence about high-value terrorist targets, including in Pakistan, he would act to protect the American people.

So it is especially fitting that we have this discussion here today. One year ago today, President Obama was then facing the scenario that he discussed here at the Woodrow Wilson Center five years ago, and he did not hesitate to act. Soon thereafter, our special operations forces were moving toward the compound in Pakistan where we believed Osama bin Laden might be hiding. By the end of the next day, President Obama could confirm that justice had finally been delivered to the terrorist responsible for the attacks of September 11th, 2001, and for so many other deaths around the world.

The death of bin Laden was our most strategic blow yet against al-Qaeda. Credit for that success belongs to the courageous forces who carried out that mission, at extraordinary risk to their lives; to the many intelligence professionals who pieced together the clues that led to bin Laden's hideout; and to President Obama, who gave the order to go in.

Now one year later, it's appropriate to assess where we stand in this fight. We've always been clear that the end of bin Laden would neither mark the end of al-Qaida, nor our resolve to destroy it. So along with allies and partners, we have been unrelenting. And when we assess that al-Qaida of 2012, I think it is fair to say that, as a result of our efforts, the United States is more secure and the American people are safer. Here's why.

In Pakistan, al-Qaida's leadership ranks have continued to suffer heavy losses. This includes Ilyas Kashmiri, one of al-Qaida's top operational planners, killed a month after bin Laden. It includes Atiyah Abd al-Rahman, killed when he succeeded Ayman al-Zawahiri, al-Qaida's deputy leader. It includes Younis al-Mauritani, a planner of attacks against the United States and Europe, until he was captured by Pakistani forces.

With its most skilled and experienced commanders being lost so quickly, al-Qaida has had trouble replacing them. This is one of the many conclusions we have been able to draw from documents seized at bin Laden's compound, some of which will be published online, for the first time, this week by West Point's Combating Terrorism Center. For example, bin Laden worried about, and I quote, "The rise of lower leaders who are not as experienced and this would lead to the repeat of mistakes."

Al-Qaida leaders continue to struggle to communicate with subordinates and affiliates. Under intense pressure in the tribal regions of Pakistan, they have fewer places to train and groom the next generation of operatives. They're struggling to attract new recruits. Morale is low, with intelligence indicating that some members are giving up and returning home, no doubt aware that this is a fight they will never win. In short, al-Qaida is losing badly. And bin Laden knew it at the time of his death. In documents we seized, he confessed to "disaster after disaster." He even urged his leaders to flee the tribal regions, and go to places, "away from aircraft photography and bombardment."

For all these reasons, it is harder than ever for al-Qaida core in Pakistan to plan and execute large-scale, potentially catastrophic attacks against our homeland. Today, it is increasingly clear that compared to 9/11, the core al-Qaida leadership is a shadow of its former self. Al-Qaida has been left with just a handful of capable leaders and operatives, and with continued pressure is on the path to its destruction. And for the first time since this fight began, we can look ahead and envision a world in which the al-Qaida core is simply no longer relevant.

Nevertheless, the dangerous threat from al-Qaida has not disappeared. As the al-Qaida core falters, it continues to look to affiliates and adherents to carry on its murderous cause. Yet these affiliates continue to lose key commanders and capabilities as well. In Somalia, it is indeed worrying to witness al-Qaida's merger with al-Shabaab, whose ranks include foreign fighters, some with U.S. passports. At the same time, al-Shabaab continues to focus primarily on launching regional attacks, and ultimately, this is a merger between two organizations in decline.

In Yemen, al-Qaida in the Arabian Peninsula, or AQAP, continues to feel the effects of the death last year of Anwar al-Awlaki, its leader of external operations who was responsible for planning and directing terrorist attacks against the United States. Nevertheless, AQAP continues to be al-Qaida's most active affiliate, and it continues to seek the opportunity to strike our homeland. We therefore continue to support the government of Yemen in its efforts against AQAP, which is being forced to fight for the territory it needs to plan attacks beyond Yemen. In north and west Africa, another al-Qaida affiliate, al-Qaida in the Islamic Maghreb, or AQIM, continues its efforts to destabilize regional governments and engages in kidnapping of Western citizens for

ransom activities designed to fund its terrorist agenda. And in Nigeria, we are monitoring closely the emergence of Boko Haram, a group that appears to be aligning itself with al-Qaida's violent agenda and is increasingly looking to attack Western interests in Nigeria, in addition to Nigerian government targets.

More broadly, al-Qaida's killing of innocents, mostly Muslim men, women and children, has badly tarnished its image and appeal in the eyes of Muslims around the world.

John Brennan:

Thank you. More broadly, al-Qaida's killing of innocents, mostly men women and children, has badly tarnished its appeal and image in the eyes of Muslims around the world. Even bin Laden and his lieutenants knew this. His propagandist, Adam Gadahn, admitted that they were now seen "as a group that does not hesitate to take people's money by falsehood, detonating mosques, and spilling the blood of scores of people." Bin Laden agreed that "a large portion" of Muslims around the world "have lost their trust" in al-Qaida.

So damaged is al-Qaida's image that bin Laden even considered changing its name. And one of the reasons? As bin Laden said himself, U.S. officials "have largely stopped using the phrase 'the war on terror' in the context of not wanting to provoke Muslims." Simply calling them al-Qaida, bin Laden said, "reduces the feeling of Muslims that we belong to them."

To which I would add, that is because al-Qaida does not belong to Muslims. Al-Qaida is the antithesis of the peace, tolerance, and humanity that is the hallmark of Islam.

Despite the great progress we've made against al-Qaida, it would be a mistake to believe this threat has passed. Al-Qaida and its associated forces still have the intent to attack the United States. And we have seen lone individuals, including American citizens, often inspired by al-Qaida's murderous ideology, kill innocent Americans and seek to do us harm.

Still, the damage that has been inflicted on the leadership core in Pakistan, combined with how al-Qaida has alienated itself from so much of the world, allows us to look forward. Indeed, if the decade before 9/11 was the time of al-Qaida's rise, and the decade after 9/11 was the time of its decline, then I believe this decade will be the one that sees its demise. This progress is no accident.

It is a direct result of intense efforts made over more than a decade, across two administrations, across the U.S. government and in concert with allies and partners. This includes the comprehensive counterterrorism strategy being directed by President Obama, a strategy guided by the President's highest responsibility, to protect the safety and the security of the American people. In this fight, we are harnessing every element of American power: intelligence, military, diplomatic, development, economic, financial, law enforcement, homeland security, and the power of our values, including our commitment to the rule of law. That's why, for instance, in his first days in office, President Obama banned the use of enhanced interrogation techniques, which are not needed to keep our country safe. Staying true to our values as a nation also includes upholding the transparency upon which our democracy depends.

A few months after taking office, the president travelled to the National Archives where he discussed how national security requires a delicate balance between secrecy and transparency. He pledged to share as much information as possible with the American people "so that they can make informed judgments and hold us accountable." He has consistently encouraged those of us on his national security team to be as open and candid as possible as well.

Earlier this year, Attorney General Holder discussed how our counterterrorism efforts are rooted in, and are strengthened by, adherence to the law, including the legal authorities that allow us to pursue members of al-Qaida, including U.S. citizens, and to do so using technologically advanced weapons.

In addition, Jeh Johnson, the general counsel at the Department of Defense, has addressed the legal basis for our military efforts against al-Qaida. Stephen Preston, the general counsel at the CIA, has discussed how the agency operates under U.S. law.

These speeches build on a lecture two years ago by Harold Koh, the State Department legal adviser, who noted that "U.S. targeting practices, including lethal operations conducted with the use of unmanned aerial vehicles, comply with all applicable law, including the laws of war."

Given these efforts, I venture to say that the United States government has never been so open regarding its counterterrorism policies and their legal justification. Still, there continues to be considerable public and legal debate surrounding these technologies and how they are sometimes used in the fight against al-Qaida.

Now, I want to be very clear. In the course of the war in Afghanistan and the fight against al-Qaida, I think the American people expect us to use advanced technologies, for example, to prevent attacks on U.S. forces and to remove terrorists from the battlefield. We do, and it has saved the lives of our men and women in uniform. What has clearly captured the attention of many, however, is a different practice, beyond hot battlefields like Afghanistan, identifying specific members of al-Qaida and then targeting them with lethal force, often using aircraft remotely operated by pilots who can be hundreds, if not thousands, of miles away. And this is what I want to focus on today.

Jack Goldsmith, a former assistant attorney general in the administration of George W. Bush and now a professor at Harvard Law School, captured the situation well. He wrote:

"The government needs a way to credibly convey to the public that its decisions about who is being targeted, especially when the target is a U.S. citizen, are sound. First, the government can and should tell us more about the process by which it reaches its high-value targeting decisions. The more the government tells us about the eyeballs on the issue and the robustness of the process, the more credible will be its claims about the accuracy of its factual determinations and the soundness of its legal ones. All of this information can be disclosed in some form without endangering critical intelligence."

Well, President Obama agrees. And that is why I am here today.

I stand here as someone who has been involved with our nation's security for more than 30 years. I have a profound appreciation for the truly remarkable capabilities of our counterterrorism professionals, and our relationships with other nations, and we must never compromise them. I will not discuss the sensitive details of any specific operation today. I will not, nor will I ever, publicly divulge sensitive intelligence sources and methods. For when that happens, our national security is endangered and lives can be lost. At the same time, we reject the notion that any discussion of these matters is to step onto a slippery slope that inevitably endangers our national security. Too often, that fear can become an excuse for saying nothing at all, which creates a void that is then filled with myths and falsehoods. That, in turn, can erode our credibility with the American people and with foreign partners, and it can undermine the public's understanding and support for our efforts. In contrast, President Obama believes that done carefully, deliberately and responsibly we can be more transparent and still ensure our nation's security.

So let me say it as simply as I can. Yes, in full accordance with the law, and in order to prevent terrorist attacks on the United States and to save American lives, the United States Government conducts targeted strikes against specific al-Qaida terrorists, sometimes using remotely piloted aircraft, often referred to publicly as drones. And I'm here today because President Obama has instructed us to be more open with the American people about these efforts.

Broadly speaking, the debate over strikes targeted at individual members of al-Qaida has centered on their legality, their ethics, the wisdom of using them, and the standards by which they are approved. With the remainder of my time today, I would like to address each of these in turn.

First, these targeted strikes are legal. Attorney General Holder, Harold Koh, and Jeh Johnson have all addressed this question at length. To briefly recap, as a matter of domestic law, the Constitution empowers the president to protect the nation from any imminent threat of attack. The Authorization for Use of Military Force, the AUMF, passed by Congress after the September 11th attacks authorized the president "to use all necessary and appropriate forces" against those nations, organizations, and individuals responsible for 9/11. There is nothing in the AUMF that restricts the use of military force against al-Qaida to Afghanistan.

As a matter of international law, the United States is in an armed conflict with al-Qaida, the Taliban, and associated forces, in response to the 9/11 attacks, and we may also use force consistent with our inherent right of national self-defense. There is nothing in international law that bans the use of remotely piloted aircraft for this purpose or that prohibits us from using lethal force against our enemies outside of an active battlefield, at least when the country involved consents or is unable or unwilling to take action against the threat.

Second, targeted strikes are ethical. Without question, the ability to target a specific individual, from hundreds or thousands of miles away, raises profound questions. Here, I think it's useful to consider such strikes against the basic principles of the law of war that govern the use of force.

Targeted strikes conform to the principle of necessity, the requirement that the target have definite military value. In this armed conflict, individuals who are part of al-Qaida or its associated forces are legitimate military targets. We have the authority to target them with lethal force just as we target enemy leaders in past conflicts, such as Germans and Japanese commanders during World War II.

Targeted strikes conform to the principles 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-Qaida terrorist and innocent civilians.

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.

For the same reason, targeted strikes conform to the principle of humanity which requires us to use weapons that will not inflict unnecessary suffering. For all these reasons, I suggest to you that these targeted strikes against al-Qaida terrorists are indeed ethical and just.

Of course, even if a tool is legal and ethical, that doesn't necessarily make it appropriate or advisable in a given circumstance. This brings me to my next point.

Targeted strikes are wise. Remotely piloted aircraft in particular can be a wise choice because of geography, with their ability to fly hundreds of miles over the most treacherous terrain, strike their targets with astonishing precision, and then return to base. They can be a wise choice because of time, when windows of opportunity can close quickly and there just may be only minutes to act.

They can be a wise choice because they dramatically reduce the danger to U.S. personnel, even eliminating the danger altogether. Yet they are also a wise choice because they dramatically reduce the danger to innocent civilians, especially considered against massive ordnance that can cause injury and death far beyond their intended target.

In addition, compared against other options, a pilot operating this aircraft remotely, with the benefit of technology and with the safety of distance, might actually have a clearer picture of the target and its surroundings, including the presence of innocent civilians. It's this surgical precision, the ability, with laser-like focus, to eliminate the cancerous tumor called an al-Qaida terrorist while limiting damage to the tissue around it, that makes this counterterrorism tool so essential.

There's another reason that targeted strikes can be a wise choice, the strategic consequences that inevitably come with the use of force. As we've seen, deploying large armies abroad won't always be our best offense.

Countries typically don't want foreign soldiers in their cities and towns. In fact, large, intrusive military deployments risk playing into al-Qaida's strategy of trying to draw us into long, costly wars that drain us financially, inflame anti-American resentment, and inspire the next generation of terrorists. In comparison, there is the precision of targeted strikes.

I acknowledge that we, as a government, along with our foreign partners, can and

must do a better job of addressing the mistaken belief among some foreign publics that we engage in these strikes casually, as if we are simply unwilling to expose U.S forces to the dangers faced every day by people in those regions. For, as I'll describe today, there is absolutely nothing casual about the extraordinary care we take in making the decision to pursue an al-Qaida terrorist, and the lengths to which we go to ensure precision and avoid the loss of innocent life.

Still, there is no more consequential a decision than deciding whether to use lethal force against another human being, even a terrorist dedicated to killing American citizens. So in order to ensure that our counterterrorism operations involving the use of lethal force are legal, ethical, and wise, President Obama has demanded that we hold ourselves to the highest possible standards and processes.

This reflects his approach to broader questions regarding the use of force. In his speech in Oslo accepting the Nobel Peace Prize, the president said that "all nations, strong and weak alike, must adhere to standards that govern the use of force." And he added:

"Where force is necessary, we have a moral and strategic interest in binding ourselves to certain rules of conduct. And even as we confront a vicious adversary that abides by no rules, I believe the United States of America must remain a standard bearer in the conduct of war. That is what makes us different from those whom we fight. That is a source of our strength."

The United States is the first nation to regularly conduct strikes using remotely piloted aircraft in an armed conflict. Other nations also possess this technology, and any more nations are seeking it, and more will succeed in acquiring it. President Obama and those of us on his national security team are very mindful that as our nation uses this technology, we are establishing precedents that other nations may follow, and not all of those nations may -- and not all of them will be nations that share our interests or the premium we put on protecting human life, including innocent civilians.

If we want other nations to use these technologies responsibly, we must use them responsibly. If we want other nations to adhere to high and rigorous standards for their use, then we must do so as well. We cannot expect of others what we will not do ourselves. President Obama has therefore demanded that we hold ourselves to the highest possible standards, that, at every step, we be as thorough and as deliberate as possible.

This leads me to the final point I want to discuss today, the rigorous standards and process of review to which we hold ourselves today when considering and authorizing strikes against a specific member of al-Qaida outside the hot battlefield of Afghanistan. What I hope to do is to give you a general sense, in broad terms, of the high bar we require ourselves to meet when making these profound decisions today. That includes not only whether a specific member of al-Qaida can legally be pursued with lethal force, but also whether he should be.

Over time, we've worked to refine, clarify, and strengthen this process and our standards, and we continue to do so. If our counterterrorism professionals assess, for example, that a suspected member of al-Qaida poses such a threat to the United States to warrant lethal action, they may raise that individual's name for consideration. The proposal will go through a careful review and, as appropriate, will be evaluated by the very most senior officials in our government for a decision.

First and foremost, the individual must be a legitimate target under the law. Earlier, I described how the use of force against members of al-Qaida is authorized under both international and U.S. law, including both the inherent right of national self-defense and the 2001 Authorization for Use of Military Force, which courts have held extends to those who are part of al-Qaida, the Taliban, and associated forces. If, after a legal review, we determine that the individual is not a lawful target, end of discussion. We are a nation of laws, and we will always act within the bounds of the law.

Of course, the law only establishes the outer limits of the authority in which counterterrorism professionals can operate. Even if we determine that it is lawful to pursue the terrorist in question with lethal force, it doesn't necessarily mean we should. There are, after all, literally thousands of individuals who are part of al-Qaida, the Taliban, or associated forces, thousands upon thousands. Even if it were possible, going after every single one of these individuals with lethal force would neither be wise nor an effective use of our intelligence and counterterrorism

resources.

As a result, we have to be strategic. Even if it is lawful to pursue a specific member of al-Qaida, we ask ourselves whether that individual's activities rise to a certain threshold for action, and whether taking action will, in fact, enhance our security.

For example, when considering lethal force we ask ourselves whether the individual poses a significant threat to U.S. interests. This is absolutely critical, and it goes to the very essence of why we take this kind of exceptional action. We do not engage in legal action -- in lethal action in order to eliminate every single member of al-Qaida in the world. Most times, and as we have done for more than a decade, we rely on cooperation with other countries that are also interested in removing these terrorists with their own capabilities and within their own laws. Nor is lethal action about punishing terrorists for past crimes; we are not seeking vengeance. Rather, we conduct targeted strikes because they are necessary to mitigate an actual ongoing threat, to stop plots, prevent future attacks, and to save American lives.

And what do we mean when we say significant threat? I am not referring to some hypothetical threat, the mere possibility that a member of al-Qaida might try to attack us at some point in the future. A significant threat might be posed by an individual who is an operational leader of al-Qaida or one of its associated forces. Or perhaps the individual is himself an operative, in the midst of actually training for or planning to carry out attacks against U.S. persons and interests. Or perhaps the individual possesses unique operational skills that are being leveraged in a planned attack. The purpose of a strike against a particular individual is to stop him before he can carry out his attack and kill innocents. The purpose is to disrupt his plans and his plots before they come to fruition.

In addition, our unqualified preference is to only undertake lethal force when we believe that capturing the individual is not feasible. I have heard it suggested that the Obama Administration somehow prefers killing al-Qaida members rather than capturing them. Nothing could be further from the truth. t is our preference to capture suspected terrorists whenever and wherever feasible.

For one reason, this allows us to gather valuable intelligence that we might not be able to obtain any other way. In fact, the members of al-Qaida that we or other nations have captured have been one of our greatest sources of information about al-Qaida, its plans, and its intentions. And once in U.S. custody, we often can prosecute them in our federal courts or reformed military commissions, both of which are used for gathering intelligence and preventing future terrorist attacks.

You see our preference for capture in the case of Ahmed Warsame, a member of al-Shabaab who had significant ties to al-Qaida in the Arabian Peninsula. Last year, when we learned that he would be traveling from Yemen to Somalia, U.S. forces captured him in route and we subsequently charged him in federal court.

The reality, however, is that since 2001 such unilateral captures by U.S. forces outside of hot battlefields, like Afghanistan, have been exceedingly rare. This is due in part to the fact that in many parts of the world our counterterrorism partners have been able to capture or kill dangerous individuals themselves.

Moreover, after being subjected to more than a decade of relentless pressure, al-Qaida's ranks have dwindled and scattered. These terrorists are skilled at seeking remote, inhospitable terrain, places where the United States and our partners simply do not have the ability to arrest or capture them. At other times, our forces might have the ability to attempt capture, but only by putting the lives of our personnel at too great a risk. Oftentimes, attempting capture could subject civilians to unacceptable risks. There are many reasons why capture might not be feasible, in which case lethal force might be the only remaining option to address the threat, prevent an attack, and save lives.

Finally, when considering lethal force we are of course mindful that there are important checks on our ability to act unilaterally in foreign territories. We do not use force whenever we want, wherever we want. International legal principles, including respect for a state's sovereignty and the laws of war, impose constraints. The United States of America respects national sovereignty and international law.

Those are some of the questions we consider; the high standards we strive to meet. And in the end, we make a decision, we decide whether a particular member of al-Qaida warrants being pursued in this manner. Given the stakes involved and the consequences of our decision, we consider all the information available to us,

carefully and responsibly.

We review the most up-to-date intell gence, drawing on the full range of our intelligence capabilities. And we do what sound intelligence demands, we challenge it, we question it, including any assumptions on which it might be based. If we want to know more, we may ask the intelligence community to go back and collect additional intelligence or refine its analysis so that a more informed decision can be made.

We listen to departments and agencies across our national security team. We don't just hear out differing views, we ask for them and encourage them. We discuss. We debate. We disagree. We consider the advantages and disadvantages of taking action. We also carefully consider the costs of inaction and whether a decision not to carry out a strike could allow a terrorist attack to proceed and potentially kill scores of innocents.

Nor do we limit ourselves narrowly to counterterrorism considerations. We consider the broader strategic implications of any action, including what effect, if any, an action might have on our relationships with other countries. And we don't simply make a decision and never revisit it again. Quite the opposite. Over time, we refresh the intelligence and continue to consider whether lethal force is still warranted.

In some cases, such as senior al-Qaida leaders who are directing and planning attacks against the United States, the individual clearly meets our standards for taking action. In other cases, individuals have not met our standards. Indeed, there have been numerous occasions where, after careful review, we have, working on a consensus basis, concluded that lethal force was not justified in a given case.

As President Obama's counterterrorism advisor, I feel that it is important for the American people to know that these efforts are overseen with extraordinary care and thoughtfulness. The president expects us to address all of the tough questions I have discussed today. Is capture really not feasible? Is this individual a significant threat to U.S. interests? Is this really the best option? Have we thought through the consequences, especially any unintended ones? Is this really going to help protect our country from further attacks? Is this going to save lives?

Our commitment to upholding the ethics and efficacy of this counterterrorism tool continues even after we decide to pursue a specific terrorist in this way. For example, we only authorize a particular operation against a specific individual if we have a high degree of confidence that the individual being targeted is indeed the terrorist we are pursuing. This is a very high bar. Of course, how we identify an individual naturally involves intelligence sources and methods, which I will not discuss. Suffice it to say, our intelligence community has multiple ways to determine, with a high degree of confidence, that the individual being targeted is indeed the al-Qaida terrorist we are seeking.

In addition, we only authorize a strike if we have a high degree of confidence that innocent civilians will not be injured or killed, except in the rarest of circumstances. The unprecedented advances we have made in technology provide us greater proximity to target for a longer period of time, and as a result allow us to better understand what is happening in real time on the ground in ways that were previously impossible. We can be much more discriminating and we can make more informed judgments about factors that might contribute to collateral damage.

I can tell you today that there have indeed been occasions when we decided against conducting a strike in order to avoid the injury or death of innocent civilians. This reflects our commitment to doing everything in our power to avoid civilian casualties, even if it means having to come back another day to take out that terrorist, as we have done previously. And I would note that these standards, for identifying a target and avoiding the loss of innocent -- the loss of lives of innocent civilians, exceed what is required as a matter of international law on a typical battlefield. That's another example of the high standards to which we hold ourselves.

Our commitment to ensuring accuracy and effectiveness continues even after a strike. In the wake of a strike, we harness the full range of our intelligence capabilities to assess whether the mission in fact achieved its objective. We try to determine whether there was any collateral damage, including civilian deaths. There is, of course, no such thing as a perfect weapon, and remotely piloted aircraft are no exception.

As the president and others have acknowledged, there have indeed been instances when, despite the extraordinary precautions we take, civilians have been accidently killed or worse -- have been accidentally injured, or worse, killed in these strikes. t is exceedingly rare, but it has happened. When it does, it pains us, and we regret it deeply, as we do any time innocents are killed in war. And when it happens we take it very, very seriously. We go back and we review our actions. We examine our practices. And we constantly work to improve and refine our efforts so that we are doing everything in our power to prevent the loss of innocent life. This too is a reflection of our values as Americans.

Ensuring the ethics and efficacy of these strikes also includes regularly informing appropriate members of Congress and the committees who have oversight of our counterterrorism programs. Indeed, our counterterrorism programs, including the use of lethal force, have grown more effective over time because of congressional oversight and our ongoing dialogue with members and staff.

This is the seriousness, the extraordinary care, that President Obama and those of us on his national security team bring to this weightiest of questions: Whether to pursue lethal force against a terrorist who is plotting to attack our country.

When that person is a U.S. citizen, we ask ourselves additional questions. Attorney General Holder has already described the legal authorities that clearly allow us to use lethal force against an American citizen who is a senior operational leader of al-Qaida. He has discussed the thorough and careful review, including all relevant constitutional considerations, that is to be undertaken by the U.S. government when determining whether the individual poses an imminent threat of violent attack against the United States.

To recap, the standards and processes I've described today, which we have refined and strengthened over time, reflect our commitment to: ensuring the individual is a legitimate target under the law; determining whether the individual poses a significant threat to U.S. interests; determining that capture is not feasible; being mindful of the important checks on our ability to act unilaterally in foreign territories; having that high degree of confidence, both in the identity of the target and that innocent civilians will not be harmed; and, of course, engaging in additional review if the al-Qaida terrorist is a U.S. citizen.

Going forward, we'll continue to strengthen and refine these standards and processes. As we do, we'll look to institutionalize our approach more formally so that the high standards we set for ourselves endure over time, including as an example for other nations that pursue these capabilities. As the president said in Oslo, in the conduct of war, America must be the standard bearer.

This includes our continuing commitment to greater transparency. With that in mind, I have made a sincere effort today to address some of the main questions that citizens and scholars have raised regarding the use of targeted lethal force against al-Qaida. I suspect there are those, perhaps some in this audience, who feel we have not been transparent enough. I suspect there are those, both inside and outside our government, who feel I have been perhaps too open. If both groups feel a little bit unsatisfied, then I probably struck the right balance today.

Again, there are some lines we simply will not and cannot cross because, at times, our national security demands secrecy. But we are a democracy. The people are sovereign. And our counterterrorism tools do not exist in a vacuum. They are stronger and more sustainable when the American people understand and support them. They are weaker and less sustainable when the American people do not. As a result of my remarks today, I hope the American people have a better understanding of this critical tool, why we use it, what we do, how carefully we use it, and why it is absolutely essential to protecting our country and our citizens.

I would just like to close on a personal note. I know that for many people in our government and across the country the issue of targeted strikes raised profound moral questions. It forces us to confront deeply held personal beliefs and our values as a nation. If anyone in government who works in this area tells you they haven't struggled with this, then they haven't spent much time thinking about it. I know I have, and I will continue to struggle with it as long as I remain in counterterrorism.

But I am certain about one thing. We are at war. We are at war against a terrorist organization called al-Qaida that has brutally murdered thousands of Americans, men, women and children, as well as thousands of other innocent people around the world. In recent years, with the help of targeted strikes, we have turned al-Qaida into

a shadow of what it once was. They are on the road to destruction.

Until that finally happens, however, there are still terrorists in hard-to-reach places who are actively planning attacks against us. If given the chance, they will gladly strike again and kill more of our citizens. And the president has a Constitutional and solemn obligation to do everything in his power to protect the safety and security of the American people.

Yes, war is hell. It is awful. It involves human beings killing other human beings, sometimes innocent civilians. That is why we despise war. That is why we want this war against al-Qaida to be over as soon as possible, and not a moment longer. And over time, as al-Qaida fades into history and as our partners grow stronger, I'd hope that the United States would have to rely less on lethal force to keep our country safe.

Until that happens, as President Obama said here five years ago, if another nation cannot or will not take action, we will. And it is an unfortunate fact that to save many innocent lives we are sometimes obliged to take lives, the lives of terrorists who seek to murder our fellow citizens.

On behalf of President Obama and his administration, I am here to say to the American people that we will continue to work to safeguard this nations -- this nation and its citizens responsibly, adhering to the laws of this land and staying true to the values that define us as Americans, and thank you very much.

Jane Harman:
Thank you, Mr. Brennan. As it is almost 1:00, I hope you can stay a few extra minutes to take questions, and I would just like to make a comment, ask you one question, and then turn over to our -- turn it over to our audience for questions. Please no statements. Ask questions. First your call for greater transparency is certainly appreciated by me. I think that the clearer we can make our policies, and the better we can explain them, and the more debate we can have in the public square about them, the more: one, they will be understood; and two, they will persuade the would-be suicide bomber about to strap on a vest that there is a better answer. We do have to win the argument in the end with the next generation, not just take out those who can't be rehabilitated in this generation, and I see you nodding, so I know you agree and I'm not going to ask you a question about that. I also want to say how honored we are that you would make this important speech at the Wilson Center. There is new material here, for those who may have missed it. The fact that the U.S. conducts targeted strikes using drones has always been something that I, as a public official, danced around because I knew it had not been officially acknowledged by our government. I was one of those members of Congress briefed on this program, I have seen the feed that shows how we do these things, I'm not going to comment on specific operations or areas of the world, but I do think it is important that our government has acknowledged this, and set out, as carefully as possible, the reasons why we do it, and I want to commend you personally as well as Eric Holder, Jeh Johnson, and Harold Koh for carefully laying out the legal framework, and also add that at the Wilson Center, we will continue to debate these issues, and see what value we can add free from spin on a non-partisan basis to helping to articulate even more clearly the reasons why, as you said, war is hell, and why, as you said, there is no decision more consequential than deciding to use legal force, so thank you very much for making those remarks here.

My question is this: One thing I don't think you mentioned in that enormously important address was the rise of Islamist parties, which have been elected in Tunisia, Egypt, and probably will be elected, and exist in Turkey and other countries. Do you think that having Islamist inside the tent, in a political sphere, also helps diminish the threat of outside groups like al-Qaida?

John Brennan:
Well, hopefully political pluralism is breaking out in the Middle East, and we're going to find in many countries the ability of various constituencies to find expression through political parties. And certainly, we are very strong advocates of using the political system, the laws, to be able to express the views of individual groups within different countries, and so rather than finding expression through violent extremism, these groups have the opportunity now, and since they've never had before in countries like Tunisia, and in Egypt, Yemen, other places, where they can in fact participate meaningfully in the political system. This is going to take some time for these systems to be able to mature sufficiently so that there can be a very robust and democratic system there, but certainly those individuals who are parties -- who are associated with parties that have a religious basis to them, they can find now the

opportunity now to be able to participate in that political system.

Jane Harman:
My second and final question, and I see all of you with your hands about to be raised, and again, please just state a question as I'm about to do. You just mentioned Yemen, that has been part of your broader portfolio, I know you made many trips there, and you were a key architect of the deal to get Saleh to agree to -- the 40 year autocrat ruler -- to agree to accept immunity, leave the country, and then to be replaced by an elected leader, in this case, his vice president in a restructured government. Do you think a Yemen-type solution could work in Syria? Do you think there's any possibility of getting the Bashar family out of Syria and structuring a new government there, and perhaps in having the -- Russia lead the effort to do that, because of its close ties to Syria, and the fact that it is still unfortunately arming and supporting the Syrian regime?

John Brennan:
Well, each of these countries in the Middle East are facing different types of circumstances, and they have unique histories. Yemen was fortunate that they do -- did have a degree of political pluralism there, Ali Abdullah Saleh in fact allowed certain political institutions to develop, and we were very fortunate to have a peaceful transition from the previous regime to the government of President Hadi now. Certainly, there needs to be some way found for progress in Syria. t's outrageous what's happening in that country, the continued death of Syrian citizens at the hands of a brutal authoritarian government. This is something that needs to stop, and the international community has come together on it, so I'd like to be able to see something that would be able to transition peacefully, but the sooner it can be done, obviously, the more lives we've saved.

Jane Harman:
Thank you very much. Please identify yourselves, and ask a question only. The woman straight ahead of me, yes. Just wait for the mic.

Tara McKelvy:

Hi, my name is Tara McKelvy, I'm a scholar here, and I'm a correspondent for Newsweek and The Daily Beast, and you talked a little bit about the struggle that you have in this process of the targeted strikes, and General Cartwright talked to me about the question of surrender, that's not really an option when you use a Predator drone, for instance. I'm wondering if you can talk about which kinds of issues that you found most troubling when you think about these strikes.

John Brennan:
Well, as I said, one of the considerations that we go through is the feasibility of capture. We would prefer to get these individuals so that they can be captured. Working with local governments, what we like to be able to do is provide them the intelligence that they can get the individuals, so it doesn't have to be U.S. forces that are going on the ground in certain areas. But if it's not feasible, either because it's too risky from the standpoint of forces or the government doesn't have the will or the ability to do it, then we make a determination whether or not the significance of the threat that the person poses requires us to take action, so that we're able to mitigate the threat that they pose. I mean, these are individuals that could be involved in a very active plot, and if it is allowed to continue, you know, it could result in attacks either in Yemen against the U.S. embassy, or here in the homeland that could kill, you know, dozens if not hundreds of people. So what we always want to do, though, is look at whether or not there is an option to get this person and bring them to justice somehow for intelligence collection purposes, as well as to try them for their crimes.

Jane Harman:
Thank you, man in the green shirt right here.

Robert Baum:
Robert Baum from the Wilson Center and the University of Missouri. Thank you for your comments. I did want to ask about one area where we seem to be less successful, the events in Mali and Nigeria seem to suggest that we've been less successful in containing al-Qaida, and I was wondering if you could talk a little bit about your efforts in West Africa and also urge you to emphasize the importance of economic development as a way of -- the strategic development of economic development in combating the terrorism. Thank you.

John Brennan:

You raised two important points. One is what are we doing in terms of confronting the terrorist threat that emanates in places like Mali and Nigeria, and other areas, and then what we need to do further upstream as far as the type of development assistance, and assistance to these countries, so they can build the institutions that are going to be able to address the needs of the people. Nigeria's a particularly dangerous situation right now with Boko Haram that has the links with al-Qaida, but also has links with al-Shabaab, as well AQIM. It has this radical offshoot, Ansaru, that really is focused on U.S. or Western interests, and so there is a domestic challenge that Boko Haram poses to Nigeria, and as we well know, there's the north-south struggle within Nigeria, and tensions between the Christian-Muslim communities. So we are trying to work with the Nigerian government as well as other governments are, as well, to try to give them the capabilities they need to confront the terrorist threat, but then also the issue is the building up those political institutions within Nigeria so that they can deal with this, not just from a law enforcement or internal security perspective, but also to address those needs that are fueling some of these fires of violent extremism.

Mali, you know, because of the recent coup, we've been trying to work across the Sahel with Mali, and Niger, and Mauritania, and other countries to address the growing phenomenon and threat of al-Qaida Islamic Maghreb that is a unique organization because it has a criminal aspect to it. You know, it kidnaps these individuals for large ransoms. We're outraged whenever, you know, countries or organizations pay these huge sums to al-Qaida, whether it be in the Sahel or in Yemen because it just is able to feed their activities, but Mali right now, with the coup, and then you have the Tuareg rebellion up in the north, and then that area that basically is such a large expansive territory, that also, you know, requires both a balancing of addressing the near-term threats that are posed by al-Qaida, but also trying to give the government in Mali, in Bamako, the ability to build up those institutions, address the development needs, they have the different sort of ethnic and tribal rivalries that are there, so it's a complicated area. I've worked very closely with the -- talking with my French and British colleagues as well as with others in the region, about how there might be some way to address some of these broader African issues that manifest themselves, unfortunately, in the kidnappings, and the piracy, and the criminal activities, and terrorist attacks, so there's an operational cadence in Africa now that is concerning in a number of parts of the continent.

Jane Harman:
Back there, middle, yeah.

John Brennan:
I can take another 10 minutes [inaudible].

Leanne Erdberg:

Hi there, Leanne Erdberg [spelled phonetically] from the State Department. How can we ensure that executive interagency actors, when they are undertaking counterterrorism actions, are held to appropriate standards, and processes as we ask them to act as prosecutors, judges, and juries, and how we can ensure that intelligence is held to the same standards and processes that evidence is?

John Brennan:
Okay, well as I tried to say in my remarks, we're not carrying out these actions to retaliate for past transgressions. We are not a court, we're not trying to determine guilt or innocence, and then carry out a strike in retaliation. What we're trying to do is prevent the loss of lives through terrorist attacks, so it's not as though we're, you know, sort of judge and jury on, again, their involvement in past activities. We see a threat developing, we follow it very carefully, we identify the individuals who are responsible for allowing that plot and that plan to go forward, and then we make a determination about whether or not we have the solid intelligence base, and that's why I tried to say in my remarks, we have standards. You know, the intelligence is brought forward, we evaluate that, there's interagency meetings that a number of us are involved in on a ongoing basis, scrutinizing that intelligence, determining whether or not we have a degree of confidence that that person is indeed involved in carrying out this plan to kill Americans. If it reaches that level, then what we do is we look at it according to the other standards that I talked about in terms of infeasibility of capture, determination that we are able to have the intelligence that will give us, you know, a high degree of confidence that, you know, we can track an individual and find them, and be confident that we're taking action against an individual who really is involved in carrying out an attack. You know, if we -- if we didn't have to take these actions, and we still had -- and we had confidence that there wasn't going to be a terrorist attack, I think everybody would be very, very pleased. We only decide

to take that action if there is no other option available, if there is not the option of capture, if the local government will not take action, if we cannot do something that will prevent that attack from taking place, and the only available option is taking that individual off of the battlefield, and we're going to do it in a way that gives us the confidence that we are not going to, in fact, inflict collateral damage. So again, it really is a very rigorous system of standards and processes that we go through.

Jane Harman:
Thank you. In the far back. Yes, you.

Jon Harper:

Sir, I was wondering if you could tell us --

Jane Harman:
Identify yourself, please.

Jon Harper:

Oh, sorry, Jon Harper with the Asahi Shimbun. t's a Japanese paper. I was wondering if you could tell me how many times or what percentage of the time have proposals to target a specific individual been denied, and also if you could address the issue of signature strikes, which I guess aren't necessarily targeted against specific individuals, but people who are engaging in suspicious activities. Could you comment on what the criteria is for targeting them? Thank you.

John Brennan:

Well, I'm not going to go into sort of how many times, what proportion of instances there have been sort of either approvals or declinations of these recommendations that come forward, but I can just tell you that there have been a -- numerous times where individuals that were put forward for consideration for this type of action was declined. You make reference to signature strikes that are frequently reported in the press. I was speaking here specifically about targeted strikes against individuals who are involved. Everything we do, though, that is carried out against al-Qaida is carried out consistent with the rule of law, the authorization on the use of military force, and domestic law. And we do it with a similar rigor, and there are various ways that we can make sure that we are taking the actions that we need to prevent a terrorist attack. That's the whole purpose of whatever action we use, the tool we use, it's to prevent attack, and to save lives. And so I spoke today, for the first time openly, about, again, what's commonly referred to in the press as drones, remotely piloted aircraft, that can give you that type of laser-like precision that can excise that terrorist or that threat in a manner that, again, with the medical metaphor, that will not damage the surrounding tissue, and so what we're really trying to do -- al-Qaida's a cancer throughout the world, it has metastasized in so many different places, and when that metastasized tumor becomes lethal and malignant, that's when we're going to take the action that we need to.

Jane Harman:
Last question will be the woman in the back at the edge.

Homai Emdah:

Sorry. What about in a country like Pakistan --

Jane Harman:
Could you identify yourself please.

Homai Emdah:
Homai Emdah [spelled phonetically], Express News. Mr. Brennan, what about in a country like Pakistan where drone strikes are frequently carried out, and the Pakistani government has, over the last few months, repeatedly protested to the U.S. government about an end to drone strikes, which is also the subject of discussion between Ambassador Grossman when he was in Islamabad. You mentioned that countries can be incapable or unwilling to carry out -- to arrest militants, so how do you deal with a country like Pakistan which doesn't accept drone strikes officially?

John Brennan:
We have an ongoing dialogue with many countries throughout the world on counterterrorism programs, and some of those countries we are involved in very detailed discussions about the appropriate tools to bring to bear. In the case of

Pakistan, as you pointed out, Ambassador Grossman was there just very recently. There are ongoing discussions with the government of Pakistan about how best to address the terrorist threat that emanates from that area, and I will point out, that, you know, so many Pakistanis have been killed by that malignant tumor that is within the sovereign borders of Pakistan. It's -- and many, many brave Pakistanis have given their lives against these terrorist and militant organizations. And so, as the parliament recently said in its resolution, that Pakistan needs to rid itself of this -- these foreign militants and these foreign terrorists that have taken root inside of Pakistan. So we are committed to working very closely on an ongoing basis with the Pakistani government which includes, you know, the various components, intelligence, security, and various civilian departments and agencies in order to help them address the terrorist threat, but also so that they can help us make sure that Pakistan and that area near Afghanistan is never, ever again used as a launching pad for attacks here in the United States.

Jane Harman:
Thank you. Let me just conclude by saying that former CIA director Mike Hayden used to use the analogy of a football field, the lines on the football field, and he talked about our intelligence operatives and others as the players on the field, and he said, "We need them to get chalk on their cleats." Go up right up to the line in carrying out what are approved policies of the United States, and if you think about it that way, it is really important to have policies that are transparent, so that those who are carrying out the mission and those in the United States, and those around the world who are trying to understand the mission, know where the lines are. If we don't know where the lines are, some people will be risk-averse, other will commit excesses, and we've certainly seen a few of those, Abu Ghraib comes to mind, over recent years which are black eyes on our country. And so I just want to applaud the fact that John Brennan has come over here from the White House, spent over an hour with us laying out in great detail what the rules are for something that has been revealed today, which is the use of drones in certain operations, targeted operations. The debate will continue, no question, people in this audience and listening in have different points of view, we certainly know that one young woman did during his remarks, but that's why the Wilson Center's here. To offer a platform free of spin and partisan rhetoric to debate these issues thoroughly, and you honored us by coming here today, Mr. Brennan, thank you very much.

John Brennan:
Thank you very much Jane, thank you.

[applause]

[end of transcription]

Event Speakers List:

- **John O. Brennan** //
  Assistant to the President for Homeland Security and Counterterrorism

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Exhibit 19

May 2012 Feinstein Letter

Los Angeles Times | ARTICLE COLLECTIONS

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Letters: Sen. Feinstein on drone strikes

May 17, 2012

Re "Coming clean on drones," Opinion, May 6

Doyle McManus raised some excellent questions about congressional oversight of U.S. drone strikes.

The Senate Intelligence Committee, which I chair, has devoted significant time and attention to the drone program. We receive notification with key details shortly after every strike, and we hold regular briefings and hearings on these operations. Committee staff has held 28 monthly in-depth oversight meetings to review strike records and question every aspect of the program including legality, effectiveness, precision, foreign policy implications and the care taken to minimize noncombatant casualties.

The committee has received answers to McManus' questions and many more, including the process for selecting targets and approving strikes. I have insisted on this oversight, and the committee has been satisfied with the results.

Sen. Dianne Feinstein

(D-Calif.)

ALSO:

Letters: Romney, then and now

Letters: A brighter future for the Coliseum

Letters: County supervisors, L.A.'s 'five kings'

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Exhibit 20

June 2012 Carney Statement

Press Briefing by Press Secretary Jay Carney, Secretary of Education Arne Duncan, and Director of the Consumer Financial Protection Bureau Richard Cordray, 6/5/12

James S. Brady Press Briefing Room

2:35 P.M. EDT

MR. CARNEY: We apologize for the delay, but we are glad that you're here and welcome you as ever to the briefing room for your daily briefing.

As I think was advertised, I have with me Secretary of Education Arne Duncan on my right, and to my left, Director of the Consumer Financial Protection Bureau, Rich Cordray. They're here to talk to you about student loans and college costs. They participated in a roundtable just earlier this afternoon that was led by the Vice President with a number of presidents of colleges and universities to discuss ways to provide students with more transparency about college costs to help them make very important financial decisions.

So what I'd like to do is first turn it over to Secretary Duncan and then Director Cordray. They'll talk to you about these issues, this bucket of issues. If you could direct questions to them on their issues at the top, after which we'll let them leave, and I'll be here to take your questions on other subjects.

And with that I give you the Secretary of Education.

SECRETARY DUNCAN: Thanks so much, Jay. And thanks, all of you guys, for giving us the opportunity.

As all of you know, post-secondary education is the ticket to economic success in America. But while it's never been more important to have a degree or certificate, unfortunately it's also never been more expensive. The Obama administration is working every single day to do our part to keep college affordable by helping students better manage their debt after graduation.

We've also proposed to extend and make permanent the American Opportunity Tax Credit and to create new incentives for states and institutions to keep college costs from escalating and to increase those completion rates.

And we're also working to provide parents of students with the information they need to make smart educational decisions so that they can know before they owe.

Each year, colleges and universities send prospective students and their parents financial aid award letters, intended to lay out how much it will cost them to attend school. But as you guys know, these letters often look different, contain different information and often, frankly, do a poor job of making clear how much a student will receive in terms of grants and scholarships, and how much they'll have to borrow in terms of student loans. This not only makes it difficult to figure out how much college will cost, it also makes comparison shopping almost impossible.

And we have the best system of higher education in the world, over 6,000 institutions of higher education. So that situation now makes no sense to me. I just fundamentally think we have to empower parents and students to make a good choice. And that's why we've been working so hard on designing an easy-to-use form that standardizes this information and makes the true cost of higher education much more transparent.

We plan to have it available in the beginning of the upcoming school year of this fall, and we hope that it will be voluntarily adopted by the higher education community. This is, frankly, not rocket science. However, I think it is a triumph of common sense.

In advance of that, we're pleased today to announce that leaders from 10 universities have already voluntarily adopted five data elements from our shopping sheet proposal. They'll provide much greater transparency for prospective students and families. And these 10 university presidents, who we just met with -- it's a fantastic group -- I want to thank them for their leadership, their courage and their commitment. And those 10 colleges by themselves represent over 1.4 million students -- fully 5 percent of the higher ed community -- so very significant players at the table today and a huge amount of energy and enthusiasm in the room.

All of these institutions have pledged to provide every incoming student for the 2013-2014 school year with easy to understand information as part of their

financial aid package, and that includes these five elements I talked about: First, how much one year of school will cost them. Secondly, financial aid options to pay for this cost with a clear distinction between grants and scholarships, which obviously do not have to be repaid, and loans, which do. The net cost after grants and scholarships are taken into account. Fourth, estimated monthly payments for the federal student loans the student will likely owe once they graduate. And, finally, critically important information about student results, including comparative information about default rates, graduation rates and retention rates for the school.

We've worked very, very hard on the access side. That's a big step in the right direction. The goal, however, is not access. The goal is completion and understanding that all these students graduate at the back end.

Having this important information provided both clearly and transparently will help students and their parents invest wisely and make the best, most informed decision possible about where to enroll. That's the fundamental point here. And today, we're calling on all colleges -- all 6,000 colleges, university presidents -- from across the country to make the same commitment as those 10 leaders did today to provide this easy to understand financial data about their higher education investment.

Director Cordray and all the folks on his team at CFPB have been just amazing partners in this effort. And I want to thank them for their leadership and their commitment as we take on this critically important work. And now, I'd like to turn it over to Rich to talk about what the CFPB is doing to help parents, students and consumers know before they owe.

MR. CORDRAY: Thank you, Arne. Higher education is a critical part of the American Dream, as all of you know. I'm sure it's been true in your lives. But for many students today, this dream can only be realized through borrowing.

Figuring out how to pay for college can be daunting. It's often the first major financial decision that a student will make, one that will affect her for the rest of her life. Unfortunately, for many families, the process is often complex and confusing. It's hard for students to compare college costs, evaluate financial aid options and figure out how much debt they can afford.

We have heard from thousands of student loan borrowers who tell us that they simply didn't understand what they were signing up for. Many of them chose private loans before exhausting their federal loan options, which are cheaper

and protect them if they run into trouble. Some resorted to credit cards and other high-priced loans. And, all too often, borrowers got in way over their heads.

Recently, we announced that outstanding student loan debt had crossed the $1 trillion mark. Student loans have eclipsed credit cards as the leading source of U.S. household debt outside of mortgages. The stakes have never been higher for families to clearly understand the costs and risks of student debt. We're still recovering from the worst financial crisis since the Great Depression.

While a college education can be a gateway to better job prospects, taking on too much student debt can have real consequences. Students need to know before they owe.

The Consumer Bureau's goal across consumer markets is to give people the confidence and peace of mind that the financial world is not full of tricks and traps that will ruin their lives. We want information to be clear and easy to understand, so that consumers can make wise financial decisions for themselves and their families.

Today’s announcement is an important step toward that goal. We’re grateful to Secretary Duncan for being a strong partner in a Know Before You Owe initiative to develop a financial aid shopping sheet that enables students to clearly see their aid options so they can pick the package that works best for them.

And we’re pleased to receive support today from college presidents representing some of the largest universities and university systems in America who are committed to ensure that their students understand their financial aid and student loans and the cost of college.

We look forward to continue working with them to create a system where students can climb the economic ladder and live their American Dream. Thank you.

MR. CARNEY: With that, we’ll take your questions.

Q Thank you. To either of you -- what can you do to monitor the universities who are going to impose these standards to make sure that they’re being imposed properly? And also, you talk about encouraging other students to get

on board. In addition to kind of asking them to do so today, what will you do in the coming days to try to get more schools on board?

SECRETARY DUNCAN: To be clear, these aren't standards. This is just transparency. This is just basic data -- how much are your grants, how much are your loans, what are graduation rates, what do you have to repay at the back end. And we just think America's young people and their families deserve to have really basic information about this huge decision they're making.

We think there's going to be a tremendous appetite out there. We don't think universities have anything to hide. And we think just providing that transparency will make families -- will enable families to make better decisions. So we're going to work really, really hard. Again, great leadership here. These are major, major systems who have already signed on. And our goal is to have 100 percent of universities sign on as we go into the fall.

Q Secretary Duncan and Jay, could you respond to the Republican criticism on this student loan bill? They're saying that the Democrats have not responded to their proposals that this legislation be paid for.

SECRETARY DUNCAN: I think obviously all of us want to get this thing done and get it done before July 1st. And the President has worked extraordinarily hard and traveled the country. The Vice President has worked extraordinarily hard and traveled the country. I've done the same. If the Republicans are getting serious about that, that's fantastic. And we hope, over the next couple weeks, we fully expect Congress to do the right thing and to solve this and solve it in a bipartisan way.

Q Does that mean, though, that you're open to a compromise offsetting the cost of it, or see the --

SECRETARY DUNCAN: I don't think it's my job to negotiate from here, but again, our goal has been to have this fixed -- to have it fixed by July 1st. That's critically important. For so many not just disadvantaged families, but so many middle-class families now are starting to think college is unaffordable -- somehow it's not for them, it's for rich folks. That's a real problem. We can't afford to take this step in the wrong direction. We have to keep those Stafford interest rates low. And we're committed to doing that, and absolutely hope and expect the Republicans to work with us in a bipartisan way to get this done -- not to talk about it, but to fix it.

Q Secretary Duncan, what programs are you saying that will not be on the table to be considered to help fund this --

SECRETARY DUNCAN: Yes, again, I don't think I'm -- it's not right for me to negotiate from here, but it's up to Congress for the House and Senate to work together and to get this done by the end of the month.

Q But for instance, they're saying things like the nutrition programs and that kind of efforts that the East Wing is doing to help --

SECRETARY DUNCAN: So they're not serious proposals, and that's not one we're going to take seriously. But if it's a serious proposal, we'll entertain it seriously.

Q This is for Mr. Cordray mainly, but it may also apply to you, too, Secretary Duncan. The House Republicans are using a lot of the appropriation bills to cut back on spending in some of the areas that constitute what the administration would consider its achievements to date. And, for instance, the ag appropriations bill cuts back deeply on the CFTC. There are cutbacks for the SEC. I'd like to know what this means, do you think, for enforcement and implementation of the Dodd-Frank law. And if you have anything in terms of the appropriations for your department and Race to the Top or any other program, I'd like to hear it.

MR. CORDRAY: I think obviously if you don't have resources, it makes it harder to enforce the law. The CFPB is like the other banking agencies where we're not an appropriated agency, and I think that that's appropriate. Those agencies have been taken out of politics for many years, in some cases over a century. It's very important for us to do our job of protecting the American consumer in the financial marketplace. That's a hazardous place; they often end up in trouble -- we've seen that. It helped lead in the mortgage market to the financial crisis, and that's why we're working to fix that.

Q Can you give a specific, maybe, of how enforcement would be affected?

MR. CORDRAY: Well, given that the proposals you're talking about don't affect the CFPB, I'm not in a position to give a specific. But I think it's just basic common sense that if you don't have the resources to enforce the law, you're not going to enforce it effectively. And I think that's part of what's contemplated here.

Q Secretary Duncan, is there anything that applies?

SECRETARY DUNCAN: Sure. I mean, if you look at the Ryan budget, you see a couple -- potentially a couple hundred thousand children lose access to Head Start. I would argue that's probably the best investment we can make is to get our three- and four-year-olds off to a good start and ready to succeed in kindergarten. You'd see potentially hundreds of thousands of people lose access to Pell grants and Pell grants take a step backwards.

It's one of the things I've been most proud of that we've seen a 50 percent increase from 6 million to 9 million people, young people with access to Pell grants and going to college. And we need to educate our way to a better economy. And anyone who argues we need less access to college, that that's the right thing for children or families or our communities or our nation, I think we're cutting off our nose to spite our face.

So I continue to think passionately that education is an investment not an expense. We're not -- we've never asked for an investment in the status quo. Hopefully, you've seen our administration push an unprecedented level of reform at every level -- early childhood, K to 12, and now in the higher ed side. We're proposing a Race to the Top for higher education. But obviously, this is about shared responsibility, so we have to invest at the federal level. But on the higher ed side, which we're talking about today, this past year, 40 states cut funding for higher ed -- 40 states, 80 percent of the country. How is that good for where we need to go?

I know these are really tough economic times, but we want to use a Race to the Top for higher education to incentivize states to invest and make sure more young people have access, not less. So we have to get there. And the jobs of the future are going to go to the countries where they have the knowledge workers -- and that's either going to be here, or that's going to be overseas. And that's up to us. That's in our control.

Q Why are tuitions skyrocketing so much? And what has become of the administration -- previous proposals by the administration to try to clamp down on this by threatening to withhold federal funds if tuitions keep rising?

SECRETARY DUNCAN: It's pretty simple. I mean, the biggest driver of increased tuition -- there are states cutting back on funding for it. That's the biggest driver. And so, where states continue to invest, where we can challenge that, then we can continue to challenge universities to be efficient and to be more effective and to be more productive and use technology.

But our goal for Race to the Top for higher education is threefold. One is to incentivize states to continue to invest. Secondly, is incentivize universities to keep tuition down. And many places are doing very creative things in tough economic times -- not everybody, but a lot. And then, finally -- I keep saying this -- it can't just be about access, it's got to be about completion. So where universities are building cultures around completion where first-generation college-goers and English-language learners and Pell grant recipients are graduating, we want to use Race to the Top resources to incentivize that behavior. It's got to be about shared responsibility. We have to play. States have to play. Universities have to play.

Q Just a quick follow-up. When you talked about some of the creative solutions, are you referring to the program recently profiled in Ohio where they're selling off this lease to all of the parking, and privatizing the airport and --

SECRETARY DUNCAN: I don't know that one specifically. We see universities who are going to three-year programs, going to no-frills campuses. You see universities doing very different things. It's actually really interesting. All those introductory classes that often wash out half the students -- half the students fail -- they're actually doing some really creative things with technology of driving down costs and increasing passing rates pretty substantially. So there's lots of work that universities are doing in a creative way to control costs and to make sure students are staying in there. We have to take those best practices to scale. We have to make that the norm rather than the exception.

Q For the Secretary, along with the accurate sticker price initiative, has there been any commitment by these university leaders to control their costs, keep their costs down? Because I would imagine that there's maybe an incentive to not participate in something like this, so you can maybe hoodwink students into paying a little bit more.

SECRETARY DUNCAN: So I think if folks are out there trying to hoodwink students, we have the bully pulpit. And where folks are doing that, we intend to be very loud and very clear. And again, we have 6,000 institutions of higher education. We have the best system in the world. What we haven't had is enough transparency. I think transparency is a very, very powerful lever. And again, that's why this partnership is so important.

And our young people are smart and savvy. And if some university thinks they're going to get over or get by, by hoodwinking people, I think that's a losing strategy.

Q But is there a commitment from these universities to control their costs as part of this plan?

SECRETARY DUNCAN: Many of them are doing that in a creative way. People in very different situations -- in some states we have -- Maryland has done a pretty good job of funding education. California is very -- has struggled. So not every institution is at a similar platform, so it's a little hard to hold everyone to the same standard. But asking everyone to become more efficient, to become more economical, you had some real leaders there who are doing that.

And again, what we want is, with transparency, good actors are going to get rewarded, people are going to vote with their feet. Bad actors are going to lose business, and we think that's okay. We think that marketplace needs to play in ways that it hasn't before.

Q Senate Republicans, Mitch McConnell, House Republican leaders are really complaining that they've offered up four different ways now to pay for the student loan fix, all of which they say are in the President's budget, are things the President himself has proposed. They can't get a response back from the White House. Is that something that they should expect this week? And how long is it going to take for the White House to sort of figure out where they're --

SECRETARY DUNCAN: Again, I think it's our collective goal to have this done by July 1st, whatever that's -- three weeks, three and a half weeks, whatever it is. And we're glad folks are taking this very seriously now, and we hope and anticipate moving forward in a bipartisan way by the end of the month. Absolutely. I feel the real sense of urgency now.

Q Are you going to be negotiating with them, or is the White House going to be negotiating with them?

SECRETARY DUNCAN: Again, this is -- Congress has to do this together, so we're happy to help, happy to participate. But we need Republicans and Democrats to come together. And if they can come together on nothing else, I think they can come together on education and do the right thing. So we fully anticipate and expect this to be resolved in a good way and this problem to be

fixed for the 7.4 million Americans this would impact if it doesn't get fixed. We anticipate by the end of the month having a good resolution here.

Q One of the Republicans' proposals is to raise the federal employee retirement contribution. Is that something that you would propose? I mean, this economic climate --

SECRETARY DUNCAN: Again, I'm not going to --

Q -- it would be --

SECRETARY DUNCAN: I don't think it's appropriate for me to get into any specifics here. Again, the goal is to get this done in a bipartisan way that makes sense over the next three, three and a half weeks.

Q I think Senator McConnell, though, said today that there hasn't been any outreach from the White House on this. Is that true? Has there been --

SECRETARY DUNCAN: I don't know all the details. I have a lot of respect for Senator McConnell, and if he's very serious about this, we want to sit down with him and Speaker Boehner and everybody else who want to get this done, and get it done.

Q This concerns the CFPB's role with higher education, and it seems to be with regards to student loans. But Republicans have said -- Senate Republicans have complained in the past already that the agency sort of has too broad and too vague power. The fact that it's involved in college cost, does that speak to that at all?

MR. CORDRAY: I actually don't think there's anything broad or vague about our powers. These are very specific problems that regular families face across this country -- problems in the mortgage markets; problems with credit card debt; increasingly, as we've seen and discussed today, problems with student loan debt -- knowing what the prices and risks are before they make decisions so they can make better-informed decisions. And as Secretary Duncan said, those are decisions that will make the market work better.

Everybody who supports a free market should want consumers to be well informed, able to compare, able to make choices. That's what we're working for across all of these markets. And I think it's something that the American people support, and I think it's something that they deserve. And I think they

have a right to expect basic consumer protections on all of these products that are so important to their lives.

MR. CARNEY: Goyal. We'll take this last one for these gentlemen.

Q Thank you. Mr. Secretary, the Obama-Singh Knowledge Initiative was signed between the world's largest and richest democracies by President Obama and Prime Minister Dr. Singh. Now, high-level officials are meeting next week at the third annual U.S.-India Strategic Dialogue in Washington, D.C. Now, what role your agency will play as far as this Knowledge Initiative is concerned between the U.S. and India? And many universities are going to open in India, like the U.S. universities and colleges. So what is your role, sir?

SECRETARY DUNCAN: So we've had -- you and I have talked about it before. We have a great working relationship with my counterpart in India. He is a man, I think, of tremendous vision and courage. We have real challenges here. I think the challenges India faces dwarf -- make ours look relatively simple. But I think there's a chance to provide a much better education for hundreds and hundreds and thousands of young people in India.

And whatever we can do to help as they build the next system of community colleges, as they scale up what’s working, as American institutions start to set up campuses in India, we want to be a great partner. I just absolutely believe that a rising tide lifts all boats. And the more young people across India are getting a world-class education, that's a great thing for your country and for ours as well.

Q And just, do you believe and do you feel so next week that there will be some major kind of initiative or you will be announcing something major? How many universities --

SECRETARY DUNCAN: I hope we can come back on that next week. It's premature now. Thank you.

MR. CARNEY: I want to thank Secretary Duncan and Director Cordray. I appreciate it. And I’ll remain to take your questions. Let everybody get out the door while I survey the field, clear my throat and look to the Associated Press.

Q Can you confirm the death of al Qaeda number two, al-Libi in the U.S. drone strike in Pakistan, and comment please on what his assassination would

mean for the al Qaeda organization, your fight against it and, secondly, for U.S. relations with Pakistan?

MR. CARNEY: I can tell you that our intelligence community has intelligence that leads them to believe that al Qaeda's number-two leader, al-Libi, is dead. I can't get into details about how his death was brought about. But I can tell you that he served as al Qaeda's general manager, responsible for overseeing the group's day-to-day operations in the tribal areas of Pakistan, and he managed outreach to al Qaeda's regional affiliates.

His death is part of the degradation that has been taking place to core al Qaeda during the past several years. And that degradation has depleted the ranks to such an extent that there is now no clear successor to take on the breadth of his responsibilities, and that puts additional pressure on al Qaeda's post-bin Laden leader, Zawahiri, to try to manage the group in an effective way. This would be a major blow -- we believe al-Libi's death is a major blow to core al Qaeda, removing the number-two leader for the second time in less than a year and further damaging the group's morale and cohesion, and bringing it closer to its ultimate demise than ever before.

Q Just to follow on the Pakistan question -- if this was a U.S. drone strike it would be the second U.S. attack that killed a senior al Qaeda leader within Pakistan's borders in a very short period of time, and they didn't respond so well to the first one.

MR. CARNEY: What I can tell you is that our government has been able to confirm al-Libi's death. I don't have anything for you on the circumstances of his death or the location. I can simply say that he was the number-two leader in al Qaeda, and this is the second time in less than a year that the number-two leader of al Qaeda has been removed from the battlefield.

And that represents, in the wake of the death of Osama bin Laden, another serious blow to core al Qaeda in what is an ongoing effort to disrupt, dismantle and ultimately defeat a foe that brought great terror and death to the United States on September 11th, 2001, and that has perpetrated acts of terrorism against innocent civilians around the globe.

Q You said that his breadth of experience would be difficult to replace, but the organization has shown that it can get a warm body wherever it needs to and continually regenerate. What is it about him that makes him -- made him particularly valuable?

MR. CARNEY: Well, I think he was very much an operational leader, general manager, of al Qaeda with a range of experience that is hard to replicate. I think that it is a job that is hard to fill and that there may not be, given the duration of late that people have held that job, that there could be a lot of candidates hoping to fill.

So the point is that removing leaders like al-Libi from the very top of al Qaeda is part of an ongoing effort to disrupt and dismantle, and ultimately defeat al Qaeda. And that is an important piece of business.

Yes, Reuters.

Q Jay, with the crisis in Europe deepening by the day, can you talk about what the President has been doing behind the scenes in the last few days and what his conversations with European leaders have intended to send a message on?

MR. CARNEY: Throughout this crisis in the eurozone, the President has remained closely engaged with his European counterparts, as I have said in the past. And that has continued throughout recent days and weeks.

We believe that economic performance in Europe is of great importance to us here in the United States. The eurozone crisis creates a headwind for the global economy, and we are obviously connected to the global economy, so trouble in the eurozone presents a challenge to the American economy.

Europe is our -- is an important trading partner, and our financial systems, as you know, are deeply connected. As I've said in the past, European leaders have taken significant steps in implementing a firewall, establishing a firewall, and in various countries implementing reforms that are necessary. And we support those efforts.

More needs to be done, as we have said. And today, as you know, I believe, the G7 ministers and governors reviewed developments in the global economy and financial markets, and the policy response currently under consideration, including progress towards financial and fiscal union in Europe. They agreed to monitor developments closely, ahead of the G20 Summit in Los Cabos.

I can say that European leaders seem to be moving with a heightened sense of urgency, and we welcome that, and we're hoping to see accelerated European action over the next several weeks, including in the run-up to the aforementioned G20 leaders meeting in Mexico. A movement to strengthen

the European banking system will be of particular importance in this time period.

Q The President has tried to walk a fine line over the last several months between not appearing to lecture his European counterparts but also trying to prod them into action -- he's felt that strong action was needed. Is it time now to step up that message? Does he feel that he needs to underscore that even more strongly?

MR. CARNEY: The President and Secretary Geithner and others have shared the United States' experience with the kinds of challenges that the Europeans have been facing, whether it's the need to implement very strict stress tests on banks, the need to ensure that financial institutions are recapitalized. These are decisions that are sometimes difficult politically, but important for the long-term fiscal health of -- in the case of the decisions we made here, of the United States, and in the case of the decisions being made in Europe, of the countries of the eurozone and the region.

He has discussed, as you know, and he talked about at Camp David, he has discussed with European leaders the efforts that we have taken here in Washington to restart our economy, to reverse the extreme economic decline that was taking place here in 2008 and 2009, and to put the economy on a path towards economic growth and job creation. That focus on growth and job creation is very important in the near term. And as you saw coming out of the G8, there was a commitment by and a consensus from European leaders there to focus on growth and job creation.

There is much work to be done in Europe, and we -- this administration, the President, Secretary Geithner and others continue to advise and consult their European counterparts as they make some very important decisions.

Jake.

Q Did your intelligence sources provide information about whether or not there were any other people killed other than al-Libi?

MR. CARNEY: I don't have anything more for you except for the confirmation that they have that al-Libi is dead. Beyond that, I would refer you to other agencies.

Q It's not difficult to foresee a world in which the United States is not the only country with this kind of technology. Is the administration at all concerned

about the precedent being set in terms of secrecy, in terms of operating military craft in other sovereign nations, and what we might see as a result when China or Russia get their hands on drones?

MR. CARNEY: Again, I can't discuss methods from here, and I do not -- I won't discuss --

Q I wasn't asking you to.

MR. CARNEY: Well, this is in relation, obviously, to the particular incident that we've been discussing, and I can't get into details about al-Libi's death, the circumstances or the location.

I would simply say that this President is firmly committed to carrying out his policy objective in Afghanistan and in the Afghanistan-Pakistan region, which is to disrupt, dismantle and ultimately defeat al Qaeda. He is committed to disrupting, dismantling and ultimately defeating al Qaeda beyond that region, too. That's why we cooperate with countries around the world in efforts to counter al Qaeda and other extremists.

Q Not relating this question to the death of al-Libi -- the United States has this technology; President Obama has said that the administration should be more transparent about it. Is there not any concern that the administration has that there is precedent being set? We've just heard Assad this week blame the massacre that took place in Houla on terrorists. Any country can say that --

MR. CARNEY: And I heard a collective rolling of the eyes --

Q I'm not saying --

MR. CARNEY: -- or saw a collective rolling of the eyes around the globe because everyone knows how preposterous that assertion is.

Q That's my point. And countries claim terrorism as a justification for their actions all the time. Even positing that the United States, under any President, only acts righteously every time, is there not any concern that a precedent is being set either for some future dangerous President and for any other --

MR. CARNEY: Jake, without getting into very sensitive issues that go to the core of our national security interests, I can simply say that this President, this

Commander-in-Chief, puts a great deal of thought and care into the prosecution of and implementation of the policy decisions he makes, and that includes in the effort to combat al Qaeda in the Af-Pak region and around the world.

There is no question, as the President has stated on many occasions, that the decisions that a Commander-in-Chief has to make when it comes to war and peace, when it comes to defending the United States and protecting the United States and our allies are weighty serious decisions, and he treats them that way every time he makes one.

Q What gives the United States the moral foundation to object in the future to when Russia -- I'm sorry?

Q I'm just wondering how many questions -- I mean, maybe you should have like an interview with him somewhere.

Go ahead.

Q Do you mind if I continue?

Q Go right ahead.

Q I'm just wondering what the -- where the moral foundation comes from if the United States objects in the future to an action being taken by China or Russia along these same lines.

MR. CARNEY: Well, I reject the comparison, but I would simply say that, as I said just now, that this President, this administration takes very seriously the decisions that are involved in the effort to disrupt, dismantle and defeat al Qaeda. But this President is absolutely committed to that objective. As Commander-in-Chief, as President, protection of the United States, protection of American citizens, protection of our allies and our interests are a high priority -- the highest. And that will be the case as long as he's in office.

Kristen.

Q Jay, has the killing of al-Libi complicated efforts to press Pakistan to open its supply routes?

MR. CARNEY: Again, Kristen, as I think I just noted, I can only discuss the fact that we have confirmation of his death. I can't get into location or circumstances. And I would simply say that we have an important relationship

with Pakistan that we endeavor to work on every day because it is in our national security interest to do so.

Q To ask it in another way -- obviously this was a big topic of conversation during the NATO Summit -- has the administration made progress since NATO toward getting Pakistan to reopen the routes?

MR. CARNEY: I don't have an update for you on that. Both, obviously this administration and the government of Pakistan are committed to resolving that issue. We believe that it will be resolved, but I have no specific updates for you on that.

Q So are talks ongoing?

MR. CARNEY: Again, I don't have specific information about discussions on that issue. Obviously, we have regular contacts and consultations with the Pakistanis.

Move around a little bit. Yes.

Q Jay, as you know, yesterday was third-year anniversary of speech that the President gave in Cairo. In that speech he made some promises concerning Iraq, Iran, Afghanistan, the Middle East peace process, of course, about changing the American image in the Muslim world. Now three years later, do you think that the President has kept these promises? And how does this administration read or see his speech after bearing in mind the events of Arab Spring?

MR. CARNEY: I would say again without going through in detail the President's speech, that, yes, the President has kept the commitments that he made there. He's been, I think, very transparent and clear about what his objectives are, about what the interests of the United States are, who our foes are and who they are not.

He, as I think you've seen throughout the Arab Spring, has very carefully made clear the United States sides with the democratic desires and aspirations of the people of the region. And while each country is different, and the process by which each country engages in a democratic transformation has been and will be different, our commitment to that democratic future is strong and will continue to be so.

The President has also committed, as I've just been discussing with Jake, to making sure that our military operations in a place like Afghanistan have a very clear objective. When he took office in January of 2009, you could ask 10 members of the United States military -- or the previous administration what our objective in Afghanistan was and you would get 10 different answers because it was so unclear. And that was highly unacceptable to President Obama, and he made sure that he thoroughly reviewed the situation in Afghanistan, thoroughly reviewed our policy objectives, our resources, and put in place a policy with a very specific goal and the resources necessary to fulfill it. And I think that has contributed to a clarity about U.S. interests and U.S. objectives.

Ed.

Q Jay, on the economy, former President Clinton last night at one of the fundraisers said that if you look at history, an economic recovery takes five to 10 years, and if there was a housing collapse --

MR. CARNEY: After a financial crisis.

Q Yes. Did I not say that?

MR. CARNEY: You said an economic recovery.

Q Well, but after a --

MR. CARNEY: I think there's a distinction between the types of --

Q After a downturn, it takes five to 10 years.

MR. CARNEY: Well, again, I think it's more specific than just a downturn. Some shallow recessions take less time to recover from. When you suffer from a financial crisis that precipitates the worst recession since the Great Depression, the hole is quite deep. I think there are important distinctions to be made.

Q Okay. And another distinction he made was that when there's a housing collapse, as there was in this case, it usually takes longer and can take up to 10 years to turn it around. Does the President -- do you agree with that timetable?

MR. CARNEY: Well, I think that the President has made clear -- President Obama has made clear from the very beginning that we did not get into the

mess that was the Great Recession, the worst recession since the Great Depression, overnight. It took a number of years of flawed policy decisions, of an absence of appropriate oversight and regulation, of unfortunate risky behavior in our financial markets to precipitate the economic free fall that we all experienced in 2008 and 2009. And it will take a long time for us to get out of the hole that that created.

What he has also said is that working with Congress and other folks, he has presided over a situation where that severe economic decline was halted and reversed; a situation where almost 9 percent shrinkage in our GDP has now turned around to the point where we've seen two and a half years of economic growth, positive GDP; a situation where we were losing 750,000 jobs per month, to now a situation where even though growth in jobs has not been satisfying, has not been enough, it has created 4.3 million private sector jobs.

We have more work to do. There is no question. I think that's what President Clinton was speaking to and certainly what President Obama talks about all the time.

Q And so it may take up to 10 years? Do you agree with --

MR. CARNEY: Again, I'm not an economist, and I think we all believe that we need to do everything we can to bring about the day when the 8 million jobs that were lost as a result of that recession are recovered, and that we are in a situation where not only are we back to where we were before, but we are stronger economically. We have a foundation economically upon which to build in the 21st century that doesn't rely on financial bubbles or housing bubbles or .com bubbles, but relies on strength in our manufacturing sector, strength in education, strength in innovation and strength throughout the country economically.

Q Last thing. President Clinton also said, "Remember me, I'm the only guy that gave you four surplus budgets out of the eight I sent." Is it awkward for President Obama to hear President Clinton say that when he has not had surpluses?

MR. CARNEY: Ed, that is a profoundly interesting question that you would phrase -- (laughter.) The point that President Clinton was making, and I concede that he makes it well, but I will attempt on my own to make it, is that when he was in office, he inherited a deficit. After eight years in office, he presided over a number of years of surpluses and turned over to his successor

an economic circumstance, which was judged by the CBO and everyone else, to be one that would produce surpluses as "far as the eye could see." Eight years later, when President Obama took office, handed the Oval Office by his predecessor, a Republican President, we had the largest deficits in history up to that time. Something happened in those eight years, and it was not fiscal responsibility. And that is unfortunate.

We had a situation in eight years where record surpluses were turned into record deficits. So claims by those who supported the policies that led to record deficits that they are the bastions of fiscal conservatism do not meet the laugh test. It's just not borne out by the facts.

We need to work together. This is not about one side being better than the other, and I think that's -- is it important to bring it back to this. What was a fact under President Clinton is that he had contentious relations with a Republican Congress, but in the end, he had Republicans in Congress who were willing to work with him to help bring about those surpluses -- albeit in economic times that were not nearly as strained as we've experienced in the last few years -- but still, it takes bipartisan cooperation. And unfortunately, we have not seen enough of that in the last several years.

But hope springs eternal and this President is committed to putting forward the kinds of proposals that address the weak spots in our economy. I mean, look at where we still have weaknesses in our economy -- in construction, in state and local employment, especially in education. These are areas where the President has put forward specific proposals that would boost employment and boost economic growth; the kinds of proposals that should, I think, earn bipartisan support.

The American Jobs Act, a portion of which was passed by this Congress -- the extension of the payroll tax cut and the extension of unemployment insurance -- had within it elements that Republicans in Congress refused to vote for, that outside economists said at the time would create more than a million jobs. So Republicans in Congress left a million jobs on the table, unfortunately, because they didn't want to ask oil and gas companies to give up subsidies despite record profits. They didn't want to ask others to give up tax breaks and loopholes that would have allowed for the funding of those initiatives that would have taken those million jobs off the table and put teachers back into the classroom and construction workers back on the job. The employment picture

would look a little different today had they chosen otherwise. And those proposals remain on the table and available for action.

Alexis.

Q Jay, you mentioned unemployment insurance. Can you just clarify, what is the President's message to the millions of people who have been unemployed for six months or longer about their worries that unemployment insurance will trigger off? Is the President going to fight to extend that?

MR. CARNEY: Look, the President fought very hard and faced quite remarkable resistance to extending unemployment insurance in December and again in February, I believe it was. The fact is we need to take a number of steps to strengthen the economy and create an environment where more jobs are being created by the economy. And that is what's needed right now.

I don't have anything specific for you on new proposals or along the lines that you suggest. But this is not calculus, it's just math. We know what we can do to improve the employment picture and improve the growth picture. We've been studying these issues quite a bit -- and you have, too -- for a number of months and years now. And action can and should be taken so that the American people feel that Washington is addressing their highest priority.

Q Can I follow up on that? If the President were, by some miracle, to succeed in getting some of these initiatives through, is he concerned that adding to the deficit would bring the debt ceiling closer, not push it farther out?

MR. CARNEY: You're aware that of course the American Jobs Act was paid for entirely. Again, there's -- but you have to make choices. And that was the debate we had and that's the debate we're continuing to have.

You're right. If you don't want to ask oil and gas companies to give up their subsidies, you don't want to ask corporate jet owners to give up their subsidies, if you don't want to ask the wealthiest Americans who have enjoyed a pretty good run in the past 10 years or so to pay a little bit more, then it's harder to pay for these initiatives that would put, in the case of the remaining elements of the American Jobs Act, more than a million people to work.

But that's what governing is all about. You got to make these choices. The President is clear about the choice he thinks ought to be made. Overwhelmingly, the American people tend to support those initiatives. And, hopefully, Congress will act. There's pressure on them, too, to demonstrate to

their constituents that they're not just sitting on their hands and hoping the economy doesn't get better because it will improve their prospects in November.

I mean, I don't think their constituents think that's generally a responsible approach. So, hopefully, there will be pressure on them to do something and to demonstrate they did something to help the economy.

Leslie, and then Norah.

Q Jay, could you just discuss the CBO report that was out today that has some pretty grim numbers? Republicans are seizing on it, suggesting that it's proof that the President is not taking the country on the right path. And what is he going to do with his negotiations later this year?

MR. CARNEY: Well, look, I think what the CBO report demonstrates is that we need to take sensible measures to deal with our medium- and long-term deficit and debt challenges.

Again, this is arithmetic, not calculus. We know what we have to do. There has been a great deal of ink spilled on the various options available to us. There is either an option that says dealing with our deficits and debt, the responsibility for that should be borne entirely almost by the middle class and seniors and folks who depend on programs like Medicaid, or it should be borne evenly in a balanced way, which is what the President believes. That approach has been endorsed not just by this administration, not just by Democrats in Congress, but by every bipartisan commission of any credibility that's looked at this issue.

The holdouts, thus far, have been elected members of the Republican Party in Congress -- not all of them, but most of them. Hopefully, that will change, too. There are occasionally glimmers of hope on the horizon with regards to recognition of the need to take a balanced approach to our deficit and debt challenges.

Look, this is a responsibility that everyone needs to take and to bear, dealing with our deficit and debt -- and going back to my answer to Ed's question about the fact that this President, in the midst of a cataclysmic economic decline, was also, in addition to the keys of the building, handed the largest deficit thus far in history. Plus, the need to take dramatic steps to prevent a depression,

dramatic steps that were seen almost across the board as including the need for a program like the Recovery Act.

So he also took steps like saving the automobile industry that was not popular at the time, but has gained more and more adherence in retrospect as every week passes, because it's been the right thing to do so obviously when we see the numbers coming out of Detroit. These are tough calls and tough decisions. And there's no question that they created a situation where we need to take action on our deficit and debt, and we need to do it in a balanced way.

Norah.

Q I'm going to return to the eurozone crisis affecting the U.S. economy. Does the President believe June is the month that European leaders have to get something done?

MR. CARNEY: I haven't heard him give a date or a month. I think, as I just said when discussing this earlier, we have noted that European leaders, European officials, seem to be acting with a sense of urgency. And we anticipate and hope that there will be expedited action in the weeks ahead, in the run-up to the G20. But I don't have a deadline to provide to you.

I think Europeans are fully aware of the situation that they find themselves in. And they understand that, I think, as you would expect, what the options are and what steps are available to them that would help stabilize the situation, stabilize the banking sector, and help them emerge from this crisis.

Q The Treasury Department said today that finance ministers from the G7 countries, along with the Central Bank, the President is having an emergency conference call. What's the emergency conference call about?

MR. CARNEY: Well, I mentioned that when I was answering questions on Europe, that today, the G7 ministers and governors did meet via teleconference and reviewed developments in the global economy and financial markets, and the policy response under consideration, including the progress towards financial and fiscal union in Europe.

I think there's no mystery to the fact that, as I have said, that there's a need to act with some urgency. Europeans have it very much within their capacity to

deal with this situation. And we have provided consistent advice and counsel based on our experience on how to deal with this, and we'll continue to do so.

Q How worried is the President about the crisis?

MR. CARNEY: I think he is very clear that he recognizes, as I said earlier, that Europe is a very important trading partner to the United States, and troubles in the European economies have an impact on the American economy. Because of that relationship, our financial systems are very integrated and trouble in the European financial sector can have an impact on the American economy. This is the headwind that the President has talked about in the past.

Now, that's why we need to take the steps that we can take, that we can control entirely here in Washington to insulate the American economy, to insulate the American people from these kinds of challenges posed by Europe and elsewhere.

Q And you mentioned he was closely engaged. If he was talking with other world leaders and Presidents, you would read out those calls, correct?

MR. CARNEY: Not necessarily. I think you might expect that he has conversations that we don't always tell you about. I'm not trying to be sly here. I would just say it certainly is the case and has been the case as long as I've been Press Secretary that the President has conversations that we don't read out to you either with American business leaders or members of Congress or foreign leaders or others. So we don't read out every conversation the President has.

Q Jay, what are your expectations for the upcoming "Friends of Syria" -- the next phase of that "Friends of Syria" process?

MR. CARNEY: It's part of a concerted effort to unify the international community around the notion that there needs to be a political transition in Syria to help the opposition in Syria to organize itself and to bring diplomatic pressure to bear on the Assad regime as well as pressure through sanctions and other means to help facilitate that transition.

And that includes -- and Secretary of State Clinton has been very clear about this as have others -- that includes working with other members of the United Nations Security Council, in particular Russia, on the need to take steps to bring about political transition in Syria, take steps to prevent Assad from continuing to brutally assault his own people -- because there is not a whole lot

of time available to the international community before that situation, at least potentially, devolves into a sectarian civil war, a situation that could spill beyond the Syrian borders and could involve other countries in the region.

And that obviously is profoundly not in the interest of the Syrian people, but it's not in the interest of countries of the region. It's not in the interest of any member of the United Nations Security Council. So that's why we need to work collectively to ensure that that does not transpire.

Q Are you ready to say this is the last such meeting before it devolves into that?

MR. CARNEY: No, I'm not going to draw any lines in the sand. I simply will make the point that there is a need to act urgently because the situation in Syria demands it.

Q Is the President monitoring the recall election in Wisconsin? And if Governor Walker isn't recalled, what do you think that says about the mood of the country?

MR. CARNEY: I'm sure the President -- I know the President is aware of the recall election. I think he's got some other responsibilities, so I don't -- I know that he's not following it minute by minute, but he's aware of it. You know that he tweeted about it earlier and stands with the Democratic candidate, Mayor Barrett, in this race.

I would simply say -- not speaking for him, because I haven't had this conversation with him -- but noting what others have noted in your profession and elsewhere, that a race where one side is outspending the other by a ratio of at least 8 to 1 probably won't tell us much about a future race.

Q And it looks like the highway bill conference is about to collapse. Is the President prepared to make calls, invite members of Congress in? Because obviously both Republicans and Democrats want to --

MR. CARNEY: Well, the President is prepared to make the case that we need to take action on the surface transportation bill, on investments in infrastructure, precisely because this is an area that has been identified, rightly, as a soft spot in our economy; an area where we can take steps to help improve economic growth and job creation, the construction industry.

So I don't have a specific action plan to read out to you. But it really is vital that Congress get its act together and pass some of these important pieces of legislation that have -- in the case of surface transportation and in the case of the aforementioned student loan rate legislation and a host of others -- have enjoyed bipartisan support in the past. And there is no reason why they should not enjoy that bipartisan support today and in the future.

Q So we can expect him to get personal --

MR. CARNEY: Again, I don't have an action plan to provide to you, but it is essential that Congress do its job.

Q Yesterday -- or last night, President Clinton said that the GOP and Mitt Romney had adopted Europe's policies. I was wondering if the President -- excuse me, President Obama agrees with that statement?

MR. CARNEY: Well, I haven't had that conversation with President Obama. I think others have made the observation that austerity alone is not -- at least not the right prescription for and was not the right prescription for our economy. We're not in a position and do not want to lecture other nations about the steps they should take. We can provide counsel and advice based on our experience.

And we are certainly not satisfied with the pace of the recovery thus far, the pace of job creation thus far. But there has been economic growth and there has been significant job creation -- 4.3 million jobs in the last 27 months here in the United States. And that is in no small measure. In fact, it is completely because of the initiatives that were taken to help stop the bleeding, in terms of the cataclysmic economic decline that greeted this President when he took office, and reverse it and to create a situation where the economy began to grow again, where employers began to hire again, and in some sectors of the economy like manufacturing and the auto industry, where the economy really began to rebound in significant ways. It has been uneven and it is far from complete, but it is a picture of a response to a financial and economic crisis that I think bears review.

Dave.

Q Yes, on the student loan issue, Secretary Duncan said just moments ago that he didn't want to negotiate from the lectern, but that if Republicans offered serious proposals, the White House would engage those serious proposals.

Just generally speaking, the Republicans have offered proposals. Does the White House believe they're serious? And if so, are you willing to engage?

MR. CARNEY: Again, I'm not going to negotiate the particulars here. I would note -- look, I share Secretary Duncan's optimism about the fact that this will be resolved. Despite the Speaker referring to it as a phony issue, we think there are signs that Republicans understand that it would be a terrible thing for the 7.4 million Americans who would be affected if these loan rates were allowed to double. And, therefore, they will take the necessary action. I'm not going to get into the nitty-gritty here of negotiating --

Q What's the next step for the White House involvement in this?

MR. CARNEY: Well, we'll continue to work with Congress and with the leaders on this issue to get it resolved. But I don't have specific elements of what that final outcome will look like for you.

Ari.

Q The White House has said for several years -- a few years, at least -- that the health care law cannot stand without the individual mandate. Is that still your position?

MR. CARNEY: Well, I would simply say that, obviously, the individual mandate is a hugely important component to the Affordable Care Act, because it is what allows for, in many ways, coverage of those with preexisting conditions and others who might otherwise not be able to get insurance were the mandate not in place.

So I think it is profoundly important, as it was, say, in Massachusetts and has been in its implementation in Massachusetts. I'm sure that's why Republicans in Massachusetts, and even at the Heritage Foundation, thought it was a good idea when they came up with it. But I'm not going to game out for you what -- I know where you're headed -- what a Supreme Court decision would look like if it were to come out this way or that way. The President believes, I believe, I think a lot of lawyers believe, who have studied the precedent here with regards to the Commerce Clause, that the Affordable Care Act is very much constitutional. But it's up to the Supreme Court to render its judgment.

Q But do you still believe that functionally, as a matter of policy, the law --

MR. CARNEY: I have no change in what my predecessor or others have said about that. But, again, the question is based on an assumption about a decision that the Supreme Court has not made.

Q Jay, earlier you said that the servicemembers who were in Afghanistan -- the conflict there is simpler because of the Obama administration. Do drone strikes make it less simple to the American people to understand, when these are secret and often done without really understanding --

MR. CARNEY: Again, you're trying to get me to talk about things that I can't talk about from the podium.

Q I'm asking you --

MR. CARNEY: But I will simply say that the American people very much support the idea that our efforts in Afghanistan, efforts that put the lives of American men and women in uniform at risk -- as well as the lives of our civilian personnel in Afghanistan at risk -- should be focused primarily on disrupting, dismantling and defeating al Qaeda. That is the policy objective that the President put into place and it's the right one. And it is the reason why we went to Afghanistan in the first place.

Q Do they support it if it's secret?

MR. CARNEY: Again, I think you're conflating a bunch of things here that I would love to tease them apart for you, and I'm happy to do that at another time. But I think the President's policy objective of defeating al Qaeda is one that does have the support of the American people.

Q One more, Jay. On the transit of Venus, is the President expecting to spend any time today looking at the transit of Venus? (Laughter.) He is a nerdy guy.

MR. EARNEST: It's cloudy.

MR. CARNEY: My colleague says it's clouding up out there. I wasn't even aware of it. I'm so focused on making sure I have the answers to your questions, I knew nothing about the transit of Venus.

Okay, last one. Thank you. That was it. Thanks, guys. My audience is leaving. (Laughter.)

END
3:42 P.M. EDT

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2015 Annual Report to Congress on White House Staff

The White House
Office of the Press Secretary

For Immediate Release June 15, 2012

Presidential Letter -- 2012 War Powers

Resolution 6-Month Report

Dear Mr. Speaker: (Dear Mr. President:)

I am providing this supplemental consolidated report, prepared by my Administration and consistent with the War Powers Resolution (Public Law 93-148), as part of my efforts to keep the Congress informed about deployments of U.S. Armed Forces equipped for combat.

MILITARY OPERATIONS AGAINST AL-QA'IDA, THE TALIBAN, AND ASSOCIATED FORCES AND IN SUPPORT OF RELATED U.S. COUNTERTERRORISM (CT) OBJECTIVES

Since October 7, 2001, the United States has conducted combat operations in Afghanistan against al-Qa'ida terrorists, their Taliban supporters, and associated forces. In support of these and other overseas operations, the United States has deployed combat equipped forces to a number of locations in the U.S. Central, Pacific, European, Southern, and Africa Command areas of operation. Previously such operations and deployments have been reported, consistent with Public Law 107-40 and the War Powers Resolution, and operations and deployments remain ongoing. These operations, which the United States has carried out with the assistance of numerous international partners, have degraded al-Qa'ida's capabilities and brought an end to the Taliban's leadership of Afghanistan.

United States Armed Forces are now actively pursuing and engaging remaining al-Qa'ida and Taliban fighters in Afghanistan. The total number of U.S. forces in Afghanistan is approximately 90,000, of which more than 70,000 are assigned to the North Atlantic Treaty Organization (NATO)-led International Security Assistance Force (ISAF) in Afghanistan. In accordance with June 2011 Presidential guidance, the Department of Defense remains on track to achieve a Force Management Level of 68,000 U.S. forces by the end of this summer. After that, reductions will continue at a steady pace.

The U.N. Security Council most recently reaffirmed its authorization of ISAF for a 12-month period until October 13, 2012, in U.N. Security Council

Resolution 2011 (October 12, 2011). The mission of ISAF, under NATO command and in

partnership with the Government of the Islamic Republic of Afghanistan, is to prevent Afghanistan from once again becoming a safe haven for international terrorists. Fifty nations, including the United States and all 28 NATO Allies, contribute forces to ISAF. These forces, including U.S. "surge" forces deployed in late 2009 and 2010, broke Taliban momentum and trained additional Afghan National Security Forces (ANSF). The ANSF are now increasingly assuming responsibility for security on the timeline committed to at the 2010 NATO Summit in Lisbon by the United States, our NATO allies, ISAF partners, and the Government of Afghanistan.

United States Armed Forces are detaining in Afghanistan approximately 2,748 individuals under the Authorization for the Use of Military Force (Public Law 107-40) as informed by the laws of war. On March 9, 2012, the United States signed a Memorandum of Understanding with the Afghan government under which the United States is to transfer Afghan nationals detained by U.S. forces in Afghanistan to the custody and control of the Afghan government within 6 months. Efforts are underway to accomplish such transfers in a safe and humane manner.

The combat-equipped forces, deployed since January 2002 to Naval Base, Guantanamo Bay, Cuba, continue to conduct secure detention operations for the approximately 169 detainees at Guantanamo Bay under Public Law 107-40 and consistent with principles of the law of war.

In furtherance of U.S. efforts against members of al-Qa'ida, the Taliban, and associated forces, the United States continues to work with partners around the globe, with a particular focus on the U.S. Central Command's area of responsibility. In this context, the United States has deployed U.S. combat-equipped forces to assist in enhancing the CT capabilities of our friends and allies, including special operations and other forces for sensitive operations in various locations around the world.

In Somalia, the U.S. military has worked to counter the terrorist threat posed by al-Qa'ida and al-Qa'ida-associated elements of al-Shabaab. In a limited number of cases, the U.S. military has taken direct action in Somalia against members of al-Qa'ida, including those who are also

members of al-Shabaab, who are engaged in efforts to carry out terrorist attacks against the United States and our interests.

The U.S. military has also been working closely with the Yemeni government to operationally dismantle and ultimately eliminate the terrorist threat posed by al-Qa'ida in the Arabian Peninsula (AQAP), the most active and dangerous affiliate of al-Qa'ida today. Our joint efforts have resulted in direct action against a limited number of AQAP operatives and senior leaders in that country who posed a terrorist threat to the United States and our interests.

The United States is committed to thwarting the efforts of al-Qa'ida and its associated forces to carry out future acts of international terrorism, and we have continued to work with our CT partners to disrupt and degrade the capabilities of al-Qa'ida and its associated forces. As necessary, in response to the terrorist threat, I will direct additional measures against al-Qa'ida, the Taliban, and associated forces to protect

U.S. citizens and interests. It is not possible to know at this time the precise scope or the duration of the deployments of U.S. Armed Forces necessary to counter this terrorist threat to the United States. A classified annex to this report provides further information.

MILITARY OPERATIONS IN IRAQ

The United States completed its responsible withdrawal of U.S. forces from Iraq in December 2011, in accordance with the 2008 Agreement Between the United States of America and the Republic of Iraq on the Withdrawal of United States Forces from Iraq and the Organization of Their Activities during Their Temporary Presence in Iraq.

MILITARY OPERATIONS IN CENTRAL AFRICA

In October and November 2011, U.S. military personnel with appropriate combat equipment deployed to Uganda to serve as advisors to regional forces that are working to apprehend or remove Joseph Kony and other senior Lord's Resistance Army (LRA) leaders from the battlefield, and to protect local populations. The total number of U.S. military personnel deployed for this mission, including those providing logistical and support functions, is approximately 90. United States forces are working with

select partner nation forces to enhance cooperation, information-sharing and synchronization, operational planning, and overall effectiveness. Elements of these U.S. forces have deployed to forward locations in the LRA-affected areas of the Republic of South Sudan, the Democratic Republic of the Congo, and the Central African Republic to enhance regional efforts against the LRA. These forces, however, will not engage LRA forces except in self-defense. It is in the U.S. national security interest to help our regional par

tners in Africa to develop their capability to address threats to regional peace and security, including the threat posed by the LRA. The United States is pursuing a comprehensive strategy to help the governments and people of this region in their efforts to end the threat posed by the LRA and to address the impacts of the LRA's atrocities.

MARITIME INTERCEPTION OPERATIONS

As noted in previous reports, the United States remains prepared to conduct maritime interception operations on the high seas in the areas of responsibility of each of the geographic combatant commands. These maritime operations are aimed at stopping the movement, arming, and financing of certain international terrorist groups, and also include operations aimed at stopping proliferation by sea of weapons of mass destruction and related materials. Additional information is provided in the classified annex.

HOSTAGE RESCUE OPERATIONS

As noted to you in my report of January 26, 2012, at my direction, on January 24, 2012, U.S. Special Operations Forces conducted a successful operation in Somalia to rescue Ms. Jessica Buchanan, a U.S. citizen who had been kidnapped by individuals linked to Somali pirate groups and financiers.

MILITARY OPERATIONS IN EGYPT

Approximately 693 military personnel are assigned to the U.S. contingent of the Multinational Force and Observers, which have been present in Egypt since 1981.

U.S.-NATO OPERATIONS IN KOSOVO

The U.N. Security Council authorized Member States to establish a NATO-led Kosovo Force (KFOR) in Resolution 1244 on June 10, 1999. The original mission of KFOR was to monitor, verify, and, when necessary, enforce compliance with the Military Technical Agreement between NATO and the then-Federal Republic of Yugoslavia (now Serbia), while maintaining a safe and secure environment. Today, KFOR deters renewed hostilities in cooperation with local authorities, bilateral partners, and international institutions. The principal military tasks of KFOR forces are to help maintain a safe and secure environment and to ensure freedom of movement throughout Kosovo.

Currently, 23 NATO Allies contribute to KFOR. Seven non-NATO countries also participate. The United States contribution to KFOR is approximately 817 U.S. military personnel out of the total strength of approximately 6,401 personnel, which includes a temporarily deployed Operational Reserve Force.

I have directed the participation of U.S. Armed Forces in all of these operations pursuant to my constitutional and statutory authority as Commander in Chief (including the authority to carry out Public Law 107-40 and other statutes) and as Chief Executive, as well as my constitutional and statutory authority to conduct the foreign relations of the United States. Officials of my Administration and I communicate regularly with the leadership and other Members of Congress with regard to these deployments, and we will continue to do so.

BARACK OBAMA

HOME BRIEFING ROOM ISSUES THE ADMINISTRATION PARTICIPATE

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Exhibit 22

December 2012 Government Brief

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

NASSER AL-AULAQI, as personal representative of the estate of ANWAR AL-AULAQI, et al., Plaintiffs, v. LEON E. PANETTA, et al., in their individual capacities, Defendants.	No. 1:12-cv-01192 (RMC)

DEFENDANTS' MOTION TO DISMISS

Under Federal Rules of Civil Procedure 12(b)(1) and 12(b)(6), Defendants Secretary Leon Panetta, Admiral William McRaven, Lieutenant General Joseph Votel, and former CIA Director David Petraeus—all current or former federal employees sued in their individual capacities—hereby move this Court to dismiss Plaintiffs Nasser Al-Aulaqi and Sarah Khan's complaint because this Court lacks subject matter jurisdiction over Plaintiffs' claims, and because Plaintiffs have failed to state a claim upon which relief may be granted. The grounds for this motion are set forth in the accompanying memorandum of points and authorities. A proposed order is attached.

Dated: December 14, 2012

Respectfully submitted,

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UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

NASSER AL-AULAQI, as personal representative of the estate of ANWAR AL-AULAQI, et al., Plaintiffs, v. LEON E. PANETTA, et al., in their individual capacities, Defendants.	No. 1:12-cv-01192 (RMC)

MEMORANDUM OF SUPPORTING POINTS AND AUTHORITIES

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INTRODUCTION

Plaintiffs Nasser Al-Aulaqi and Sarah Khan, purportedly as representatives of the estates of three U.S. citizens killed in Yemen, ask this Court to impose personal liability on Defendants, including the Secretary of Defense and the former Director of the Central Intelligence Agency, based on the Executive Branch's alleged conduct of military and counterterrorism operations against an elusive and hostile enemy abroad in the course of an ongoing, congressionally authorized armed conflict with al-Qa'ida and associated forces. Particularly, Plaintiffs seek damages from individual government officials for allegedly authorizing and directing missile strikes that they contend resulted in these citizens' deaths abroad.

But courts repeatedly have recognized that the political branches, with few exceptions, have both the responsibility for—and the oversight of—the defense of the Nation and the conduct of armed conflict abroad. The Judiciary rarely interferes in such arenas. In this case, Plaintiffs ask this Court to take the extraordinary step of substituting its own judgment for that of the Executive. They further ask this Court to create a novel damages remedy, despite the fact that—based on Plaintiffs' own complaint—their claims are rife with separation-of-powers, national defense, military, intelligence, and diplomatic concerns. Judicial restraint is particularly appropriate here, where Plaintiffs seek non-statutory damages from the personal resources of some of the highest officials in the U.S. defense and intelligence communities. Under these weighty circumstances, this Court should follow the well-trodden path the Judiciary—and particularly the D.C. Circuit—have taken in the past and should leave the issues raised by this case to the political branches.

BACKGROUND

In the exercise of the United States' inherent right to national self-defense, the U.S.

government has been engaged in an armed conflict against al-Qa'ida and associated forces since 2001. *See Hamdan v. Rumsfeld*, 548 U.S. 557, 630-31 (2006). Plaintiffs' allegations involve the deaths of three individuals in Yemen, including Anwar Al-Aulaqi, in that conflict. Anwar Al-Aulaqi was killed in Yemen in 2011. Compl. ¶ 2. At the time of his death, Al-Aulaqi was known to be a leader of al-Qa'ida in the Arabian Peninsula (AQAP) and had been designated by the U.S. Department of the Treasury as a Specially Designated Global Terrorist (SDGT). *See* Designation of Anwar Al-Aulaqi Pursuant to Executive Order 13224 and Global Terrorism Sanctions Regulations, 31 C.F.R. Part 594, 75 Fed. Reg. 43,233-34 (publicly announced July 12, 2010) (SDGT Designation).[1]

AQAP is an organized armed group that is either part of, or an associated force of, al-Qa'ida. *See infra* p. 20 & n.12. Anwar Al-Aulaqi played "a key role in setting the strategic direction for AQAP"; "recruited individuals to join AQAP"; "facilitated training" at AQAP camps in Yemen; and "helped focus AQAP's attention on planning attacks on U.S. interests." SDGT Designation. The SDGT Designation also identifies Al-Aulaqi's role in the plot to detonate an explosive device aboard a U.S. airliner en route from Amsterdam to Detroit on Christmas Day, 2009. *Id.* (reciting that Umar Abdulmutallab "received instructions" from Al-Aulaqi to detonate an explosive device "aboard a U.S. airplane over U.S. airspace" and then "obtained the explosive device" he used in the attempted attack). *Accord* Gov.'s Sentencing Mem. 12-15, *United States v. Abdulmutallab*, No. 2:10-cr-20005 (E.D. Mich. Feb. 19, 2012), ECF No. 130. Al-Aulaqi had called for "jihad against the West" and declared he "will never surrender." *Al-Aulaqi v. Obama*, 727 F. Supp. 2d 1, 10-11 (D.D.C. 2010).

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[1] This Court can take judicial notice of the United States' published designation of Anwar Al-Aulaqi as an SDGT and of its asserted basis for that designation. *See Covad Comms. Co. v. Bell Atl. Corp.*, 407 F.3d 1220, 1222 (D.C. Cir. 2005).

Plaintiffs Nasser Al-Aulaqi and Sarah Khan filed this complaint as the purported representatives of the estates of Anwar Al-Aulaqi, Samir Khan, and Abdulrahman Al-Aulaqi (Anwar Al-Aulaqi's son), claiming decedents died in two separate "missile strikes" in Yemen.[2] *See* Compl. ¶¶ 2-3, 10-11. Plaintiffs claim these alleged strikes were launched from remotely piloted aircraft (RPAs)—commonly referred to as "drones." *Id.* The first alleged strike occurred on September 30, 2011, and purportedly targeted "Anwar Al-Aulaqi and his vehicle." *Id.* ¶ 31. Anwar Al-Aulaqi and Samir Khan allegedly were killed by this strike. *Id.* The complaint does not deny that Anwar Al-Aulaqi was part of an enemy force, nor does it provide any hint that the United States' information regarding his activities was mistaken. The complaint nonetheless maintains in conclusory fashion that Anwar Al-Aulaqi did not pose a "concrete, specific, and imminent threat" at the time of the strike. *Id.* ¶ 34. Plaintiffs opine in similar conclusory fashion that "means short of lethal force" were available that "could reasonably have been used to neutralize any threat" he posed. *Id.* ¶ 24. The second alleged strike occurred on October 14, 2011, and purportedly targeted "Ibraham al Banna, an Egyptian national." *Id.* ¶ 37. According to the complaint, Abdulrahman Al-Aulaqi died in this second alleged strike. *Id.*

Plaintiffs claim that the first alleged strike targeting Anwar Al-Aulaqi occurred after he had been placed on a purported "kill list" of the Central Intelligence Agency (CIA) and a purported "kill list" of the Joint Special Operations Command (JSOC). The complaint alleges that Secretary Leon Panetta, the former Director of the CIA and current Secretary of Defense, "authorized the addition" of Anwar Al-Aulaqi to the purported "kill list" of the CIA. *Id.* ¶ 12.

---

[2] For purposes of this motion only, the Court should assume the truth of Plaintiffs' factual allegations, but not of any legal conclusions. *See Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009). In filing this motion, however, Defendants make no suggestion as to the veracity of any of those allegations or conclusions. Nor in filing this motion based on these assumed facts do the Defendants—or the United States, which is not a party to this litigation but filed a statement of interest concurrently with this motion—confirm or deny any of Plaintiffs' underlying allegations.

Plaintiffs claim that Admiral William McRaven, the former commander of JSOC, "authorized the addition" of Anwar Al-Aulaqi to the purported "kill list" of JSOC and that Secretary Panetta "authorized" his "continued placement" on that list. *Id.* ¶ 12-13. The complaint avers that these two Defendants—along with former CIA Director David Petraeus and current commander of JSOC Lieutenant General Joseph Votel—"authorized and directed" the two alleged strikes "without taking legally required measures to avoid harm," and that they "failed" to "take all feasible measures to protect bystanders." *Id.* ¶¶ 12-15, 35, 40.

Based on these allegations, Plaintiffs seek damages from Defendants individually under the Fourth Amendment for the purportedly unreasonable seizure of decedents. *Id.* ¶ 42. They also claim Defendants violated decedents' Fifth Amendment due process rights. *Id.* ¶ 41. Lastly, they claim these alleged acts violated the Bill of Attainder Clause. *Id.* ¶ 43.

This Court should dismiss the complaint on four independent grounds. First, Plaintiffs have failed to demonstrate they have the capacity to sue. Second, their claims raise quintessential political questions, and therefore this Court lacks jurisdiction to consider them. Third, under governing precedent, special factors counsel against inferring a damages remedy in this novel context. And fourth, Defendants are entitled to qualified immunity because Plaintiffs have failed to allege the violation of any clearly established constitutional right.

ARGUMENT

I. Plaintiffs Have Failed To Demonstrate They Have the Capacity To Sue.

This Court should dismiss Plaintiffs' complaint because they have not properly alleged they have the capacity to sue. Under Federal Rule of Civil Procedure 17(b), the capacity to sue for individuals acting as representatives of an estate is governed by the law of the state where the court sits. Fed. R. Civ. P. 17(b)(3). Therefore, District of Columbia law applies.

Plaintiffs fail to demonstrate they have complied with that law's requirements to act as personal representatives. Under D.C. law, a "personal representative" is a "person . . . who has been appointed by the Court to administer the estate of a decedent." D.C. Stat. Ann. § 20-101(j). A lawsuit can be considered personal property for purposes of acting in a representative capacity. *See Estate of Manook v. Research Triangle Inst.*, 693 F. Supp. 2d 4, 17 (D.D.C. 2010) (citation omitted). As none of the decedents was domiciled in the District, *see* Compl. ¶¶ 22, 29, 36, Plaintiffs must qualify as "foreign personal representatives" of their estates. *See In re Estate of Monge*, 841 A.2d 769, 773 (D.C. 2004).

Plaintiffs have failed to properly allege they qualify. Where a non-domiciliary's estate has property in the District, a foreign personal representative must "file with the Register a copy of the appointment as personal representative" in another jurisdiction. D.C. Stat. Ann. § 20-341(b); *see In re Estate of Monge*, 841 A.2d at 774. This suit may be considered such property. *See Estate of Manook*, 693 F. Supp. 2d at 17. Accordingly, Plaintiffs are required to file their appointments as personal representative with the Register of Wills in order to proceed with this litigation. *See* D.C. Stat. Ann. § 20-101(m) (defining "Register" as "Register of Wills"); *see also Estate of Manook*, 693 F. Supp. 2d at 17 (requiring plaintiff to submit to Register "Qassam Sharie" documents issued by Iraqi court to proceed as foreign personal representative of Iraqi decedent in litigation). Plaintiffs have failed to allege they complied with this requirement or to demonstrate their legal capacity to sue on decedents' behalf, and their allegations that they are decedents' personal representatives, *see* Compl. ¶¶ 10-11, are conclusory. Thus, the Court should require Plaintiffs to demonstrate their capacity to sue and, if they fail to do so, dismiss their suit.

II. Plaintiffs' Claims Raise Non-Justiciable Political Questions.

At the core of their claims, Plaintiffs ask this Court to pass judgment on the alleged

conduct of Executive Branch officials in carrying out purported military and counterterrorism operations abroad in exercising the Executive's prerogative of national self-defense and in the course of an armed conflict authorized by Congress. Such a request is a "quintessential source[]" of non-justiciable political questions. *Al-Aulaqi*, 727 F. Supp. 2d at 45 (citation omitted).

The Supreme Court has long recognized that certain questions, "in their nature political," are not fit for adjudication. *Marbury v. Madison*, 1 Cranch 137, 170 (1803). The "political question doctrine" is "primarily a function of the separation of powers." *Baker v. Carr*, 369 U.S. 186, 210-11 (1962). It is the "relationship between the judiciary and the coordinate branches of Federal Government" that gives rise to a political question. *Id.* at 210. Such questions arise in "controversies which revolve around policy choices and value determinations" that are constitutionally committed to the Executive or Legislative Branches of our system of government. *Japan Whaling Ass'n v. Am. Cetacean Soc'y*, 478 U.S. 221, 230 (1986).

In this case, the gravamen of Plaintiffs' complaint is that U.S. officials unlawfully applied the warmaking and national defense powers of the political branches to conduct alleged missile strikes abroad against enemy forces engaged in an armed conflict against the United States—a subject that, under governing precedent, squarely implicates the political question doctrine. *See El-Shifa Pharm. Indus. Co. v. United States*, 607 F.3d 836, 841, 845 (D.C. Cir. 2010) (en banc) (dismissing on political question grounds tort action brought for U.S. missile strike in Sudan). To evaluate whether a case raises political questions, it is important for a court to first "identify with precision" the issues it is being asked to decide. *Zivotofsky v. Clinton*, 132 S. Ct. 1421, 1434 (2012) (Sotomayor, J., concurring). *See also El-Shifa*, 607 F.3d at 842 ("[T]he presence of a political question . . . turns not on the nature of the government conduct under review but more precisely on the question the plaintiff raises about the challenged action."). Once the court

identifies the issues presented, it considers whether any factors the Supreme Court identified in *Baker v. Carr* apply.

In *Baker*, the Court listed six factors to consider in determining whether a suit presents non-justiciable political questions. Courts should refrain from adjudicating suits raising issues that (1) have a "textually demonstrable constitutional commitment" to the political branches; (2) lack "judicially discoverable and manageable standards" for resolution; (3) require "an initial policy determination of a kind clearly for nonjudicial discretion" for resolution; (4) require the court to express "lack of the respect due coordinate branches of government" through their resolution; (5) present "an unusual need for unquestioning adherence to a political decision already made"; or (6) risk embarrassing the government through "multifarious pronouncements by various departments on one question." *Baker*, 369 U.S. at 217. The first two factors are the "most important." *Harbury v. Hayden*, 522 F.3d 413, 418 (D.C. Cir. 2008). However, to dismiss a case on political question grounds, a court "need only conclude that one factor is present, not all." *Schneider v. Kissinger*, 412 F.3d 190, 194 (D.C. Cir. 2005).

Here, even assuming that Plaintiffs' complaint properly identifies the issues that would need to be decided to adjudicate their claims, those issues each implicate *Baker* factors. First, the complaint as pled by Plaintiffs asks this Court to determine that Anwar Al-Aulaqi did not pose a "concrete, specific, and imminent threat of death or serious physical injury" (presumably to U.S. citizens) at the time he was allegedly targeted by a missile strike while in Yemen. Compl. ¶¶ 24, 34. Second, the complaint asks this Court to determine that at the time of the alleged strike, "means short of lethal force" were available—presumably to the federal officials allegedly participating in any underlying decisions—which "could reasonably have been used to neutralize any threat" that Anwar Al-Aulaqi posed. *Id.* ¶ 34. Third, Plaintiffs contend that Defendants did

not use "all feasible measures to protect bystanders" during alleged missile strikes on Anwar Al-Aulaqi and an Egyptian national in Yemen, thereby violating Samir Khan and Abdulrahman Al-Aulaqi's Fourth and Fifth Amendment rights. *Id.* ¶¶ 35, 40.[3]

Plaintiffs thus invite this Court to determine whether an individual in Yemen whom the Executive Branch had already declared a leader of an organized armed enemy group, and a foreign operative of that group, posed a sufficient threat to the United States and its citizens to warrant the alleged use of missile strikes abroad within the context of an armed conflict and the Executive's national self-defense mission. Moreover, they ask this Court to pass judgment on the Executive's purported battlefield and operational decisions in that conflict—namely, to determine whether lethal force was the most appropriate option available; if so, what sort of lethal force to employ; and whether appropriate measures were taken to minimize collateral damage. Each of these issues is a "quintessential source" of political questions.

A. Plaintiffs' claims raise issues with a "textually demonstrable constitutional commitment" to the political branches.

There is "no doubt that decision-making in the fields of foreign policy and national security is textually committed to the political branches of government." *Schneider*, 412 F.3d at 194. The issues raised by this complaint unquestionably involve the conduct of hostilities in armed conflict, as well as national security, and foreign policy—matters which are constitutionally committed to the Executive and the Legislature in the first instance and are "rarely proper subjects for judicial intervention." *Haig v. Agee*, 453 U.S. 280, 292 (1981) (citations omitted).

First and foremost, Plaintiffs' claims directly challenge the Executive's alleged acts of

[3] In assessing the claims of Samir Khan and Abdulrahman Al-Aulaqi, the complaint also implicitly asks this Court to determine the magnitude of the threats posed by the alleged targets, Anwar Al-Aulaqi and Al-Banna—a necessary predicate to evaluating which protective "measures" were "feasible" or "proportionat[e]" in any action against them.

warfighting and national self-defense abroad targeting members of an armed enemy group against which the political branches have authorized the use of all necessary and appropriate force. The United States is currently engaged in an armed conflict with al-Qa'ida and associated forces. *See Hamdan*, 548 U.S. at 630-31 (holding that Common Article 3 of the Geneva Conventions—which applies in armed conflicts not of an international character—applies to the conflict between the United States and al-Qa'ida and associated forces). The stated reasons for the U.S. government's designation of Anwar Al-Aulaqi as an SDGT explain his role in that conflict. *See* SDGT Designation. Particularly, Al-Aulaqi was a leader of AQAP, which had conducted numerous attacks on U.S. targets, and he had "taken on an increasingly operational role" in that group, including preparing an individual to attack the United States by giving him instructions "to detonate an explosive aboard a U.S. airplane over U.S. airspace." *Id.* at 75 Fed. Reg. 43,234. *See also* Unclassified Declaration in Support of Formal Claim of State Secrets Privilege by James R. Clapper, Director of National Intelligence ¶¶ 13-15, *Al-Aulaqi v. Obama*, No. 1:10-cv-1469 (D.D.C. Sept. 25, 2010), ECF No. 15-2 (Clapper Decl.).[4] Any alleged missile strikes targeting Al-Aulaqi and Al-Banna, both members of AQAP, would have been taken in furtherance of the Nation's self-defense in an armed conflict with al-Qa'ida and associated forces.[5]

The conduct of armed conflict is a matter with a "textually demonstrable constitutional

[4] As mentioned above, *supra* note 1, the Court can take judicial notice of "facts on the public record" in considering a motion to dismiss. *Covad Commc'ns Co.*, 407 F.3d at 1222. This Court can properly take judicial notice both of the United States' SDGT designation, and of the *stated reasons* that federal officials proffered regarding Al-Aulaqi's activities, even if Plaintiffs were to dispute, as a factual matter, the actual extent of his terrorist involvement. *See id.*

[5] Al-Banna is "an Egyptian member of AQAP." Gregory Johnsen, *Signature Strikes in Yemen*, bigthink – Waq al-Waq (Apr. 19, 2012 2:45 PM), http:// bigthink.com/waq-al-waq/signature-strikes-in-yemen?page=all. Plaintiffs refer to this article and therefore the Court can consider it in a motion to dismiss. *See* Compl. ¶ 37; *Vanover v. Hartman*, 77 F. Supp. 2d 91, 98 (D.D.C. 1999), *aff'd*, 38 F. App'x 4 (D.C. Cir. 2002).

commitment" to the Executive and Legislative Branches. The President is "Commander in Chief" of the United States Armed Forces. U.S. Const. art. II, § 2. And the Constitution invests Congress with the power to "provide for the Common Defence"; "declare War"; "raise and support Armies"; "provide and maintain a Navy"; "make Rules for the Government and Regulation of the land and naval Forces"; and "provide for calling forth the Militia to . . . repel Invasions." *Id.* art. I, § 8.

The en banc D.C. Circuit in *El-Shifa* explicitly recognized that claims directly implicating the political branches' powers to use force abroad will often fall outside the Judiciary's competence. There, the court dismissed on political question grounds tort claims seeking compensation for a U.S. missile strike against a factory in Sudan. In dismissing the claim, the court was unequivocal: "Whether the circumstances warrant a military attack on a foreign target is a 'substantive political judgment[] entrusted expressly to the coordinate branches of government.'" 607 F.3d at 845 (quoting *Gilligan v. Morgan*, 413 U.S. 1, 11 (1973)). Plaintiffs' complaint asks this Court to make a similar judgment as to whether the circumstances warranted the United States' alleged conduct of missile strikes against targets located overseas.

Indeed, in *Al-Aulaqi v. Obama*, Judge Bates of this Court found *El-Shifa* dispositive on facts that are materially identical to those here. There, plaintiff sought a preliminary injunction that would forbid the use of force against Anwar Al-Aulaqi unless certain conditions were met. *See Al-Aulaqi*, 727 F. Supp. 2d at 12. Here, Plaintiffs base their claims on the alleged use of that force. In dismissing the complaint in the earlier litigation, Judge Bates explained: "plaintiff asks this Court to do exactly what the D.C. Circuit forbid in *El-Shifa*—assess the merits of the President's (alleged) decision to launch an attack on a foreign target." *Id.* at 47. The same logic applies here, particularly given that Plaintiffs challenge not only the alleged attack on Anwar Al-

Aulaqi, but also the propriety of the alleged attack on Al-Banna, an Egyptian national. *Cf. Johnson v. Eisentrager*, 339 U.S. 763, 789 (1950) ("Certainly it is not the function of the Judiciary to entertain private litigation—even by a citizen—which challenges the legality, the wisdom, or the propriety of the Commander-in-Chief in sending our armed forces abroad or to any particular region.").

In addition to the conduct of war and national self-defense, matters of foreign affairs—which clearly are implicated in a case challenging alleged missile strikes against targets on foreign soil, including a foreign national—also have a "textually demonstrable constitutional commitment" to the political branches. Article II of the Constitution states that the President "shall have Power, by and with the Advice and Consent of the Senate, to make Treaties . . . [and] appoint Ambassadors," and also "shall receive Ambassadors and other public Ministers." *Id.* art. II, §§ 2-3. Article I gives Congress the power to "regulate Commerce with foreign Nations" and "To define and punish Piracies and Felonies committed on the high Seas, and Offences against the Law of Nations." *Id.* art. I, § 8.

It is little surprise, therefore, that courts have repeatedly declined to adjudicate cases directly implicating those areas. *See, e.g.*, *Haig*, 453 U.S. at 292 ("Matters intimately related to foreign policy and national security are rarely proper subjects for judicial intervention." (citations omitted)); *Chicago & So. Air Lines, Inc. v. Waterman S.S. Corp.*, 333 U.S. 103, 111 (1948) ("[T]he very nature of executive decisions as to foreign policy is political, not judicial. Such decisions are wholly confided by our Constitution to the political departments of the government, Executive and Legislative."); *Oetjen v. Cent. Leather Co.*, 246 U.S. 297, 302 (1918) ("The conduct of foreign relations of our government is committed by the Constitution to the executive and legislative—'the political'—departments of the government."); *El-Shifa*, 607 F.3d

at 841 ("Disputes involving foreign relations, such as the one before us, are 'quintessential sources of political questions.'" (internal citation omitted)); *Schneider*, 412 F.3d at 194 (noting that there is "no doubt that decision-making in the fields of foreign policy and national security is textually committed to the political branches" in dismissing tort claims on political question grounds). *Cf. Ludecke v. Watkins*, 335 U.S. 160, 169 (1948) ("Whether and when it would be open to this Court to find that a war though merely formally kept alive had in fact ended, is a question too fraught with gravity even to be adequately formulated when not compelled.").

That is not to say that every claim that "touches foreign relations," *Baker*, 369 U.S. at 211, or involves national security necessarily implicates the political question doctrine. For example, courts "have been willing to hear habeas petitions (from both U.S. citizens and aliens)" that implicate national security and foreign relations. *Al-Aulaqi*, 727 F. Supp. 2d at 49 (citing *Boumediene v. Bush*, 553 U.S. 723 (2008)). That is because "the Suspension Clause reflects a textually demonstrable commitment of habeas corpus claims to the Judiciary." *Id.* (quotation marks omitted). But there "is no 'constitutional commitment to the courts for review of a military decision to launch a missile at a foreign target.'" *Id.* at 50 (quoting *El-Shifa*, 607 F.3d at 849). Such matters "are textually committed not to the Judiciary, but to the political branches." *Id.* Accordingly, the sorts of inquiries that would be triggered by any substantive examination of the Plaintiffs' allegations squarely implicate issues with a "textually demonstrable constitutional commitment" to the political branches, and the first *Baker* factor warrants dismissal.

B. Plaintiffs' claims raise issues lacking judicially "manageable standards."

Plaintiffs' complaint also asks this Court to decide questions lacking "judicially discoverable and manageable standards" for resolution. *Baker*, 369 U.S. at 217. To be clear, Defendants do not suggest that there are no standards that would be applied to purported missile

strikes on AQAP targets. To the contrary, the Attorney General has laid out some of the principles underlying the Executive Branch's exercise of its national self-defense prerogative against a leader of al-Qa'ida or an associated force.[6] It is the notion of *judicially* crafted and managed standards in the context of the issues raised by Plaintiffs' complaint that collides with the separation of powers delineated in our Constitution.[7]

Plaintiffs challenge alleged decisions by the military and the CIA purportedly to carry out missile strikes in Yemen—decisions that exceed the scope of the Judiciary's expertise. *See Reno v. Am.-Arab Anti-Discrimination Comm.*, 525 U.S. 471, 490-91 (1999) (explaining that courts are "ill equipped to determine the[] authenticity and utterly unable to assess the[] adequacy" of the government's "reasons for deeming nationals of a particular country a special threat"); *see also El-Shifa*, 607 F.3d at 845 (citing *Reno*). The Supreme Court has acknowledged that with respect to decisions involving military matters, "it is difficult to conceive of an area of governmental activity in which the courts have less competence." *Gilligan*, 413 U.S. at 10. *See also Waterman*, 333 U.S. at 111 (noting that the Executive "has available intelligence services whose reports neither are nor ought [sic] to be published to the world"); *Schneider*, 412 F.3d at

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[6] *See Attorney General Eric Holder Speaks at Northwestern University School of Law*, Justice News, Mar. 5, 2012, *available at* http://www.justice.gov/iso/opa/ag/speeches/2012/ag-speech-1203051 html (last visited Dec. 4, 2012) (Holder Speech), at 3. Defendants' political question argument is raised under Rule 12(b)(1). *See Gonzalez-Vera v. Kissinger*, 449 F.3d 1260, 1262 (D.C. Cir. 2006). Thus, courts can consider matters outside of the pleadings in evaluating that argument. *See Coal. for Underground Expansion v. Mineta*, 333 F.3d 193, 198 (D.C. Cir. 2003).

[7] Similarly, Defendants do not suggest that the Executive has unchecked power to conduct purported missile strikes abroad, particularly against citizens. Indeed, the Legislative Branch has been informed of strikes and has reviewed the authority to carry out such operations. *See infra* p. 20, n.14. Thus, refusal to adjudicate Plaintiffs' claims in this unique context "does not leave the executive power unbounded." *Schneider*, 412 F.3d at 200. "If the executive in fact has exceeded his appropriate role in the constitutional scheme, Congress enjoys a broad range of authorities with which to exercise restraint and balance." *Id.* In addition, checks and balances exist within the Executive Branch itself.

197 (finding non-justiciable claim challenging alleged CIA action because there were "no justiciably discoverable and manageable standards for the resolution of such a claim").

Litigating a case involving such alleged circumstances would be rife with problems of manageability. In general, courts do not "sit in camera in order to be taken into executive confidences." *Waterman*, 333 U.S. at 111. Thus, in a case such as this, "[i]t would be intolerable that courts, without the relevant information, should review and perhaps nullify actions of the Executive taken on information properly held secret." *Id.* Even if courts were privy to the information the Executive receives from its military and intelligence advisors, they "are hardly competent to evaluate it." *Holtzman v. Schlesinger*, 484 F.2d 1307, 1310 (2d Cir. 1973) (denying injunction to stop bombing of Cambodia). *See also DaCosta v. Laird*, 471 F.2d 1146, 1155 (2d Cir. 1973) ("Judges, deficient in military knowledge, lacking vital information upon which to assess the nature of battlefield decisions, and sitting thousands of miles from the field of action, cannot reasonably or appropriately" evaluate the consequences of "a specific military operation").

These limitations of judicial capacity come into sharper focus when considering the specific issues Plaintiffs contend this Court must address. As mentioned above, Plaintiffs claim that, notwithstanding his "increasingly operational role" in AQAP, SDGT Designation, Anwar Al-Aulaqi was not a "concrete, specific, and imminent" threat to the United States at the time of the purported strike and thus, his constitutional rights were allegedly violated. Even if Plaintiffs have properly articulated the relevant standard, this Court would still need to define how "concrete, specific, and imminent" the threat of an enemy belligerent must be—and how sure the Executive must be that he met that standard—to justify action. This Court could not do so without establishing novel judicial standards for use in evaluating such national self-defense

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decisions. *See El-Shifa*, 607 F.3d at 845 (noting the court could not evaluate the decision to conduct a missile strike on foreign soil "without first fashioning out of whole cloth some standard for when military action is justified"). Faced with that prospect in a similar context, the en banc D.C. Circuit stated bluntly: "The judiciary lacks the capacity for such a task." *Id. See also El-Shifa Pharm. Indus. Co. v. United States*, 378 F.3d 1346, 1367 n.6 (Fed. Cir. 2004) ("[I]t would be difficult, if not extraordinary, for the federal courts to discover and announce the threshold standard by which the United States government evaluates intelligence in making a decision to commit military force in an effort to thwart an imminent terrorist attack on Americans."); *Al-Aulaqi*, 727 F. Supp. 2d at 47.

Moreover, determining when a member of an enemy force is an appropriate target of a purported missile strike cannot be addressed with a judicially manageable standard because the assessment of whether an individual presents a sufficient threat to warrant such an action is itself a political question. *Cf. People's Mojahedin Org. of Iran v. Dep't of State*, 182 F.3d 17 (D.C. Cir. 1999) ("*PMOI*"). In *PMOI*, the D.C. Circuit held that although courts could review other aspects of the validity of the Secretary of State's designation of a foreign entity as a terrorist organization, they could not review the determination that such an entity "threatens the security of United States nationals." *Id.* at 23 (quoting 8 U.S.C. § 1189(a)(1)(C)). Such an issue was "nonjusticiable." *Id.* [8] This Court should similarly decline to announce a standard to determine whether the alleged targets posed a "concrete, specific, and imminent threat." *See Al-Aulaqi*, 727 F. Supp. 2d at 47.[9]

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[8] Defendants do not that suggest the particular threat standard applicable in *PMOI* would apply here. Rather, the point is that the standard here, as pled by Plaintiffs, involves an inquiry that is non-justiciable, as did the inquiry in *PMOI*.

[9] The precise question of whether Anwar Al-Aulaqi posed a "concrete, specific, and imminent" threat was the subject of the military and state secrets privilege invoked in *Al-Aulaqi v. Obama*.

The other two specific issues Plaintiffs contend this Court must resolve also lack judicially manageable standards. Whether other "means short of lethal force" were available that "could reasonably have been used" to counter "any" threat the alleged targets posed, Compl. ¶ 24, is not a question the Judiciary is suited to decide. Myriad military, intelligence, and foreign policy considerations arise from the issue of whether less-than-lethal means were "reasonably" available to counter a threat posed by a leader of AQAP in the course of this armed conflict. Such a determination necessarily would require the Judiciary to weigh—in hindsight—the costs and benefits of other possible options. For example, perhaps the United States could send ground troops into Yemen to attempt to apprehend someone who, like Anwar Al-Aulaqi, was a leader of AQAP. But surely such an operation would present its own unique risks of harm to those troops, collateral damage, and foreign policy consequences. It could also raise the possibility of U.S. soldiers captured in foreign lands by hostile enemies—with significant humanitarian, diplomatic, and military implications. These are but a few of the host of considerations that would have to be balanced when determining whether "means short of lethal force" were "reasonably" available. These considerations are "delicate, complex, and involve large elements of prophecy." *Waterman*, 333 U.S. at 111. They "should be undertaken only by those directly responsible to the people whose welfare they advance or imperil." *Id.*

Whether, as Plaintiffs contend, other "feasible measures" were available "to protect bystanders from harm" during the alleged strikes, Compl. ¶¶ 31, 35, 40, also raises a host of considerations most appropriately evaluated by the political branches. Determining which

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See Clapper Decl. at ¶ 18 (asserting privilege over "information that relates to the terrorist threat posed by Anwar al-Aulaqi, including information related to whether this threat may be 'concrete,' 'specific' or 'imminent'"). The United States, which is not a party to this suit, has filed a statement of interest and has reserved its right to invoke the state secrets privilege in the event this case proceeds beyond the motion-to-dismiss stage.

"feasible measures" to protect bystanders are "legally required," *id.*, when missiles are allegedly launched from RPAs at a leader of AQAP and at an AQAP operative abroad, requires an analysis to which the Judiciary is ill-suited. Relevant factors could include what other assets were available in the region at the time; where they were located; how long it would take to divert them for an operation; whether the alleged target would have moved to another location by the time those assets arrived; what risks would arise from removing those assets from their original locations; what additional risks may arise to U.S. forces during the modified operation; and any additional risks to civilians during the operation. And this list would only be the tip of the iceberg. The courts, however, "lack the competence to assess the strategic decision to deploy force or to create standards to determine whether the use of force was justified or well-founded." *El-Shifa*, 607 F.3d at 844. Moreover, the nature of intelligence-gathering at a given moment may also be fluid—requiring action far more flexible than a judicial proceeding is equipped to reflect. Indeed, a court case—which may take years to resolve—would not produce a manageable, specific, and useful standard in this rapidly evolving context.[10]

In short, there is a notable lack of "judicially manageable" standards necessary to litigate Plaintiffs' complaint. Accordingly, the second *Baker* factor applies and warrants dismissal.

C. Resolution of Plaintiffs' claims requires an initial policy determination that would show a "lack of the respect due" to the political branches.

The third and fourth *Baker* factors also warrant dismissal. The decision to use lethal force involves policy choices—to be taken in light of fast-paced and evolving intelligence available

[10] Nor does the legal framework for domestic law-enforcement provide an appropriate guide. The context of Plaintiffs' claims—alleged missile strikes abroad against enemy targets in the course of armed conflict—is wholly distinct. *Cf. Lebron v. Rumsfeld*, 670 F.3d 540, 554 (4th Cir. 2012) ("The inquiries presaged by Padilla's action are far removed from questions of probable cause or deliberate indifference to medical treatment routinely confronted by district courts in suits under 42 U.S.C. § 1983 or *Bivens*." (citations omitted)), *cert. denied*, 132 S. Ct. 2751 (2012).

regarding specific threats posed by armed terrorist organizations that operate outside the constraints of the laws of war and hide amongst civilian populations—that are "of a kind clearly for nonjudicial discretion." *Baker*, 369 U.S. at 217. It requires balancing the risk of harm to our Nation and the potential consequences of using force. Similarly, whether non-lethal means were "reasonably" available requires "policy choices and value determinations." *Japan Whaling*, 478 U.S. at 230. As detailed above, the risks to ground forces that may or may not be tolerable as a possible non-lethal alternative to a purported missile strike clearly involve policy choices, as do the foreign policy implications that making such an operational choice abroad might entail.

Any decision on the potential level of harm to innocent bystanders that may be tolerable in the context of alleged missile strikes against enemy targets overseas in an armed conflict undoubtedly raises policy choices for executive, not judicial, determination. As Plaintiffs implicitly acknowledge, Compl. ¶¶ 35, 40, civilian casualties are a regrettable but ever-present reality in armed conflict. The question is not whether such casualties will occur, but rather if they do, what amount of risk of harm to bystanders would be consistent with an appropriate use of force under the circumstances, based on principles that guide the Executive in an armed conflict. Moreover, judicially crafted standards that are specific, particular, and applied to a given set of facts may prevent or control the contours of future operations involving armed force overseas, which could inhibit the Executive's ability to carry out its national self-defense prerogative. These issues all require "policy choices and value determinations" that are reserved for the Executive. *Japan Whaling*, 478 U.S. at 230.

Deciding these issues in the context of this case would also fail to acknowledge the distinct role and structure of judicial decision-making in relation to the political branches, and would thus show a "lack of the respect due" to those branches, the fourth *Baker* factor. The

Judiciary has "institutional limitations" when it comes to "strategic choices" involving national security and foreign affairs. *El-Shifa*, 607 F.3d at 843. Unlike the Executive, "the judiciary has no covert agents, no intelligence sources, and no policy advisors." *Schneider*, 412 F.3d at 196. Moreover, the "complex subtle, and professional decisions as to the composition, training, equipping, and control of a military force are essentially professional military judgments, subject *always* to civilian control of the Legislative and Executive Branches." *Gilligan*, 413 U.S. at 10. "The ultimate responsibility for these decisions is appropriately vested in branches of the government which are periodically subject to electoral accountability." *Id.* Thus, "[i]t is not the role of judges to second-guess, with the benefit of hindsight, another branch's determination that the interests of the United States call for military action." *El-Shifa*, 607 F.3d at 844.

The use of RPAs to combat the threat to this Nation's security emanating from abroad posed by al-Qa'ida and associated forces involves just such a considered policy choice. *See* Robert Chesney, *Text of John Brennan's Speech on Drone Strikes Today at the Wilson Center* (RPA Speech), Lawfare (Apr. 30, 2012, 12:50 pm), http://www.lawfareblog.com/2012/04/brennanspeech/ ("Targeted strikes are wise.").[11] A finding by a court that another method of counterterrorism was more appropriate under the precise circumstances alleged—and in fact was constitutionally required—would show a "lack of the respect due" to the Executive's policy choices regarding how to conduct a congressionally authorized armed conflict and its national defense mission. *See El-Shifa*, 607 F.3d at 844; *Ctr. for Nat'l Sec. Studies v. U.S. Dep't of Justice*, 331 F.3d 918, 932 (D.C. Cir. 2003) ("It is not within the role of the courts to second-guess executive judgments made in furtherance of that branch's proper role.").

[11] Because Plaintiffs refer to the above speech and quote from it, *see* Compl. ¶ 18, it can be considered in deciding this motion to dismiss. *See Vanover*, 77 F. Supp. 2d at 99.

As noted, here, in addition to its inherent national self-defense prerogative, the Executive's alleged conduct is consistent with an affirmative act of Congress—the Authorization for Use of Military Force. *See* Pub. L. No. 107-40, 115 Stat. 224 (reprinted at 50 U.S.C. § 1541 note) (AUMF). Judicial intervention in these matters would thus be particularly inappropriate, given that the political branches have exercised their respective constitutional authorities to protect national security in this arena. For example, Congress, through the AUMF, authorized the Executive to use necessary and appropriate military force against al-Qa'ida and associated forces.[12] Accordingly, as alleged, these strikes would be consistent with both law and policy. Under such circumstances, the Executive's actions are afforded the "strongest of presumptions and the widest latitude of judicial interpretation." *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 636 (1952) (Jackson, J., concurring).

Finding the alleged strikes unlawful would show a lack of respect not only to the Executive, but also to Congress. Congress has had the opportunity to modify the AUMF or pass legislation limiting the Executive's ability to carry out such alleged strikes. Yet despite numerous public statements by Executive Branch officials indicating that the AUMF provides legal authority for targeted strikes against enemy forces beyond the battlefields of Afghanistan,[13] Congress has not modified the AUMF to preclude their use, nor has it passed any other law

[12] Given public information regarding its relationship with al-Qa'ida, AQAP is either part of, or an "associated force" of, al-Qa'ida and therefore falls within the AUMF's ambit. *Cf. Khan v. Obama*, 655 F.3d 20, 32-33 (D.C. Cir. 2011) (upholding detention under the AUMF of member of "associated force" of al-Qa'ida); *see* Statement for Record, Senate Homeland Security and Government Affairs Committee, "Nine Years After 9/11: Confronting the Terrorist Threat to the Homeland," September 22, 2010 at 2, 4-5 (statement of then-Director of the National Counterterrorism Center Michael Leiter), attached as exhibit in *Al-Aulaqi*, No. 10-cv-1469 (D.D.C. Sept. 25, 2010), ECF No. 15-4.

[13] *See, e.g.*, RPA Speech at 3; Holder Speech at 3. *See also* Harold Hongju Koh, *The Obama Administration and International Law*, *available at* http://www.state.gov/s/l/releases/remarks/139119.htm (last visited Dec. 6, 2012), at 8.

limiting the Executive's authority to conduct missile strikes of the type alleged here.[14]

Accordingly, a judicial finding that the alleged strikes were illegal would show a lack of deference regarding policy choices made by the political branches. It would take the Judiciary well beyond its traditional role and would thrust it into the realm of policymaking. *See Schneider*, 412 F.3d at 197 ("To determine whether drastic measures should be taken in matters of foreign policy and national security is not the stuff of adjudication, but of policymaking."). And it would upend the carefully balanced "relationship between the judiciary and the coordinate branches of Federal Government," *Baker*, 369 U.S. at 210, and violate the separation of powers the Constitution enshrines.

In sum, at a minimum, the first four *Baker* factors apply. Plaintiffs' complaint raises non-justiciable political questions. Accordingly, this Court should dismiss this case.

III. Under Governing Precedent, Special Factors Preclude a Damages Remedy.

Even if this Court determines that Plaintiffs have the capacity to sue and their claims do not raise non-justiciable political questions, the issues detailed above counsel against devising a discretionary damages remedy not authorized by Congress in this highly sensitive context.

A. Plaintiffs' claims raise separation-of-powers concerns, which counsel hesitation.

As a threshold matter, the separation-of-powers concerns detailed in the preceding section apply with special force when considering whether to infer a new damages remedy in this context at all. Indeed, the five federal courts of appeals—the D.C., Ninth, and Fourth Circuits,

[14] Not only have members of the Executive Branch made public statements regarding counterterrorism operations carried out under the AUMF, but the Legislative Branch has been explicitly notified of alleged missile strikes—and has not acted to preclude them. *See* Sen. Dianne Feinstein, *Letters: Sen. Feinstein on Drone Strikes*, L.A. Times, May 17, 2012 (noting that the Senate Intelligence Committee receives "key details" shortly after each strike; has held twenty-eight oversight meetings to question "every aspect" of the targeting program, "including legality"; and "has been satisfied with the results").

the en banc Second Circuit, and most recently the en banc Seventh Circuit—to address whether to infer civil damages actions against federal officials in novel separation-of-powers contexts have unanimously declared: "No."[15]

In *Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics*, 403 U.S. 388 (1971), the Supreme Court inferred a damages remedy under the Fourth Amendment against federal law enforcement agents operating domestically for an allegedly unlawful arrest of an individual in his Brooklyn apartment. *Id.* at 389, 397. The Court did so only after noting that the case "involves no special factors counseling hesitation in the absence of affirmative action by Congress." *Id.* at 396. Since that decision, the Court has inferred a damages remedy in new contexts only twice. *See Carlson v. Green*, 446 U.S. 14 (1980) (prisoner in federal prison); *Davis v. Passman*, 442 U.S. 228 (1979) (employment discrimination). In the thirty-two years since *Carlson*, the Court has "consistently refused to extend *Bivens* liability to any new context or new category of defendants." *Corr. Servs. Corp. v. Malesko*, 534 U.S. 61, 68 (2001).[16]

As this case law makes clear, a *Bivens* remedy is "not an automatic entitlement no matter what other means there may be to vindicate a protected interest." *Wilkie*, 551 U.S. at 550.

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[15] *See Vance v. Rumsfeld*, --F.3d--, 2012 WL 5416500, *3-8 (7th Cir. Nov. 7, 2012) (en banc); *Mirmehdi v. United States*, 689 F.3d 975, 982-83 (9th Cir. 2012), *cert. petition filed*, No. 12-522 (U.S. Oct. 22, 2012); *Doe v. Rumsfeld*, 683 F.3d 390, 394-96 (D.C. Cir. 2012); *Lebron*, 670 F.3d at 548-49; *Arar v. Ashcroft*, 585 F.3d 559, 575 (2d Cir. 2009) (en banc).

[16] *See Minneci v. Pollard*, 132 S. Ct. 617, 620 (2012) (refusing to infer damages remedy against private contractors working in federal prison); *Wilkie v. Robbins*, 551 U.S. 537, 560-62 (2007) (refusing to infer damages remedy against federal employees who "push too hard" in performing their duties); *FDIC v. Meyer*, 510 U.S. 471, 486 (1994) (refusing to infer damages remedy against federal agencies); *Schweiker v. Chilicky*, 487 U.S. 412, 429 (1988) (refusing to infer damages remedy for allegedly improper denial of social security benefits); *United States v. Stanley*, 483 U.S. 669, 679-80 (1987) (refusing to infer damages remedy for former serviceman against military and civilian personnel); *Chappell v. Wallace*, 462 U.S. 296, 301-02 (1983) (refusing to infer damages remedy for servicemen against superiors); *Bush v. Lucas*, 462 U.S. 367, 390 (1983) (refusing to infer damages remedy for alleged First Amendment violation in government personnel decision).

Instead, judicial creation of such a remedy in a new context is a matter of discretion. *See id.* ("[A] *Bivens* remedy is a subject of judgment."). *See also Wilson v. Libby*, 535 F.3d 697, 704 (D.C. Cir. 2008) ("We have discretion in some circumstances to create a remedy against federal officials for constitutional violations, but we must decline to exercise that discretion where special factors counsel hesitation." (quotation and citation omitted)). It may be undertaken only after a court has *both* determined that no "alternative, existing process for protecting the interest" is present, *and* made "a remedial determination that is appropriate for a common-law tribunal" to decide whether to authorize "a new kind of federal litigation." *Wilkie*, 551 U.S. at 550. In making this determination, a court should pay "particular heed" to any "special factors counselling hesitation." *Id.* Moreover, implied causes of action like *Bivens* are "disfavored." *Iqbal*, 556 U.S. at 675. *See also Vance*, 2012 WL 5416500 at *4 ("Whatever presumption in favor of a *Bivens*-like remedy may once have existed has long since been abrogated."). Accordingly, the threshold for whether a special factor counsels hesitation in creating a damages remedy "is remarkably low." *Arar*, 585 F.3d at 574.

Given the Supreme Court's refusal to extend *Bivens* into new contexts, the core separation-of-powers concerns that demonstrate that Plaintiffs' claims raise political questions certainly counsel against *inferring* a remedy in this context. *See Sanchez-Espinoza v. Reagan*, 770 F.2d 202, 208 (D.C. Cir. 1985) ("Whether or not this is . . . a matter so entirely committed to the care of the political branches as to preclude our considering the issue at all, we think it at least requires the withholding of discretionary relief."). Also, as explained above, whether alleged missile strikes against enemy forces in foreign countries to counter threats from an armed enemy abroad should be undertaken as a matter of policy involves weighing and appraising a "host of considerations." *Bush*, 462 U.S. at 380. In addition, allowing money damages suits

against military officers for alleged actions taken on the battlefield would risk "fettering" field commanders in their operations. *Ali v. Rumsfeld*, 649 F.3d 762, 773 (D.C. Cir. 2011). Thus, if any remedy should be available here, it should be created by "those who write the laws, rather than . . . those who interpret them." *Bush*, 462 U.S. at 380.[17]

Indeed, in the context presented here, "those who write the laws" have made a deliberate choice *not* to create a judicially enforceable cause of action. Instead of providing a judicial remedy for harms arising from combat activities abroad, Congress has funded Executive Branch programs permitting military commanders to provide discretionary "humanitarian relief" in active theaters of war. Pub. L. No. 108-106, 117 Stat. 1209, 1215 (2003).[18] That Congress forbade judicial relief for combat activities abroad and instead chose to provide certain discretionary relief through the Executive strongly counsels hesitation in augmenting such decisions by way of judicially implied remedies. *See Vance*, 2012 WL 5416500, at *7.

B. Plaintiffs' claims raise additional special factors under D.C. Circuit precedent.

Aside from these over-arching separation-of-powers concerns, Plaintiffs' claims directly implicate four special factors under binding precedent: (1) national security; (2) the effectiveness of the military; (3) the risk of disclosing classified information; and (4) foreign affairs. Any *one*

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[17] To the extent Plaintiffs may attempt to rely on customary international law as support for their individual-capacity damages claims, such an attempt must fail. The Constitution does not perforce incorporate all customary international law. *See United States v. Yunis*, 924 F.2d 1086, 1091 (D.C. Cir. 1991) ("Our duty is to enforce the Constitution, laws, and treaties of the United States, not to conform the law of the land to norms of customary international law."). When Congress has wanted to make claims for violations of customary international law actionable in domestic courts, it has done so. *See, e.g.*, 18 U.S.C. § 2441 (war crimes); 28 U.S.C. § 1350 (tort claims); 10 U.S.C. § 821 (law of war).

[18] The Military Claims Act, 10 U.S.C. § 2733, and the Foreign Claims Act, 10 U.S.C. § 2734, are among other vehicles Congress has provided to offer compensation for injuries caused by the military. Both provisions, however, allow for compensation through an administrative process, not a judicial one. *See* 10 U.S.C. §§ 2733(a), 2734(a). More importantly, both preclude compensation for injuries resulting from combat. *See id.*

would warrant denying a judge-made constitutional tort remedy in this novel context. Together, they are overwhelming.

First, the D.C. Circuit has repeatedly held that where claims directly implicate matters involving national security and particularly war powers, special factors counsel hesitation. *See Doe*, 683 F.3d at 394-95 (discussing the "strength of the special factors of military and national security" in refusing to infer remedy for citizen detained by military in Iraq); *Ali*, 649 F.3d at 773 (explaining that "the danger of obstructing U.S. national security policy" is a special factor in refusing to infer remedy for aliens detained in Iraq and Afghanistan (internal quotation and citation omitted)); *Rasul v. Myers*, 563 F.3d 527, 532 n.5 (D.C. Cir. 2009) (same for aliens detained at Guantánamo Bay). These cases alone should control Plaintiffs' claims here. Plaintiffs challenge the alleged targeting of and missile strikes against members of AQAP in Yemen. Few cases more clearly present "the danger of obstructing U.S. national security policy" than this one. *Ali*, 649 F.3d at 773. Accordingly, national security considerations bar inferring a remedy for Plaintiffs' claims.[19]

Second, Plaintiffs' claims implicate the effectiveness of the military. As with national security, the D.C. Circuit has consistently held that claims threatening to undermine the military's command structure and effectiveness present special factors. *See Doe*, 683 F.3d at 396; *Ali*, 649 F.3d at 773. Allowing a damages suit brought by the estate of a leader of AQAP against officials who allegedly targeted and directed the strike against him would fly in the face of

[19] Decedents' citizenship does not affect this analysis. *See Vance*, 2012 WL 5416500 at *8 ("We do not think that the plaintiffs' citizenship is dispositive one way or the other."); *Doe*, 683 F.3d at 396 (holding that the plaintiff's citizenship "does not alleviate" the special factor of national security). *See also Lebron*, 670 F.3d at 554 (noting, in case involving treatment of U.S. citizen, that "[t]he source of hesitation is the nature of the suit and the consequences flowing from it, not just the identity of the plaintiff."). Indeed, all Supreme Court cases in which the Court has precluded a *Bivens* remedy because of special factors involved U.S. citizens. *See, e.g.*, *Stanley*, 483 U.S. at 671; *Chappell*, 462 U.S. at 297.

explicit circuit precedent. As the court in *Ali* explained: "It would be difficult to devise more effective fettering of a field commander than to allow the very enemies he is ordered to reduce to submission to call him to account in his own civil courts and divert his efforts and attention from the military offensive abroad to the legal defensive at home." 649 F.3d at 773 (quoting *Eisentrager*, 339 U.S. at 779). Moreover, allowing such suits to proceed "would diminish the prestige of our commanders, not only with enemies but with wavering neutrals." *Id.*; *see also Vance*, 2012 WL 5416500 at *5 ("The Supreme Court's principal point was that civilian courts should not interfere with the military chain of command . . . ."); *Lebron*, 670 F.3d at 553 (barring on special factors grounds *Bivens* claims by detained terrorist because suit would "require members of the Armed Services and their civilian superiors to testify in court as to each other's decisions and actions" (citation and internal quotation omitted)).

Creating a new damages remedy in the context of alleged missile strikes against enemy forces in Yemen would have the same, if not greater, negative outcome on the military as in the military detention context that is now well-trodden territory in this and other circuits. These suits "would disrupt and hinder the ability of our armed forces to act decisively and without hesitation in defense of our liberty and national interests." *Ali*, 649 F.3d at 773 (citation and internal quotation omitted). To infuse such hesitation into the real-time, active-war decision-making of military officers absent authorization to do so from Congress would have profound implications on military effectiveness. This too warrants barring this new species of litigation.

Third, Plaintiffs' claims raise the specter of disclosing classified intelligence information in open court. The D.C. Circuit has recognized that "the difficulties associated with subjecting allegations involving CIA operations and covert operatives to judicial and public scrutiny" are pertinent to the special factors analysis. *Wilson*, 535 F.3d at 710. In such suits, "'even a small

chance that some court will order disclosure of a source's identity could well impair intelligence gathering and cause sources to close up like a clam.'" *Id.* (quoting *Tenet v. Doe*, 544 U.S. 1, 11 (2005)). And where litigation of a plaintiff's allegations "would inevitably require an inquiry into 'classified information that may undermine ongoing covert operations,'" special factors apply. *Wilson*, 535 F.3d at 710 (quoting *Tenet*, 544 U.S. at 11). *See also Vance*, 2012 WL 5416500 at *8 ("When the state-secrets privilege did not block the claim, a court would find it challenging to prevent the disclosure of secret information."); *Lebron*, 670 F.3d at 554 (noting that the "chilling effects on intelligence sources of possible disclosures during civil litigation and the impact of such disclosures on military and diplomatic initiatives at the heart of counterterrorism policy" are special factors); *Arar*, 585 F.3d at 576 (holding that the risk of disclosure of classified information is a special factor in the "extraordinary rendition" context).

This precedent controls here. Plaintiffs' allegations that Department of Defense and CIA officials targeted Al-Aulaqi and then "authorized and directed" a series of missile strikes in Yemen are claims which—assuming their truth as pled for purposes of this motion only—would "inevitably require an inquiry into classified information," *Wilson*, 535 F.3d at 710, as the United States has made clear in its statement of interest.[20] The Court thus should not infer a novel remedy in this context.

Lastly, litigating this suit directly implicates foreign affairs, yet another special factor

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[20] *See, e.g.*, United States' Statement of Interest at 3-4 (noting that the United States previously invoked the state secrets privilege over "information that relates to the terrorist threat posed by Anwar Al-Aulaqi, including information related to whether this threat may be 'concrete,' 'specific,' or 'imminent'"; "[i]ntelligence information concerning Anwar al-Aulaqi"; "any information concerning . . . criteria or procedures [the Department of Defense] may utilize in connection with [military operations in Yemen]"; and "any information, if it exists, that would tend to confirm or deny any allegations" regarding CIA involvement in the purported targeting of Anwar Al-Aulaqi).

under binding precedent. *See Ali*, 649 F.3d at 774 ("[T]he danger of foreign citizens' using the courts . . . to obstruct the foreign policy of our government is sufficiently acute that we must leave to Congress the judgment whether a damage remedy should exist." (quoting *Sanchez-Espinoza*, 770 F.2d at 209)). Although Plaintiffs' decedents are all U.S. citizens, and therefore the precise foreign affairs concerns detailed in *Ali* and *Sanchez-Espinoza* do not squarely arise in this case, *see Doe*, 683 F.3d at 396, without question, litigating the allegations in this case, which involve at least one foreign citizen and purported events abroad, threatens to disrupt U.S. foreign policy. *Cf. Vance*, 2012 WL 5416500 at *4 ("The [Supreme] Court has never created or even favorably mentioned a nonstatutory right of action for damages on account of conduct that occurred outside the borders of the United States.").[21]

Plaintiffs' claims, if litigated, could clearly affect our government's relations with the government of Yemen. Litigating these issues also could affect our relations with Egypt because Plaintiffs claim Defendants specifically targeted and attempted to kill an Egyptian national. *See* Compl. ¶ 37. Beyond these countries, Plaintiffs allege that the United States has conducted strikes in other countries as well. *See id.* ¶ 1. Assuming the truth of Plaintiffs' allegations, adjudication of this case could disrupt U.S. relations with these countries too. It takes little imagination to envision the repercussions on foreign relations that could be spurred by the creation of an entirely novel and discretionary damages remedy—in private civil litigation no less. Given the above separation-of-powers, national security, military effectiveness, classified information, and foreign policy concerns—and the binding precedent on these issues—the Court should decline to create a remedy for Plaintiffs' claims in this novel context.

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[21] Indeed, even Congress's express authorization of damages actions against the United States, the Federal Tort Claims Act, 28 U.S.C. §§ 1346(b), 2401, 2671-80, does not allow for claims arising from injuries occurring abroad. *Id.* § 2680(k).

IV. Defendants Are Entitled to Qualified Immunity.

In this suit, Plaintiffs seek money damages from the personal resources of individual federal officials. The Supreme Court has long recognized that such personal-capacity suits "entail substantial social costs, including the risk that fear of personal monetary liability and harassing litigation will unduly inhibit officials in the discharge of their duties." *Anderson v. Creighton*, 483 U.S. 635, 639 (1987). In light of these concerns, government officials performing discretionary functions are protected by qualified immunity and cannot be liable unless their actions violate "clearly established statutory or constitutional rights of which a reasonable person would have known." *Harlow v. Fitzgerald*, 457 U.S. 800, 818 (1982).

For a right to be clearly established, the "contours" of the right "must be sufficiently clear that a reasonable officer would understand that what he is doing violates that right." *Anderson*, 483 U.S. at 640. The Court has "repeatedly" instructed lower courts "not to define clearly established law at a high level of generality." *Ashcroft v. Al-Kidd*, 131 S. Ct. 2074, 2084 (2011). Instead, the law must be defined "in a more particularized, and hence more relevant, sense." *Anderson*, 483 U.S. at 640. In essence, qualified immunity contains a "fair notice" requirement. *Hope v. Pelzer*, 536 U.S. 730, 739 (2002). It is meant to protect all but the "plainly incompetent" or those who "knowingly violate the law." *Malley v. Briggs*, 475 U.S. 335, 341 (1986). And although guiding precedent need not be directly on point for a right to be clearly established, "existing precedent must have placed the . . . constitutional question *beyond debate*." *Al-Kidd*, 131 S. Ct. at 2083 (emphasis added). Therefore, to overcome a qualified immunity defense, a complaint must plead two things: that a constitutional right was violated, and that the contours of the right violated were clearly established "beyond debate." *Id.*

When addressing a qualified immunity defense, courts exercise their "sound discretion"

in deciding whether first to consider the constitutional question, or to forego the constitutional inquiry altogether and proceed immediately to the second prong. *Pearson*, 555 U.S. at 236. Under the longstanding principle of constitutional avoidance, courts should resolve a case on clearly-established grounds alone whenever possible. *See Ashwander v. TVA*, 297 U.S. 288, 346-47 (1936) (Brandeis, J., concurring). Indeed, the "usual adjudicatory rules suggest that a court *should* forbear" resolving the constitutional issue in qualified immunity cases. *Camreta v. Greene*, 131 S. Ct. 2020, 2031 (2011). The D.C. Circuit has clearly heeded this counsel, noting that the earlier "*Saucier* procedure" of deciding the constitutional issue first "is not appropriate in most cases." *Ali*, 649 F.3d at 773 (proceeding directly to clearly-established prong in dismissing claims directly implicating national security); *see also Rasul*, 563 F.3d at 530 (same).[22]

Beyond the principle of constitutional avoidance, the Supreme Court has provided additional guideposts for when courts should proceed directly to the second prong. For example, in cases where it is "plain that a constitutional right is not clearly established," courts should resolve the case on that basis. *Pearson*, 555 U.S. at 237. So too where a court can "rather quickly and easily decide" there was no clearly established violation. *Id.* at 239. Also, where the constitutional inquiry is highly fact-dependent—and, as is often the case at the pleadings stage, the factual record is scant—a decision on the constitutional issue will provide "little guidance" for future cases and should be avoided. *Id.* at 237 (citations omitted).

These guideposts all apply here. There is no precedent decided in the unique and extraordinary circumstances alleged here: the purported targeting by military and intelligence officers, in the course of waging war, of a U.S. citizen abroad who was declared a leader of an

[22] Under *Saucier v. Katz*, 533 U.S. 194 (2001), courts were required to address the constitutional issue first before proceeding to the question of whether the alleged right was clearly established. The Supreme Court abandoned this requirement in *Pearson*.

armed terrorist group. Nor does any body of case law involve the specific context of the death of U.S. citizens abroad as the unintended result of such alleged operations. Accordingly, regardless of the particular constitutional provision at issue, it can "rather quickly and easily" be determined that the contours of any constitutional right allegedly violated were not clearly established, let alone so clearly established as to *require* officials to disregard the legal analysis Plaintiffs allege the Executive Branch conducted. *See* Compl. ¶ 25 (alleging the Department of Justice provided "legal justifications" for the purported targeting of Anwar Al-Aulaqi). Moreover, avoiding the constitutional question is appropriate here because deciding abstract principles based on sparse pleadings would provide "little guidance" to courts in what would ultimately be a highly fact-dependent inquiry. *See Scott v. Harris*, 550 U.S. 372, 383 (2007) (noting that resolution of Fourth Amendment claim requires court to "slosh" its way "through the factbound morass of 'reasonableness'"); *County of Sacramento v. Lewis*, 523 U.S. 833, 850 (1998) ("What we have said of due process in the procedural sense is just as true here: . . . 'Asserted denial is to be tested by an appraisal of the totality of facts in a given case.'" (citation omitted)). Therefore, each principle warrants proceeding directly to the second prong of the qualified immunity analysis.[23]

A. Plaintiffs fail to allege the violation of a clearly established right.

The three decedents in this case are U.S. citizens allegedly killed abroad during armed conflict. Given the unique and extraordinary context of these allegations, the extent to which particular Fourth and Fifth Amendment rights apply to decedents simply is not clearly established. Context is "a potentially recurring scenario that has similar legal and factual

[23] Furthermore, because binding circuit precedent on both the political question doctrine and special factors demonstrates that this case should be dismissed, *see supra* Parts II-III, the above guidance with respect to the lack of clarity in the governing legal principles applies with even more force. Accordingly, if this Court determines it needs to reach qualified immunity at all, it should proceed directly to the clearly established prong.

components." *Arar*, 585 F.3d at 572. *See also Mirmehdi*, 689 F.3d at 981. The context here is unique for a number of reasons: it is an alleged (1) military and intelligence action; (2) abroad; (3) during the course of ongoing armed conflict; (4) targeting a U.S. citizen declared a leader of an armed terrorist group (and Al-Banna, a non-citizen enemy). Thus, an analysis of the extraterritorial question presented requires this Court to determine whether, and to what extent, to judicially enforce the particular Fourth and Fifth Amendment protections that may apply to a U.S. citizen allegedly targeted and killed—or inadvertently killed—by a purported missile strike abroad on members of an organization against which the political branches have authorized the use of all necessary and appropriate force. There are no cases holding such conduct illegal, let alone illegal "beyond debate." *Al-Kidd*, 131 S. Ct. at 2083. To the extent the Supreme Court has discussed the constitutional rights of U.S. citizens abroad, it has generally done so in the context of custody, detention, or trials—not in the active battlefield. *See, e.g.*, *Hamdi v. Rumsfeld*, 542 U.S. 507 (2004) (plurality) (detention); *Reid v. Covert*, 354 U.S. 1 (1957) (plurality) (trials).

The absence of case law on point is notable. The United States military killed thousands of U.S. citizens during the Civil War, and also likely killed U.S. citizens fighting abroad as part of enemy forces during more recent wars, such as World War II. *Cf. Ex parte Quirin*, 317 U.S. 1, 37-38 (1942). Not only have no courts adjudicated the constitutional claims of such casualties, there is not even a judicially recognized test—as a matter of constitutional law—that is accepted to apply in this context. And there would be sound reasons to conclude that no test the Supreme Court has articulated to date—in either the Fourth or Fifth Amendment arenas—adequately accounts for the extremely weighty government interests during armed conflict abroad against declared enemies. Thus, the extraterritorial application of the specific provisions Plaintiffs invoke in this context is not clearly established. *Cf. Reid*, 354 U.S. at 75 ("[T]he question of

which specific safeguards of the Constitution are appropriately to be applied in a *particular context* overseas can be reduced to the issue of what process is 'due' . . . in the *particular circumstances* of a *particular case*." (emphasis added)). Moreover, no court has explained whether or how the Fourth and Fifth Amendments apply to operations involving armed force in a foreign country. Given the unique and extraordinary circumstances alleged by Plaintiffs' complaint, and the standards for qualified immunity, it is impossible to avoid the conclusion that any rights decedents had under the Fourth and Fifth Amendments were not clearly established. Thus, qualified immunity applies.

B. Decedents' Fourth Amendment rights were not clearly established.

In Count II of Plaintiffs' complaint, Plaintiffs allege each decedent was unconstitutionally "seized" in violation of the Fourth Amendment. Compl. ¶ 42. Because the Supreme Court has suggested that traditional notions of the Fourth Amendment may not apply in the context of the conduct of armed conflict abroad, and because sufficiently analogous case law in the lower courts is wholly lacking, the scope of any Fourth Amendment rights of decedents was not clearly established. To the extent the Supreme Court has intimated anything in this extraterritorial context, it has suggested at most that Fourth Amendment protections would be limited. In *United States v. Verdugo-Urquidez*, 494 U.S. 259 (1990), the Court noted that application of the Fourth Amendment in the context of military action abroad to protect national security "could significantly disrupt the ability of the political branches to respond to foreign situations involving our national interest." *Id.* at 273-74. *Cf. Hamdi*, 542 U.S. at 534 (plurality) (noting that "initial captures on the battlefield" need not receive the due process protections required for U.S. citizens in the context of lengthy military detention). Certainly, nothing in the existing body of precedent clearly establishes that routine application of the Fourth Amendment to the conduct

alleged—at least to the same extent and in the same manner it applies in the domestic law-enforcement context—would be workable. *Cf. Verdugo*, 494 U.S. at 278 (Kennedy, J., concurring) (noting that the "need to cooperate with foreign officials" and the implications for military actions abroad, *inter alia*, make it "impracticable and anomalous" to apply the Fourth Amendment to searches abroad of aliens without property or presence in the United States).

Moreover, most of the scant case law on the application of the Fourth Amendment to U.S. citizens abroad involves searches—not seizures.[24] The only case addressing the "seizure" of a U.S. citizen in an active theater of war—*Kar v. Rumsfeld*—is inapposite. There, Iraqi troops detained plaintiff at a checkpoint after finding suspicious items in the taxi he travelled in and transferred him to U.S. forces. *Kar*, 580 F. Supp. 2d at 85-86. The *Kar* plaintiff did not challenge his initial arrest and detention. *Id.* at 84. Rather, he challenged acts of U.S. officials after they had custody of him. Even then, the court found that plaintiff's Fourth and Fifth Amendment rights were not clearly established. *Id.* at 85-86. Thus, *Kar* provides no guidance for the seizures alleged here—alleged missile strikes at designated targets from RPAs circling above Yemen in the context of an ongoing armed conflict. Given *Verdugo*'s intimation of the Fourth Amendment's limited application, the lack of other case law providing relevant guidance, and the unique context of Plaintiffs' claims, the contours of any Fourth Amendment protections here were not clearly established.

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[24] *See Gillars v. United States*, 182 F.2d 962, 973-74 (D.C. Cir. 1950) (assuming without deciding that Fourth Amendment protections applied to warrantless search of citizen's apartment in post-war, occupied Germany in holding that no violation occurred); *Best v. United States*, 184 F.2d 131, 140 (1st Cir. 1950) (finding reasonable warrantless search of citizen's apartment in post-war, occupied Austria); *Kar v. Rumsfeld*, 580 F. Supp. 2d 80, 85 (D.D.C. 2008) (applying Fourth Amendment to arrest and detention of citizen by military in wartime Iraq); *United States v. Bin Laden*, 126 F. Supp. 2d 264, 277 (S.D.N.Y. 2000) (applying Fourth Amendment to warrantless search of citizen's home in Kenya, but adopting exception to warrant requirement where search aimed at foreign intelligence gathering against foreign powers and their agents).

Plaintiffs, then, are left to argue that this Court should import a Fourth Amendment standard from the domestic law enforcement context and apply it to the alleged facts of this case. But the very process of importing such a standard for the first time into a unique context *itself* makes the law not clearly established. Finally, even were this Court to rely on domestic Fourth Amendment law enforcement case law by analogy, the case law that is arguably most analogous from the domestic context does not (as explained below) warrant the finding of a constitutional violation, let alone a clearly established one.

C. Assuming the Fourth Amendment extends to this unique context, Plaintiffs fail to state a violation.

The Fourth Amendment protects "the people" from "unreasonable . . . seizures." U.S. Const. amend. IV. The burden is upon Plaintiffs to state a Fourth Amendment claim. To state such a claim, Plaintiffs must show both that a "seizure" of each decedent occurred, and that it was "unreasonable." In the domestic law-enforcement context, a "seizure" only occurs when government action terminates freedom of movement "*through means intentionally applied*." *Brower v. County of Inyo*, 489 U.S. 593, 597-99 (1989) (holding driver of car that collided with police roadblock was seized). Under *Brower*, the "means intentionally applied" must terminate the movement of the *intended* target to constitute a seizure. *See Emanuel v. District of Columbia*, 224 F. App'x 1, 2 (D.C. Cir. 2007) ("There is no evidence that Officer Long intended to shoot Emanuel rather than the plainclothes officer, as a valid [Fourth Amendment] claim requires." (citing *Brower* and other cases)). *Cf. Livermore v. Lubelan*, 476 F.3d 397, 404 (6th Cir. 2007) (analyzing claim of decedent killed by police sniper under the Fourth Amendment).

Because the context of Plaintiffs' claims is unique, however, there is no clear body of case law to apply to the Fourth Amendment claims here. Courts have repeatedly held that law enforcement officials who shoot at fleeing or resisting suspects and accidently strike bystanders

do not seize those bystanders.[25] To the extent any traditional domestic law-enforcement cases apply by analogy, those cases provide the closest analogy and foreclose Abdulrahman Al-Aulaqi's and Samir Khan's unique Fourth Amendment claims. As pled, the alleged targets were Anwar Al-Aulaqi and Al-Banna. *See* Compl. ¶¶ 31, 37. Based on these allegations, Abdulrahman Al-Aulaqi was a bystander unintentionally struck by the alleged launch against Al-Banna, and Samir Khan was a bystander unintentionally struck by the alleged launch against Al-Aulaqi. Assuming the Fourth Amendment applies here in the same manner it does in the domestic law-enforcement context, no seizure of these individuals would have occurred, and any Fourth Amendment reasonableness inquiry regarding them is inapplicable. And to the extent that the above analogy suffers because of the extraordinary context of Plaintiffs' claims, that is a detriment to Plaintiffs, who carry the burden to state a claim.

As for Anwar Al-Aulaqi, Plaintiffs cannot establish that his alleged seizure—assuming it occurred as claimed—was as a matter of law unreasonable. Any reasonableness inquiry requires a "careful balancing of the 'nature and quality of the intrusion on the individual's Fourth Amendment interests' against the countervailing governmental interests at stake." *Graham v. Connor*, 490 U.S. 386, 396 (1989) (citation omitted). The proper application of this "careful balancing" requires a focus on "the facts and circumstances of each particular case." *Id.* at 396. Relevant "facts and circumstances" include the severity of the crime at issue, the threat an individual poses, and whether that individual is evading arrest through flight. *Id.* Even as Plaintiffs allege the facts to be, Anwar Al-Aulaqi's seizure cannot be said to be unreasonable.

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[25] *See, e.g.*, *Emanuel*, 224 F. App'x at 2 (no seizure of bystander killed by stray bullet during arrest of suspect); *Childress v. City of Arapaho, Okla.*, 210 F.3d 1154, 1157 (10th Cir. 2000) (no seizure of mother and child held hostage who were accidentally shot during high-speed chase of hostage takers); *Claybrook v. Birchwell*, 199 F.3d 350, 359 (6th Cir. 2000) (no seizure of bystander hit by stray bullet during gun battle with suspect); *Medeiros v. O'Connell*, 150 F.3d 164, 168 (2d Cir. 1998) (no seizure of hostage hit by stray bullet during rescue attempt).

A seizure satisfies this balancing test so long as it is "objectively reasonable." *Harris*, 550 U.S. at 381. Even in the domestic law-enforcement context, when lethal force is used, no "magical on/off switch" exists to trigger "rigid preconditions" for when such force may be reasonable. *Id.* at 382. Instead, the objective reasonableness of a specific use of force "must be judged from the perspective of a reasonable officer on the scene," and not with "the 20/20 vision of hindsight." *Graham*, 490 U.S. at 396. Also, a reasonableness determination must allow for the reality that government officials "are often forced to make split-second judgments—in circumstances that are tense, uncertain, and rapidly evolving." *Id.* at 397.

This last point is particularly relevant here, where Plaintiffs allege that military and intelligence officials purportedly directed a missile strike against a vehicle carrying a declared leader of an armed enemy group in a foreign country. The calculus of whether to strike, when the next opportunity to strike may arise, and how many possible bystander casualties could occur in this alleged strike versus a later strike—to name but a few considerations—is undoubtedly "tense" and involves "uncertain" and "rapidly evolving" variables.

Given the information the United States published supporting its designation of Al-Aulaqi as an SDGT based on his leadership role in AQAP, there are a number of factors supporting the conclusion that the alleged missile strike, as pled in the complaint, was not constitutionally unreasonable. First, in terms of the severity of the conduct at issue, Anwar Al-Aulaqi had played a key role in setting the strategic direction of AQAP and had prepared and provided instructions to another terrorist who attempted to bring down an airliner filled with passengers while over the United States. *See* SDGT Designation. He also recruited individuals to join AQAP and helped to focus that terrorist organization's sights on attacking U.S. interests. *See*

id.; *see also* Clapper Decl. ¶ 14.[26] The objective severity of this conduct as understood by U.S. officials is plain. Second, regarding the threat Anwar Al-Aulaqi posed, the United States possessed information indicating that he had already directed an attack on a civilian airliner. *See* SDGT Designation. If successful, that operation would undoubtedly have cost all the passengers and crew on the flight their lives. Under such circumstances, the complaint does not "plausibly suggest" it would have been objectively unreasonable to have viewed Anwar Al-Aulaqi as an enemy and an active threat to the lives of U.S. citizens. *Iqbal*, 556 U.S. at 681.[27] Third, it would have been equally and objectively reasonable to conclude that surrender was not a viable option. As this district noted, Anwar Al-Aulaqi had stated in a video interview that he "will never surrender." *Al-Aulaqi*, 727 F. Supp. 2d at 11. *See also* Clapper Decl. ¶ 16 (stating that Anwar Al-Aulaqi "declares he has no intention of turning himself in to America").

As the Supreme Court stated in *Tennessee v. Garner*—another domestic law-enforcement case—if there is "probable cause to believe that [a suspect] has committed a crime involving the infliction or threatened infliction of serious physical harm, deadly force may be used if necessary to prevent escape." 471 U.S. 1, 11 (1985). The alleged strike on Anwar Al-Aulaqi at the very least fits that example. And again, to the extent that case law is not directly on point, it is

[26] Defendants reiterate that the information in the Clapper Declaration is used not to establish that information in a factual sense. Rather, the Court can take judicial notice of the government's understanding, *i.e.*, "the perspective of" reasonable officials "on the scene" at the time of the alleged strike, which informs the qualified immunity inquiry. *Graham*, 490 U.S. at 396. The complaint, in any event, does not dispute these assertions. Nor could Plaintiffs plausibly deny the United States' stated *understanding* regarding Al-Aulaqi's activities—even if they sought to dispute, as a matter of fact, particular pieces of evidence that supported that understanding.

[27] Were this Court to seek to delve into the particulars of the United States' knowledge regarding the threat Anwar Al-Aulaqi posed, the state secrets privilege could be implicated. *See* United States Statement of Interest. This possible outcome is all the more reason why this Court should avoid the constitutional issue and instead should resolve this case on any of the numerous other grounds presented in this motion.

Plaintiffs' burden to state a claim in the first instance. Accordingly, Plaintiffs cannot establish that the alleged seizure of Anwar Al-Aulaqi violated the Fourth Amendment.

D. Decedents' Fifth Amendment rights were not clearly established.

In Count I of their complaint, Plaintiffs allege that decedents' Fifth Amendment due process rights were violated when Defendants allegedly authorized and directed their subordinates to use lethal force. Compl. ¶ 41. Legal precedent provides almost no guidance on whether and to what extent the Fifth Amendment applies extraterritorially in the battlefield context presented. The very question of the extent to which the Fifth Amendment applies abroad in particular circumstances "is one of judgment, not of compulsion." *Reid*, 354 U.S. at 75. As Justice Harlan explained, the question of "which specific safeguards" of the Fifth Amendment "are appropriately to be applied in a particular context overseas can be reduced to the issue of what process is 'due' . . . in the particular circumstances of a particular case." *Id.* No cases clearly state what test to apply in considering whether specific provisions of the Fifth Amendment are judicially enforceable abroad in the "particular circumstances" alleged here. These circumstances all demonstrate that no Defendant could have had "fair notice" of the parameters that would have made any of their alleged actions clearly unconstitutional. *Camreta*, 131 S. Ct. at 2031.

The few cases that do address the due process rights of citizens abroad—*Hamdi v. Rumsfeld*, *Reid v. Covert*, and *Kar v. Rumsfeld*—involve entirely different "particular circumstances." All three cases involved the detention of citizens—not the alleged targeting of an AQAP leader or the unintended death of citizens in the course of an armed conflict. *See Hamdi*, 542 U.S. at 509 (considering due process rights of U.S. citizen captured abroad and detained in United States); *Reid*, 354 U.S. at 3-5 (considering due process rights of non-military

personnel subjected to courts martial abroad); *Kar*, 580 F. Supp. 2d at 85-86 (considering due process rights of U.S. citizen detained in Iraq). And again, there are good reasons to think that tests as to any process constitutionally due would operate differently when the United States is a custodian of a military or security detainee as compared to when the United States engages in alleged battlefield actions—a conclusion underscored by the Supreme Court's observation in *Hamdi* that the parties to that case agreed that the "process" due there did not apply to "initial captures." 542 U.S. at 534. Lastly, the *Hamdi* Court noted that the process it outlined "meddles little, if at all, in the strategy or conduct of war." *Id.* at 535. The case law thereby leaves unanswered the question of what process may be due to citizens in the particular context of Plaintiffs' claims—alleged missile strikes against enemy forces in a foreign country in the course of active hostilities.[28]

Along those lines, this particular context provides further confirmation that the contours of any due process rights of the decedents were not clearly established. As the Supreme Court has noted: "In the face of an actively hostile enemy, military commanders necessarily have broad power over persons on the battlefront." *Reid*, 354 U.S. at 33. Accordingly, "the extraordinary circumstances present in an area of actual fighting have been considered sufficient" to allow for punishing through military courts certain civilians accompanying troops. *Id.*[29] Because Plaintiffs'

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[28] Once active hostilities have begun, certainly citizenship does not immunize one from becoming an enemy belligerent. *See Ex parte Quirin*, 317 U.S. at 37-38 ("Citizens who associate themselves with the military arm of the enemy government, and with its aid, guidance and direction [engage in] hostile acts are enemy belligerents."). Nor does citizenship relieve one of the consequences of belligerency. *See id.* (holding that U.S. citizen associated with German forces during World War II could be subjected to military tribunal); *see also Hamdi*, 542 U.S. at 523 (discussing *Ex parte Quirin*).

[29] *Cf. Boumediene*, 553 U.S. at 770 (acknowledging that the context of "an active theater of war" could diminish the level of Suspension Clause rights available to detainees); *Al Maqaleh v. Gates*, 605 F.3d 84, 97-99 (D.C. Cir. 2010) (refusing to extend the Suspension Clause to aliens

claims as alleged present those precise "extraordinary circumstances," the extent of judicially enforceable due process rights in the context pled is wholly unclear.

In sum, the threshold question of which, whether, and to what extent Fifth Amendment due process rights apply abroad under the circumstances alleged is simply unclear. The very context of Plaintiffs' claims—the conduct of hostilities in an armed conflict—means that the precise contours of any due process rights of the decedents were not clearly delineated. *See Padilla v. Yoo*, 678 F.3d 748, 761-62 (9th Cir. 2012). And, as with the Fourth Amendment claim, even if this Court were to borrow from an otherwise accepted standard for the Fifth Amendment in this novel context, the very borrowing of standards would make any right not clearly established. Finally, even assuming the requisite "test" were clearly established, which it is not, its application to the extraordinary and unique circumstances of this case does not, for the reasons explained below, state a Fifth Amendment claim and so such a claim certainly could not be clearly established. Qualified immunity thus applies, and this Court should dismiss Plaintiffs' claims.

E. Assuming the Fifth Amendment extends to this unique context, Plaintiffs have failed to allege facts showing a due process violation.

To the extent Plaintiffs seek to bring a substantive due process claim on behalf of Anwar Al-Aulaqi, a point on which the complaint is unclear, that claim fails because such a claim would be properly addressed under the Fourth Amendment. *See supra* Part IV.C. As the Court in *Graham* held, claims that government officials used excessive force in seizing a citizen "should be analyzed under the Fourth Amendment and its 'reasonableness' standard, rather than under a 'substantive due process' approach." *Graham*, 490 U.S. at 395. This is because the Fourth

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detained by the military in Afghanistan because of the "practical obstacles" inherent in applying that clause in an active theater of war).

Amendment "provides an explicit textual source" of protection against unreasonable seizures, in contrast to the "more generalized notion of 'substantive due process.'" *Id.* Accordingly, any substantive due process claim by Anwar Al-Aulaqi fails as a matter of law.

Even if Samir Khan and Abdulrahman Al-Aulaqi could raise colorable substantive due process claims in light of the fact that they were not "seized" for Fourth Amendment purposes, the allegations in the complaint fail to state a substantive due process violation as to them. The allegation that Defendants failed to "take all feasible measures to protect bystanders," Compl. ¶ 40, sounds in negligence. Negligence does not give rise to a due process claim—substantive or procedural. *See Davidson v. Cannon*, 474 U.S. 344, 348 (1986) ("[T]he protections of the Due Process Clause, whether procedural or substantive, are just not triggered by lack of due care . . . .").

Moreover, a substantive due process claim requires allegations of conduct that "shocks the conscience," which is generally defined as "conduct intended to injure in some way unjustifiable by any government interest." *Lewis*, 523 U.S. at 846, 849. Plaintiffs' complaint provides "no reason to believe" Defendants' purported actions met that standard. *Lewis*, 523 U.S. at 849, 855 (dismissing substantive due process claim based on unintentional death of bystander in domestic law enforcement context). Nor, in the context of alleged missile strikes targeting AQAP operatives abroad in the course of an armed conflict, would there be any plausible basis to second-guess the strikes' alleged purpose, *see* Compl. ¶ 1, or to otherwise conclude that the alleged actions were unrelated to a legitimate government interest. *See Iqbal*, 556 U.S. at 678. Accordingly, the substantive due process claims fail.

Lastly, Plaintiffs fail to state a procedural due process claim. Plaintiffs make no allegations that either Samir Khan or Abdulrahman Al-Aulaqi was subjected to any

unconstitutional "process" as they were not alleged to have been "targeted." Any procedural due process claim on behalf of Anwar Al-Aulaqi also "suffers from a fundamental flaw." *Elkins v. District of Columbia*, 690 F.3d 554, 561 (D.C. Cir. 2012). Procedural due process "is flexible." *Morrissey v. Brewer*, 408 U.S. 471, 481 (1972). It warrants those procedural protections that "the particular situation demands." *Id.* Moreover, the "core" of due process is "protection against arbitrary action." *Lewis*, 523 U.S. at 845. *See also Wolff v. McDonnell*, 418 U.S. 539, 558 (1974) ("The touchstone of due process is protection of the individual against arbitrary action of government."). A complaint alleging a procedural due process violation "must suggest 'what sort of process is due.'" *Elkins*, 690 F.3d at 561 (citation omitted). *See also Doe by Fein v. District of Columbia*, 93 F.3d 861, 870 (D.C. Cir. 1996) ("[A] procedural due process claim requires the plaintiff to identify the process that is due."). Plaintiffs have not done so.

In any event, under any reasonable construction of procedural due process and on the facts alleged, Anwar Al-Aulaqi's claim fails. The Supreme Court has recognized that procedural due process rights may be diminished in a battlefield situation. *See Hamdi*, 542 U.S. at 534 (noting that "initial captures on the battlefield need not receive the process" afforded to longer-term, U.S. citizen detainees). *See also Reid*, 354 U.S. at 33 (noting that "the extraordinary circumstances present in an area of actual fighting have been considered sufficient" to allow for diminished procedural protections in that area). Such a construct only makes sense: to give enemies "notice" of battlefield attacks in some sort of traditional procedural due process manner would surely permit them to evade an attack and thereby continue their hostile activity.

Anwar Al-Aulaqi was a declared leader of AQAP who had publicly announced "he 'will never surrender.'" *See Al-Aulaqi*, 727 F. Supp. 2d at 10-11. The complaint itself identifies an "executive process" through which it alleges decisions regarding any missile strike on Anwar Al-

Aulaqi were reached—albeit a "closed" one. Compl. ¶ 24.[30] And the Executive has "regularly inform[ed]" members of Congress regarding any missile strikes. RPA Speech at 5.

Where an individual identified as a leader of AQAP orchestrated a failed terrorist attack on a U.S.-bound airliner but remains abroad, evading capture, and declares his refusal to submit to U.S. authorities, nothing suggests that the "closed" executive process that the complaint alleges the government undertook to decide what particular threat he posed and whether to use lethal force would constitute arbitrary government action. *Cf. Calero-Toledo v. Pearson Yacht Leasing Co.*, 416 U.S. 663, 680 (1974) (holding that seizure, without prior notice and hearing, of yacht in "extraordinary situation" was constitutional). To the extent Plaintiffs are suggesting that—under the facts alleged and in the extraordinary context of purported missile strikes abroad against enemies—Anwar Al-Aulaqi was constitutionally entitled to *judicial* process to determine the threat he posed and how the United States should respond to that threat, that claim must fail, both as a historical and a practical anomaly. Indeed, in this weighty and unique context, "[w]hen it comes to a decision by the head of the state upon a matter involving its life," such a situation of national danger "warrants the substitution of executive process for judicial process." *Moyer v. Peabody*, 212 U.S. 78, 85 (1909). Accordingly, Plaintiffs' due process claims fail.

V. The Bill of Attainder Does Not Apply to Executive Action.

Plaintiffs' bill of attainder claim fails because the Bill of Attainder Clause applies to bills: legislative acts—not executive ones. That clause is found in Article I of the Constitution, the

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[30] That an executive process exists, as alleged, with respect generally to decisions to launch missile strikes of the sort claimed comports with the statements by a U.S. official, which Plaintiffs refer to, *see supra* note 12, that any proposed targeting by the government of an individual undergoes a "careful review," which may include an evaluation by "the very most senior officials in our government." RPA Speech, at 4 (describing the process as "rigorous"). While the particulars of any alleged process surrounding the purported targeting of terrorists like Anwar Al-Aulaqi may be subject to the state secrets privilege, that does not change the fact that, as alleged, a process did exist.

article addressing the powers of Congress. U.S. const. art. I., § 9 cl. 3. *See also United States v. Lovett*, 328 U.S. 303, 315 (1946) ("A bill of attainder is a legislative act which inflicts punishment without a judicial trial." (quotation and citation omitted)). Lower courts have uniformly refused to apply the Bill of Attainder Clause to Executive Branch acts. *See Paradissiotis v. Rubin*, 171 F.3d 983, 988 (5th Cir. 1999) ("No circuit court has yet held that the bill of attainder clause . . . applies to regulations promulgated by an executive agency."). *See also Global Relief Found., Inc. v. O'Neill*, 315 F.3d 748, 755 (7th Cir. 2002); *Walmer v. U.S. Dep't of Defense*, 52 F.3d 851, 855 (10th Cir. 1995). Even if this Court determines the Bill of Attainder Clause somehow applies, special factors would preclude inferring a private right of action under that clause in this context for the same reasons no Fourth or Fifth Amendment action should be inferred. *See supra* Part III. In any event, Defendants are certainly entitled to qualified immunity as no such claim could be clearly established. *See supra* Part IV.A. Accordingly, that claim fails.

CONCLUSION

The significance of the use of missile strikes abroad as a counterterrorism tool in armed conflict to secure our national defense, and the political considerations that frame the debate on the appropriateness of their use in particular circumstances, cannot be denied. Nor can it be denied that to adjudicate this suit in a judicial forum raises a number of distinct political questions and directly implicates multiple special factors under binding precedent. In any event, Plaintiffs cannot hold Defendants individually liable for the alleged violation of constitutional rights—rights the contours of which were by no means clearly established—in the course of purported missile strikes against terrorists overseas. Accordingly, this Court should dismiss Plaintiffs' complaint, and should leave the wide-ranging policy debate inherent to the conduct of war to the political branches.

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