

**Statement by Harold Hongju Koh  
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before the Senate Foreign Relations Committee  
Regarding  
AUTHORIZATION FOR USE OF MILITARY FORCE  
AFTER IRAQ AND AFGHANISTAN**

**May 21, 2014**

Thank you, Mr. Chairman and Members of the Committee, for inviting me before this Committee today.

I am Sterling Professor of International Law at the Yale Law School, where since 1985, I have taught international law, national security law, and the law of U.S. foreign relations.<sup>1</sup> For ten years, I served in the U.S. Government, most recently from 2009 to 2013 as Legal Adviser of the U.S. Department of State.<sup>2</sup> Having worked daily during my time as Legal Adviser on counterterrorism issues, I appear today to support the President's commitment, stated in his important speech at the National Defense University last May, to "continue to fight terrorism without keeping America on a perpetual wartime footing."<sup>3</sup>

When President Obama took office, the United States was engaged in congressionally authorized armed conflicts in Iraq, Afghanistan, and against Al Qaeda and its co-belligerents. Since then, the Iraq conflict has ended.<sup>4</sup> The President has declared his intent to withdraw combat troops from Afghanistan by the end of this calendar year.<sup>5</sup>

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<sup>1</sup> My *curriculum vitae* is attached as an appendix to this testimony. I am grateful to Hank Moon and Mara Revkin of the Yale Law School for their help in preparing this testimony. Although I sit on a law school faculty as well as on the boards of several organizations, the views expressed here are mine alone, not those of my colleagues or of any of the institutions with which I am affiliated.

<sup>2</sup> I previously served in the Clinton Administration as Assistant Secretary of State for Democracy, Human Rights and Labor from 1998-2001, and in the Reagan Administration as Attorney-Adviser at the Office of Legal Counsel of the U.S. Department of Justice from 1983-85.

<sup>3</sup> Remarks by the President at the National Defense University, White House Office of the Press Secretary (May 23, 2013) [hereinafter Obama NDU Speech], *available at* <http://www.whitehouse.gov/the-press-office/2013/05/23/remarks-president-national-defense-university>.

<sup>4</sup> See Authorization for Use of Military Force Against Iraq Resolution of 2002, Pub. L. No. 107-243, 116 Stat. 1498. On August 31, 2010, President Obama declared an end to the combat mission in Iraq. See Helene Cooper & Sheryl Gay Stolberg, *Obama Declares an End to Combat Mission in Iraq*, N.Y. TIMES, Aug. 31, 2010, <http://www.nytimes.com/2010/09/01/world/01military.html>.

<sup>5</sup> On December 1, 2009, President Obama announced his intent to withdraw troops from Afghanistan. See The White House Office of the Press Sec'y, Remarks by the President in Address to the Nation on the Way Forward in Afghanistan and Pakistan (December 1, 2009), *available at* <http://www.whitehouse.gov/the-press-office/remarks-president-address-nation-way-forward-afghanistan-and-pakistan>. The number of U.S. troops remaining in Afghanistan after the planned drawdown could drop below the originally projected figure of 10,000, reflecting "a belief among White House officials that Afghan security forces have evolved into a robust enough force to contain a still-potent Taliban-led insurgency." Missy Ryan & Arshad Mohammed, *U.S. Force in Afghanistan May be Cut to*

Today, let me explain why, after Iraq and Afghanistan, this country's counterterrorism policy should include three important and achievable elements of the President's NDU proposal: ending the war with Al Qaeda and its co-belligerents; repealing the Authorization for Use of Military Force (AUMF) enacted on September 18, 2001;<sup>6</sup> and prior to repeal, narrowing the AUMF's mandate. I agree with the President first, that the armed conflict that began against Al Qaeda and its co-belligerents nearly thirteen years ago, "like all wars, must end;" second, that Congress should aim to "ultimately repeal, the mandate" of the AUMF; and third, that in the interim, Congress should explore ways to narrow the AUMF rather than "to expand the AUMF's mandate further."<sup>7</sup>

### I. Ending the War with Al Qaeda and its Co-Belligerents

In four months time, this coming September, the United States' armed conflict with Al Qaeda will turn thirteen years old. That is nine years longer than either the Civil War or World War II, and nearly five years longer than the Revolutionary War. As I argued last year in a speech at Oxford, this conflict has become so protracted that it has come to feel like a "Forever War."<sup>8</sup> It has changed the nature of our foreign policy, consumed our new Millennium, and made it hard to remember what the world looked like before September 11.

In his NDU speech last May, the President summarized why we should reject indefinite war in favor of an "exit strategy" to bring this protracted conflict with Al Qaeda, like all wars, to an end:

[T]he choices we make about war can impact—in sometimes unintended ways—the openness and freedom on which our way of life depends. And *that is why I intend to engage Congress about the existing Authorization to Use Military Force, or AUMF, to determine how we can continue to fight terrorism without keeping America on a perpetual wartime footing...* The Afghan war is coming to an end. Core al Qaeda is a shell of its former self. Groups like AQAP must be dealt with, but in the years to come, not every collection of thugs that label themselves al Qaeda will pose a credible threat to the United States. Unless we discipline our thinking, our definitions, our actions, we may be drawn into more wars we don't need to fight, or continue to grant Presidents unbound powers more suited for traditional armed conflicts between nation states.<sup>9</sup>

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*Less Than 10,000 Troops*, REUTERS, Apr. 21, 2014, <http://www.reuters.com/article/2014/04/21/us-usa-afghanistan-idUSBREA3K1DS20140421>.

<sup>6</sup> See Authorization for Use of Military Force, Pub. L. No. 107-40, 115 Stat. 224, 224 (2001) (codified at 50 U.S.C. § 1541 note) [hereinafter 2001 AUMF] ("That the President is authorized 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.").

<sup>7</sup> Obama NDU Speech, *supra* note 3.

<sup>8</sup> See Harold Hongju Koh, *How to End the Forever War, Speech at Oxford Union* (May 7, 2013) [Koh Oxford Speech], available at <http://www.lawfareblog.com/wp-content/uploads/2013/05/2013-5-7-corrected-koh-oxford-union-speech-as-delivered.pdf>.

<sup>9</sup> See Obama NDU Speech, *supra* note 3 (emphasis added).

Last October, I argued that despite public skepticism, without fanfare, President Obama has made slow but steady progress toward achieving three key elements of his effort to end the Forever War: (1) disengaging from Afghanistan; (2) closing Guantanamo; and (3) disciplining drones.<sup>10</sup> The government witnesses you heard from earlier today have clarified how efforts in all three of those arenas continue.<sup>11</sup>

As outlined in the President’s NDU speech, the Administration’s counterterrorism strategy treats “kill and capture” as only a small part of a much *broader U.S. “smart power” strategy* toward counterterrorism.<sup>12</sup> Within that broader strategy, the President insists upon maintaining a lawful and workable framework to govern our *use of force* against Al Qaeda and its associated forces, now formalized in Presidential Policy Guidance that President Obama signed last May. “In the Afghan war theater,” the President said, “we must—and will—continue to support our troops until the transition is complete at the end of 2014 [by continuing] to take strikes against high value al Qaeda targets, but also against forces that are massing to support attacks on coalition forces.”<sup>13</sup> But “[b]eyond the Afghan theater,” the President clarified, “we only target al Qaeda and its associated forces. And even then, the use of drones is heavily constrained” by four principles, which are clearly enumerated in the important Fact Sheet that accompanied the President’s NDU speech:<sup>14</sup> (1) the priority of capture over kill;<sup>15</sup> (2) respect for

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<sup>10</sup> See Harold Hongju Koh, “*Ending the Forever War*”: A Progress Report, JUST SECURITY (Oct. 28, 2013, 3:00 PM) [hereinafter Koh Progress Report] <http://justsecurity.org/2013/10/28/ending-war-progress-report>.

<sup>11</sup> See testimonies of Department of Defense General Counsel Stephen Preston and Principal Deputy Legal Adviser Mary McLeod before the Senate Foreign Relations Committee on May 21, 2014.

<sup>12</sup> See Obama NDU Speech, *supra* note 3 (“[T]he use of force must be seen as part of a larger discussion we need to have about a comprehensive counterterrorism strategy—because for all the focus on the use of force, force alone cannot make us safe. We cannot use force everywhere that a radical ideology takes root; and in the absence of a strategy that reduces the wellspring of extremism, a perpetual war—through drones or Special Forces or troop deployments—will prove self-defeating, and alter our country in troubling ways. . . . [T]he next element of our strategy involves addressing the underlying grievances and conflicts that feed extremism—from North Africa to South Asia.”).

<sup>13</sup> *Id.*

<sup>14</sup> See U.S. Policy Standards and Procedures for the Use of Force in Counterterrorism Operations Outside the United States and Areas of Active Hostilities, WHITE HOUSE (May 23, 2013), *available at* [http://www.whitehouse.gov/sites/default/files/uploads/2013.05.23\\_fact\\_sheet\\_on\\_ppg.pdf](http://www.whitehouse.gov/sites/default/files/uploads/2013.05.23_fact_sheet_on_ppg.pdf) [hereinafter Summary of White House PPG] (“Lethal force will be used only to prevent or stop attacks against U.S. persons, and even then, only when capture is not feasible and no other reasonable alternatives exist to address the threat effectively. In particular, lethal force will be used outside areas of active hostilities only when the following preconditions are met:

*First*, there must be a legal basis for using lethal force, whether it is against a senior operational leader of a terrorist organization or the forces that organization is using or intends to use to conduct terrorist attacks.

*Second*, the United States will use lethal force only against a target that poses a continuing, imminent threat to U.S. persons. It is simply not the case that all terrorists pose a continuing, imminent threat to U.S. persons; if a terrorist does not pose such a threat, the United States will not use lethal force.

*Third*, the following criteria must be met before lethal action may be taken:

1. Near certainty that the terrorist target is present;
2. Near certainty that non-combatants will not be injured or killed.”) [The appended footnote further clarifies that “Non-combatants are individuals who may not be made the object of attack under applicable international law. The term ‘non-combatant’ does not include an individual who is part of a belligerent party to an armed conflict, an individual who is taking a direct part in hostilities, or an individual who is targetable in the exercise of national self-defense. Males of military age may be non-combatants; it is not the case that all military-aged males in the vicinity of a target are deemed to be combatants.”]
3. An assessment that capture is not feasible at the time of the operation;

international law and state sovereignty;<sup>16</sup> (3) the requirement that targets present a “continuing and imminent threat” to U.S. persons<sup>17</sup> and (4) a “near-certainty” test for avoiding civilian casualties. At the same time, the President remains committed to maintaining a clear, lawful, and workable framework to govern *detention* of Al Qaeda and its associated forces at Guantanamo and elsewhere.<sup>18</sup> Finally, the President committed himself to *transparency and consultation* with Congress and our allies,<sup>19</sup> and to considering future workable proposals to extend oversight of lethal actions outside of active warzones.<sup>20</sup> Each of these key principles—a smart-power strategy, legal frameworks to govern drones and detention, and a commitment to transparency, consultation and oversight—seems to me both correct and worth supporting.

For our country, peace is the norm and war is the exception. Condoning a state of perpetual war would mark a gross deviation from our constitutional norms. We need not and should not allow a wartime footing to become a perpetual state of affairs. Applying the President’s declared principles steadily over time, we can end the war against Al Qaeda and its allies when circumstances on the ground allow, and while so doing, continue to meet all our domestic and international law obligations.

## II. Repealing the AUMF

The President’s speech more than a year ago made clear his intent to work with members of Congress to “refine and ultimately repeal” the 2001 AUMF. He expressly stated, “I will not sign laws designed to expand this mandate further.”<sup>21</sup> Nevertheless, some argue that the AUMF must continue, or even be expanded, despite the President’s clearly stated position. They claim that repealing the 2001 AUMF will leave legal “gaps”<sup>22</sup> in both the President’s targeting and

4. An assessment that the relevant governmental authorities in the country where action is contemplated cannot or will not effectively address the threat to U.S. persons; and

5. An assessment that no other reasonable alternatives exist to effectively address the threat to U.S. persons

*Finally*, whenever the United States uses force in foreign territories, international legal principles, including respect for sovereignty and the law of armed conflict, impose important constraints on the ability of the United States to act unilaterally—and on the way in which the United States can use force. The United States respects national sovereignty and international law.”).

<sup>15</sup> *Id.* (“America does not take strikes when we have the ability to capture individual terrorists; our preference is always to detain, interrogate, and prosecute. . . . “[A]s a matter of policy, the preference of the United States is to capture terrorist suspects.”).

<sup>16</sup> *Id.* (“America cannot take strikes wherever we choose; our actions are bound by consultations with partners, and respect for state sovereignty.”).

<sup>17</sup> *Id.* (“America does not take strikes to punish individuals; we act against terrorists who pose a continuing and imminent threat to the American people, and when there are no other governments capable of effectively addressing the threat.”).

<sup>18</sup> *Id.* (“Today, I once again call on Congress to lift the restrictions on detainee transfers from GTMO.”).

<sup>19</sup> *Id.* (“I’ve insisted on strong oversight of all lethal action. After I took office, my administration began briefing all strikes outside of Iraq and Afghanistan to the appropriate committees of Congress. . . . [I] do not believe it would be constitutional for the government to target and kill any U.S. citizen—with a drone, or with a shotgun—without due process, nor should any President deploy armed drones over U.S. soil.”).

<sup>20</sup> *Id.* (“Going forward, I’ve asked my administration to review proposals to extend oversight of lethal actions outside of warzones that go beyond our reporting to Congress.”).

<sup>21</sup> See Obama NDU Speech, *supra* note 3.

<sup>22</sup> See, e.g., Robert Chesney, Jack Goldsmith, Matthew C. Waxman & Benjamin Wittes, *A Statutory Framework for Next-Generation Terrorist Threats*, HOOVER INST. AT STANFORD UNIV. 6 (2013) [hereinafter Hoover Report] (Authors are “skeptical” that the president’s inherent powers under Article II combined with ordinary law

detention authority that will prevent the Executive from successfully protecting America and our allies from known as well as future terrorist threats.

As a policy matter, any proposal to expand and extend the AUMF's mandate would be both unprecedented and exceedingly unwise. After more than three decades of studying, writing, and teaching the law of U.S. foreign policy, I know of no example in our long constitutional history where the Congress—traditionally the branch that seeks to end wars—has enacted a law expressly to extend or expand a war over the President's explicit objection.<sup>23</sup>

As a legal matter, the President's goal of "refining, then repealing" the AUMF is both achievable and sustainable without undermining the security of the American people. Substantial legal authorities for both targeting and incapacitation of terrorists were available to the Executive branch before the 2001 AUMF. These authorities have been significantly strengthened since then, and would remain in its absence.<sup>24</sup> The current legal authorities are sufficient to provide the Administration with all the authority needed to address threats to the United States. At the proper time, the President and Congress can work together to repeal the 2001 AUMF without risking exposing our population to future threats.

#### A. Targeting:

As I argued as Legal Adviser and continue to believe, the Executive branch is employing lawful standards for targeting both: (1) Taliban and Al Qaeda combatants in Afghanistan, and (2) Al Qaeda, the Taliban, and "associated forces" both inside and outside of Afghanistan.<sup>25</sup> As the Administration has explained, the U.S. government defines "associated forces" in accordance with international law to include those (1) organized armed groups that have entered the fight alongside Al Qaeda; and (2) are a co-belligerent with Al Qaeda in the hostilities against the

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enforcement tools "[a]re adequate to address any gap that may emerge between what defense of the nation demands and what law enforcement and intelligence options can provide in extra-AUMF scenarios."), *available at* <http://media.hoover.org/sites/default/files/documents/Statutory-Framework-for-Next-Generation-Terrorist-Threats.pdf>.

<sup>23</sup> See, e.g., MELVIN SMALL, *DEMOCRACY AND DIPLOMACY: THE IMPACT OF DOMESTIC POLITICS IN U.S. FOREIGN POLICY, 1789-1994*, 30 (1996) (a congressional declaration of war without presidential approval "has never happened . . ."); JENNIFER K. ELSEA & RICHARD F. GRIMMETT, *DECLARATIONS OF WAR AND AUTHORIZATIONS FOR THE USE OF MILITARY FORCE: HISTORICAL BACKGROUND AND LEGAL IMPLICATIONS 1* (2007), *available at* <http://www.fas.org/sgp/crs/natsec/RL31133.pdf> (when Congress has legislated authorizations for the use of force rather than formal declarations of war, "[i]n most cases, the President has requested the authority, but Congress has sometimes given the President less than what he asked for."). Theoretically, Congress may by a two-thirds majority declare war over the objections of the president, but "[i]n practice, such a situation cannot be imagined." Stephen Vladeck, *Why a "Drone Court" Won't Work—But (Nominal) Damages Might*, *LAWFARE* (Feb. 10, 2013, 5:12 PM) [Vladeck Drone Court], *available at* <http://www.lawfareblog.com/2013/02/why-a-drone-court-wont-work>.

<sup>24</sup> These include various statutory authorities of the and other agencies to make arrests, which are not territorially limited (e.g., 18 U.S.C. § 3052), as well as extraterritorial expansions in civilian criminal statutes especially 18 U.S.C. § 2339B. For a review of the various legal changes that have led to a dramatic increase in counterterrorism capacities since 2001, see generally Jennifer C. Daskal & Stephen I. Vladeck, *After the AUMF*, *HARV. NATL. SECUR. J.* 115, 132-37 (2014) [hereinafter Daskal & Vladeck, *After the AUMF*].

<sup>25</sup> See Harold Hongju Koh, Legal Adviser, U.S. Dept. of State, *The Obama Administration and International Law*, Address to the American Society of International Law (Mar. 25, 2010) [hereinafter Koh Speech] (noting that all operations by the U.S. government must comply with international humanitarian law), *available at* <http://www.state.gov/s/l/releases/remarks/139119.htm>.

United States and its coalition partners.<sup>26</sup> While not part of the 2001 AUMF’s wording, the term “associated forces” derived from a shared executive<sup>27</sup> and judicial interpretation of the statute’s text<sup>28</sup> used to clarify the authority of the AUMF in aftermath of 9/11, which was later codified in the 2012 NDAA.<sup>29</sup> As now construed by all three branches of government, the 2001 AUMF authorizes all necessary and appropriate force against Al Qaeda, the Taliban and associated forces under U.S. law. Those strikes are lawful under international law because the Obama Administration’s standards—as expressed in the President May 2013 NDU speech and accompanying Presidential Policy Guidance—construe the AUMF to be read consistently with international humanitarian law, which our Supreme Court has held governs the Non-International Armed Conflict (NIAC) in which the United States is currently engaged against Al Qaeda and associated forces.<sup>30</sup>

That said, the 2001 AUMF is not needed as a perpetual legal authority. It can be repealed at the appropriate time, once Al Qaeda has been effectively defeated. At that time, repeal would

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<sup>26</sup> See, e.g., Jeh Charles Johnson, General Counsel, U.S. Dep’t of Def., *The Conflict Against Al Qaeda and its Affiliates: How Will It End?*, Speech Before the Oxford Union (Nov. 30, 2012) [hereinafter Johnson Oxford Speech], available at <http://www.lawfareblog.com/2012/11/jeh-johnson-speech-at-the-oxford-union/>.

<sup>27</sup> The term “associated forces” first appeared in a Department of Justice habeas brief filed during the early days of the Obama Administration, on March 13, 2009, which argued that the President has authority to detain those who “substantially support” Al Qaeda or the Taliban and “associated forces.” Marty Lederman & Steve Vladeck, *The NDAA: The Good, the Bad, and the Laws of War—Part II*, LAWFARE BLOG (Dec. 31, 2011, 4:48 PM), <http://www.lawfareblog.com/2011/12/the-ndaa-the-good-the-bad-and-the-laws-of-war-part-ii>. The then-new Obama Administration offered this narrowed executive interpretation of the AUMF in response to calls from many, including myself, to clarify and narrow the Executive’s tendency to “construe the vaguely worded Authorization for Use of Military Force (AUMF) Resolution to override existing legislation . . . .” See Statement of Harold Hongju Koh Before the Senate Judiciary Committee, Subcommittee on The Constitution on Restoring the Rule of Law, Sept. 16, 2008, available at [http://www.law.yale.edu/documents/pdf/News\\_%26\\_Events/Kohtestimony091608RuleofLaw.pdf](http://www.law.yale.edu/documents/pdf/News_%26_Events/Kohtestimony091608RuleofLaw.pdf).

<sup>28</sup> In *Hamlily v. Obama*, 616 F. Supp. 2d 63, 78 (D.D.C. 2009), Judge Bates of the U.S. District Court for the District of Columbia accepted the Obama Administration’s interpretation of the AUMF, holding that “[t]he President also has the authority to detain persons who are or were part of Taliban or al Qaeda forces or associated forces that are engaged in hostilities against the United States.” The D.C. Circuit has since adopted this language on multiple occasions. See, e.g., *Al-Bihani v. Obama*, 590 F.3d 866, 872 (D.C. Cir. 2010); *Barhoumi v. Obama*, 609 F.3d 416, 432 (D.C. Cir. 2010).

<sup>29</sup> See FY2012 NDAA § 1021(b)(2), 125 Stat. at 1562 [hereinafter 2012 NDAA] (authorizing detention of “[a] person who was a part of or substantially supported al-Qaeda, the Taliban, or associated forces that are engaged in hostilities against the United States or its coalition partners, including any person who has committed a belligerent act or has directly supported such hostilities in aid of such enemy forces”). See also *Hussain v. Obama*, 718 F.3d 964, 967 (D.C. Cir. 2013) (citing the 2012 NDAA to hold that the AUMF authorizes the President to detain individuals who are part of Al Qaeda, the Taliban, or “associated forces”). I should caution that no court has yet considered whether precisely the same legal standards for membership in or co-belligerency with Al Qaeda should apply to determine whether an individual is targetable, as opposed to detainable. To trigger a legal right of self-defense sufficient to target an individual, the United States might well be required to demonstrate that the individual has played a senior operational role capable of generating a continuing and imminent threat to the United States.

<sup>30</sup> See generally Koh Speech, *supra* note 25 (discussing relevant international law standards). In *Hamdan v. Rumsfeld*, 548 U.S. 557 (2006), the Supreme Court held that the U.S. was engaged in a NIAC with Al Qaeda, and was therefore bound by Common Article 3, a provision appearing in all four Geneva Conventions, “which provides that, in a conflict not of an international character occurring in the territory of one of the High Contracting Parties [*i.e.*, signatories], each Party to the conflict shall be bound to apply, as a minimum, certain provisions protecting [p]ersons . . . placed *hors de combat* by . . . detention, including a prohibition on the passing of sentences . . . without previous judgment . . . by a regularly constituted court affording all the judicial guarantees . . . recognized as indispensable by civilized peoples.” *Id.* at 562 (quotations omitted).

create no “legal gap” if the United States found an ongoing need to strike particular remaining Al Qaeda terrorists and associated forces who pose a continuing and imminent threat to the United States. In such cases, future strikes against groups that pose a continuing and imminent threat to the United States could still be justified under both domestic and international law.

As a constitutional matter, it has long been settled that “[a]s Commander-in-Chief and Chief Executive, [the President] may use the armed forces to protect the nation and its people.”<sup>31</sup> In the Prize Cases, the Supreme Court affirmed the President’s inherent authority to use force in self-defense to protect the nation against invasion or sudden attack, declaring that “[i]f a war be made by invasion of a foreign nation, the President is not only authorized but bound to resist force by force. He does not initiate the war, but is bound to accept the challenge without waiting for any special legislative authority.”<sup>32</sup> Under the principle of self-defense that is inherent in the President’s Commander-in-Chief authority, the President has long been understood to have constitutional authority to act reasonably in self-defense against any threat.<sup>33</sup>

Read in light of international law, that constitutional authority would clearly include the right to act against “imminent” threats, a term defined in the famous *Caroline* case as applying to situations in which the “necessity of that self-defence is instant, overwhelming, and leaving no choice of means, and no moment for deliberation.”<sup>34</sup> But under a very narrow set of circumstances, the *Caroline* requirement may also reasonably be read to permit direct strikes as a last resort against groups or individuals who pose a continuing and imminent threat<sup>35</sup> by virtue of: (1) engaging in “a concerted pattern of continuing armed activity”<sup>36</sup> directed against the U.S.—i.e., demonstrating a willingness to attack the U.S. if given the opportunity; (2) past successful attacks; and (3) “actively planning, threatening, or perpetrating [future] armed attacks”<sup>37</sup> against America.<sup>38</sup> In my judgment, this understanding of imminence is consistent

<sup>31</sup> See *United States v. Verdugo-Urquidez*, 494 U.S. 259 (1990).

<sup>32</sup> See *The Prize Cases*, 67 U.S. (2 Black) 635, 668 (1863).

<sup>33</sup> See Daskal & Vladeck, *After the AUMF*, *supra* note 24 (“[I]t is well settled that the President has inherent authority under Article II of the U.S. Constitution and Article 51 of the U.N. Charter to take immediate—and, where necessary, lethal—action in defense of the nation,” while noting that the authority to engage in self-defense under Article II is not unlimited).

<sup>34</sup> Department of State, Letter from Mr. Webster to Lord Ashburton, Washington, Aug. 6, 1842, *available at* <http://www.yale.edu/lawweb/avalon/diplomacy/britain/br-1842d.htm>.

<sup>35</sup> See Daniel Bethlehem, *Self-Defense Against an Imminent or Actual Armed Attack by Nonstate Actors*, 106 AM. J. INT’L L. 769 (2012) [hereinafter Bethlehem Self-Defense Principles], *available at* <http://www.un.org/law/counsel/Bethlehem%20-%20Self-Defense%20Article.pdf>.

<sup>36</sup> As former Legal Adviser to the Foreign and Commonwealth Office of the United Kingdom, Sir Daniel Bethlehem, explained: “While ‘imminence’ continues to be a key element of the law relevant to anticipatory self-defense in response to a threat of attack, the concept needs to be further refined and developed to take into account the new circumstances and threats from non-state actors that states face today.” *Id.* at 5.

<sup>37</sup> *Id.* at 6 (“Armed action in self-defense may be directed against those actively planning, threatening, or perpetrating armed attacks. It may also be directed against those in respect of whom there is a strong, reasonable, and objective basis for concluding that they are taking a direct part in those attacks through the provision of material support essential to the attacks.”).

<sup>38</sup> As one commentator recently put it, “There is . . . support for the argument that a state facing an impending devastating attack cannot be expected to have to wait for it to actually strike its cities before engaging in forcible self-defence.” See Noam Lubell, *The Problem of Imminence in an Uncertain World* 5 (M. Weller, ed., THE OXFORD HANDBOOK OF THE USE OF FORCE IN INTERNATIONAL LAW, forthcoming 2014) (“There does appear to be a growing number of views that support pre-emptive action when limited to imminent attacks,” particularly against those terrorist networks that have previously attacked a country successfully.”).

with Article 51 of the UN Charter, which codifies the right of national and collective self-defense.<sup>39</sup>

President Obama essentially embraced this concept in his 2013 NDU speech when he said—regarding the use of force outside the Afghan theater—“America does not take strikes to punish individuals; we act against terrorists who pose a continuing and imminent threat to the American people, and when there are no other governments capable of effectively addressing the threat.”<sup>40</sup> If, after the Afghan conflict ends, the Executive wishes to continue conducting strikes in Afghanistan against local groups or individuals that do not pose a continuing and imminent threat to the U.S., the President would need to seek separate legal authority from Congress. But as President Obama noted in his NDU speech, the “future of terrorism” is “lethal yet less capable al Qaeda affiliates; threats to diplomatic facilities and businesses abroad; homegrown extremists,”<sup>41</sup> a threat that would require a range of tools.<sup>42</sup> With respect to both continuing and imminent terrorist threats and new threats that meet the relevant constitutional and international law tests, these tools should give the President sufficient legal authority to conduct the activities necessary to protect the American population.

I fully understand why Congress might prefer not to leave a matter of such importance to inherent constitutional authority. If so, Congress could both clarify and narrow the scope of the AUMF going forward by codifying a standard authorizing the principles stated in the President’s May 2013 Presidential Policy Guidance. Such a standard, consistent with the international law arguments outlined above, would authorize the President to use force against those groups or individuals who pose a continuing and imminent threat to the U.S. by virtue of: (1) having already attacked the U.S.; (2) engaging in a concerted pattern of continuing armed activity directed against the U.S.; and (3) actively planning, threatening, or perpetrating armed attacks against the U.S. Congressional action to codify the authority that the President needs to effectively confront post-9/11 threats would update the language of the AUMF to reflect the Administration’s actual policies, now embodied in executive branch mandates. Such a reading would draw what the President called an important “distinction between the capacity and reach of a bin Laden and a network that is actively planning major terrorist plots against the homeland versus jihadists who are engaged in various local power struggles and disputes, often

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<sup>39</sup> U.N. Charter art. 51 (“Nothing in the present Charter shall impair the inherent right of individual or collective self-defence if an armed attack occurs against a Member of the United Nations, until the Security Council has taken measures necessary to maintain international peace and security.”). By so saying, let me make clear that I am not supporting the considerably broader notion of “pre-emptive self-defense” favored by some international lawyers, which I have long rejected. *See, e.g.*, Harold Hongju Koh, *On American Exceptionalism*, 55 STANFORD L. REV. 1479, 1516 (“Preemptive self-defense arguments cannot clearly distinguish between permitted defensive measures and forbidden assaults”); Harold Hongju Koh, Comment to Michael W. Doyle, STRIKING FIRST: PREEMPTION AND PREVENTION IN INTERNATIONAL CONFLICT 99 (2011) (S. Macedo, ed.).

<sup>40</sup> *See* Obama NDU Speech, *supra* note 3. In 2012, CIA Director John Brennan, then-Assistant to the President for Homeland Security and Counterterrorism, similarly stated: “[T]he use of force against members of al-Qa’ida 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.” John O. Brennan, Assistant to the President for Homeland Security and Counterterrorism, Speech at the Woodrow Wilson International Center for Scholars (Apr. 30, 2012), *available at* <http://www.lawfareblog.com/2012/04/brennanspeech>.

<sup>41</sup> *Id.*

<sup>42</sup> *See supra* note 24.



sectarian.”<sup>43</sup>

If government officials are too loose in who they consider to be forces “associated with” Al Qaeda, then we will always have new enemies, and the Forever War will continue forever.<sup>44</sup> Instead of continuing to rely on the broadly worded 2001 AUMF to codify a permanent state of war, it would be far better to narrow the scope of targeting authority to match current policy. This would both give Congress greater say in authorizing force and bolster the constitutional legitimacy of counter-terrorism operations by giving the President’s current standards a shared legislative and executive imprimatur.<sup>45</sup>

### B. Detention:

Nor should repealing the AUMF create any “legal gap” in detaining and trying future terrorist detainees in either American courts or elsewhere.<sup>46</sup> As President Obama reiterated in both his 2013 NDU speech and his 2014 State of the Union Address,<sup>47</sup> his administration is committed to transferring the Parwan detention facility to Afghan control, closing Guantanamo, transferring the prisoners held there to other countries, trying them in Article III courts in the United States, or trying them before military commissions.

As for Parwan, the United States has already transitioned detention operations to Afghan authorities.<sup>48</sup> The end of major combat operations in Afghanistan may well also lead to renewed

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<sup>43</sup> See David Remnick, *Going the Distance: On and Off the Road with Barack Obama*, THE NEW YORKER, Jan. 27, 2014, [http://www.newyorker.com/reporting/2014/01/27/140127fa\\_fact\\_remnick?currentPage=14](http://www.newyorker.com/reporting/2014/01/27/140127fa_fact_remnick?currentPage=14). (“The analogy we use around here sometimes, and I think is accurate, is if a jayvee team puts on Lakers uniforms that doesn’t make them Kobe Bryant,” Obama said.”).

<sup>44</sup> In recent War Powers Reports to Congress, for example, the Administration has correctly taken pains to specify that “[t]he 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.*” Letter from President Barack Obama to Speaker of the House, Presidential Letter—2012 War Powers Resolution 6-Month Report (Jun. 15, 2012) [hereinafter 2012 War Powers Resolution 6-Month Report], *available at* <http://www.whitehouse.gov/the-press-office/2012/06/15/presidential-letter-2012-war-powers-resolution-6-month-report> (“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*”) (emphasis added). By so saying, the Administration has made clear that it has acted against particular individuals because they themselves are part of or co-belligerents with Al Qaeda, not because we are at war with *all of* Al Shabaab.

<sup>45</sup> Cf. *Youngstown Sheet & Tube Co. v. Sawyer*, 343 at 635–36 (Jackson, J., concurring) (“When the President acts pursuant to an express or implied authorization of Congress, his authority is at its maximum, for it includes all that he possesses in his own right plus all that Congress can delegate.”).

<sup>46</sup> See generally Daskal & Vladeck, *After the AUMF*, *supra* note 24.

<sup>47</sup> Barack H. Obama, President of the United States, Remarks by the President in State of the Union Address (Jan. 28, 2014), *available at* <http://www.whitehouse.gov/the-press-office/2014/01/28/president-barack-obamas-state-union-address> (“with the Afghan war ending, this needs to be the year Congress lifts the remaining restrictions on detainee transfers and we close the prison at Guantanamo Bay – because we counter terrorism not just through intelligence and military action, but by remaining true to our Constitutional ideals, and setting an example for the rest of the world.”).

<sup>48</sup> The March 9, 2012 Memorandum of Understanding (MOU) between Afghanistan and the United States transferred authority for Parwan detainees to Afghan control after a “Transition period, which [was] not to last more than six months.” Memorandum of Understanding between the Islamic Republic of Afghanistan and the United States of America on Transfer of U.S. Detention Facilities in Afghan Territory to Afghanistan (Mar. 9, 2012), *available at* <http://www.lawfareblog.com/wp-content/uploads/2012/04/2012-03-09-Signed-MOU-on-Detentions-Transfer-2.pdf>.

legal challenges to the President’s authority to continue to detain at least some of the detainees at Guantanamo.<sup>49</sup> But as the testimonies of Mr. Preston and Ms. McLeod make clear, executive branch lawyers are carefully studying this possibility, and assessing the effect it might have on law of war detention under the 2012 NDAA.

While some have expressed concern over so-called “unreleasable” prisoners still at Guantanamo, as the Executive branch report submitted last week under the terms of the National Defense Authorization Act makes clear, that problem can be managed in a number of ways.<sup>50</sup> This “legacy issue” should not become “the tail wagging not only the debate over closing Guantánamo, but the debate over repealing/replacing the AUMF.”<sup>51</sup> Once Congress and the President come to an agreement on how to handle the prisoners currently being held at Guantanamo, repealing the AUMF should leave no gap in America’s detention authority.<sup>52</sup>

In any event, we should not confuse the past with the future. The President has repeatedly declared his intent to close Guantanamo and not to bring any new detainees there. Thus, debates over continuing authority to hold those currently in law of war detention—a population that the President has expressly declared his intent to minimize or eliminate—lend little support to the claim that new legal authority is somehow needed to ensure potential *future* detentions of dangerous terrorist suspects. The Administration has now developed an effective scheme for detaining and trying defendants in Article III courts, which it recently executed effectively against Sulaiman Abu Ghaith, the most senior Bin Laden associate to be tried and convicted in a civilian court in the United States since 9/11, and the radical cleric Abu Hamza al-Masri, who

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<sup>49</sup> See generally Marty Lederman, *Justice Breyer’s Intriguing Suggestions In Hussain: A Sign of Habeas Challenges to Come?*, JUST SECURITY (Apr. 23, 2014, 10:30 AM), <http://justsecurity.org/2014/04/23/justice-breyers-intriguing-suggestion-hussain-sign-habeas-challenges-come/> (“[W]hen such active combat operations in Afghanistan do cease in the near future, and/or if and when the U.S. concludes that al Qaeda’s capabilities have been sufficiently degraded so that it is no longer a continuing threat to strike the U.S., attorneys for the GTMO detainees will begin to more strenuously press the argument that the continued detention of Taliban and al Qaeda forces is no longer necessary and appropriate, on the theory that there will be no ‘battle’ to which the detainees might return”); Johnson Oxford Speech, *supra* note 26 (after Al Qaeda’s defeat, “[w]e will also need to face the question of what to do with any members of al Qaeda who still remain in U.S. military detention without a criminal conviction and sentence. In general, the military’s authority to detain ends with the ‘cessation of active hostilities.’”).

<sup>50</sup> See Charlie Savage, *U.S. Report Addresses Concern Over Obama’s Plan to Close Guantanamo*, N.Y. TIMES, May 16, 2014, at A17. For the full text of the report, see U.S. Dep’t of Justice, Report Pursuant to Section 1039 of the National Defense Authorization Act for Fiscal Year 2014 (May 14, 2014), available at <https://www.documentcloud.org/documents/1160074-5-14-14-kadzik-to-pjl-re-fy14-ndaa.html>.

<sup>51</sup> Stephen I. Vladeck, *Detention After the AUMF*, 82 FORDHAM L. REV. 2189 (2014).

<sup>52</sup> One recent proposal worth exploring may be “[a] compromise solution wherein the government transfers or otherwise releases all of the detainees who have been cleared for transfer, moves all of the other detainees into the United States, and accepts a repeal of the AUMF in favor of a more specific authorization for long-term *civil* detention of those detainees who are too dangerous to be released, and yet who cannot be subjected to trial in civilian or military court.” Stephen Vladeck, *Detention After the AUMF*, JUST SECURITY (Apr. 4, 2014, 1:39 PM). See also Benjamin Weiser, *Jurors Convict Abu Ghaith, Bin Laden Son-in-Law, in Terror Case*, N.Y. TIMES, Mar. 26, 2014. In light of reports that Yemen is making progress toward building a secure rehabilitation center to hold Guantanamo returnees, the increasing feasibility of transfers to Yemen and other third countries will reduce the number of detainees who would need to be held in long-term civil detention. See *Yemen Takes Step to Set Up Secure Rehab for Guantanamo Detainees*, REUTERS, May 14, 2014, <http://www.reuters.com/article/2014/05/14/us-usa-guantanamo-yemen-idUSBREA4D0JD20140514>.

was convicted by a federal court this week on 11 criminal counts.<sup>53</sup> Two other Article III defendants, Ahmed Warsame (who pleaded guilty) and Abu Anas al Libi (who is currently awaiting trial), were initially detained for a period of questioning under AUMF authority, before being given *Miranda* warnings and charged criminally under sealed indictments.<sup>54</sup> Under laws passed since 9/11, the government should have ample authority, even without the AUMF, to pick up future terrorism suspects overseas.<sup>55</sup>

### III. Narrowing the AUMF

While eventual repeal of the 2001 AUMF remains the best long-term way to finally bring an end to the Forever War, the precise timing of that repeal remains a decision about which the Administration and Congress should agree, based upon the facts as they develop. Some, however, have invited Congress to consider proposals broadly to “update” the AUMF to address new threats.<sup>56</sup> To the extent that those proposals amount to proposals to expand, extend, or perpetuate the war with Al Qaeda and its co-belligerents—and to extend it to currently unknown, future terrorist organizations—I believe they are both unwise and unnecessary. In the interim, no

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<sup>53</sup> Abu Ghaith was convicted on three counts for which he could face life in prison. *See* Benjamin Weiser, *Jurors Convict Abu Ghaith, Bin Laden Son-in-Law, in Terror Case*, N.Y. TIMES, Mar. 26, 2014, <http://www.nytimes.com/2014/03/27/nyregion/bin-ladens-son-in-law-is-convicted-in-terror-trial.html>; Karen McVeigh, *Abu Hamza Found Guilty of Terrorism Charges at New York Trial*, THE GUARDIAN, May 19, 2014, <http://www.theguardian.com/world/2014/may/19/abu-hamza-found-guilty-terrorism-charges>. (Statement of U.S. Attorney Preet Bharara) (“As we have seen in the Manhattan federal courthouse in trial after trial . . . these trials have been difficult, but they have been fair and open and prompt.”).

<sup>54</sup>After interrogation and charging, Warsame pleaded guilty in the Southern District of New York in 2011 and is awaiting sentencing. *See* Press Release, Federal Bureau of Investigations, *Guilty Plea Unsealed in New York Involving Ahmed Warsame, a Senior Terrorist Leader and Liaison Between al Shabaab and Al Qaeda in the Arabian Peninsula, for Providing Material Support to Both Terrorist Organizations* (Mar. 25, 2013), *available at* <http://www.fbi.gov/newyork/press-releases/2013/guilty-plea-unsealed-in-new-york-involving-ahmed-warsame-a-senior-terrorist-leader-and-liaison-between-al-shabaab-and-al-qaeda-in-the-arabian-peninsula-for-providing-material-support-to-both-terrorist-organizations>. *See generally* Charlie Savage, *U.S. Tests New Approach to Terrorism Cases on Somali Suspect*, N.Y. TIMES (Jul. 6, 2011), <http://www.nytimes.com/2011/07/07/world/africa/07detain.html>. Abu Anas al Libi has pleaded not guilty to all charges, and currently awaits trial in the Southern District of New York. *See* Deborah Feyerick & Lateef Mungin, *Alleged Al Qaeda Operative Abu Anal Al Libi Pleads Not Guilty*, CNN (Oct. 15, 2013, 8:07 PM), <http://www.cnn.com/2013/10/15/justice/al-libi-case>. *See generally* Koh Progress Report, *supra* note 10.

<sup>55</sup> These include the various statutory authorities enumerated in *supra* note 24. If Congress wished specifically to preserve the possibility of the kind of pre-presentment detention (used in the Warsame and Al-Libi cases) for the purpose of questioning surviving members of Al Qaeda or its co-belligerents about possible future attacks, it could narrow the AUMF’s detention authority to cover just this narrow circumstance. Congress could also codify the preferences for counterterrorism operations already explicit in the Presidential Policy Guidance: (1) Capture over targeted killing; (2) Law enforcement over military action; and (3) Local government action in countries whose governments are able and willing. Summary of White House PPG, *supra* note 14. (“The policy of the United States is not to use lethal force when it is feasible to capture a terrorist suspect, because capturing a terrorist offers the best opportunity to gather meaningful intelligence and to mitigate and disrupt terrorist plots. Capture operations are conducted only against suspects who may lawfully be captured or otherwise taken into custody by the United States and only when the operation can be conducted in accordance with all applicable law and consistent with our obligations to other sovereign states.”).

<sup>56</sup> *Compare* Hoover Report, *supra* note 22, with Jennifer Daskal & Stephen Vladeck, *After the AUMF, II: Daskal and Vladeck Reply*, LAWFARE (Mar. 18 2013, 7:16 PM), <http://www.lawfareblog.com/2013/03/after-the-aumf-ii/> (noting that the Hoover proposal would entail “a much more expansive use-of-force regime than that which currently exists.”).

legislation would be plainly better than new legislation for its own sake.

Others claim that Congress could prepare the way for eventual repeal of the AUMF by refining and narrowing—but not expanding—the scope of the 2001 AUMF. Their claim is that reform to narrow the AUMF could first, resolve uncertainties about the continued legality and currency of a counter-terrorism framework that remains tied to 9/11, an event that transpired thirteen years ago; second, bring the text of the AUMF more into line with the landscape of post-9/11 threats and third, provide Congress with an opportunity to reassert its role in defining and limiting the authorities of the Executive branch. While I do not see pre-repeal reform as either wise or necessary, if Congress wishes to consider reforms to refine and narrow (and not expand) the AUMF’s broad authorization, it would make the most sense to include within the AUMF a sunset clause, which would provide increased opportunities for congressional and executive dialogue and force debate and voting at timed intervals. As Representative Adam Schiff noted when proposing stand-alone legislation that would sunset the 2001 AUMF beginning in 2015, concurrent with the end of combat operations in Afghanistan, “When Congress passed the AUMF shortly after 9/11, we did not intend to authorize a war without end.”<sup>57</sup> Because the current war against non-state actors responsible for 9/11 will not have a conventional end marked by a peace treaty, Congress could amend the 2001 AUMF, without narrowing its substantive scope, by adding a sunset provision—of one year, or perhaps timed to coincide with the Afghan drawdown—to ensure that both elected branches play a role in deciding whether and when the U.S. will use force against Al Qaeda and associated forces going forward. Adding a sunset clause would also help to ensure that the statutory framework for our counter-terrorism operations is regularly updated to reflect the realities of the threats we are facing, and to accurately express the intent and will of the legislative branch.<sup>58</sup>

To improve public and congressional access to information, Congress could further amend the AUMF by codifying more stringent transparency and reporting requirements. Strengthened congressional reporting requirements might require that relevant committees regularly receive information on secret military and covert operations, including requiring that Congress be informed as to which groups are covered under the AUMF and in which nations the Department of Defense believes Congress has authorized the President to use military force.<sup>59</sup>

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<sup>57</sup>See Press Release: Rep. Adam Schiff to Introduce Legislation to Sunset Authorization for Use of Military Force (June. 10, 2013), *available at* <http://schiff.house.gov/press-releases/rep-adam-schiff-to-introduce-legislation-to-sunset-authorization-for-use-of-military-force/>. See also H.R.2324 SUNSET TO THE AUTHORIZATION FOR USE OF MILITARY FORCE ACT (2013), *available at* <http://thomas.loc.gov/cgi-bin/query/z?c113:H.R.2324.IH.>. In three different years, Rep. Barbara Lee (D-Calif.) and 33 cosponsors have also introduced a bill that would repeal the AUMF 180 days after passage. See H.R.198, REPEAL OF THE AUTHORIZATION FOR USE OF MILITARY FORCE (2013), *available at* <http://thomas.loc.gov/cgi-bin/query/z?c113:H.R.198.;> H.R.198 Bill Summary & Status, 113th Congress (2013 - 2014), Cosponsors, *available at* <http://thomas.loc.gov/cgi-bin/bdquery/z?d113:HR00198:@@@P.>

<sup>58</sup> The Patriot Act provides one model for sunset provisions, and illustrates how sunset clauses can force congressional debate at the time of reauthorization. See *Uniting and Strengthening America by Providing Appropriate Tools Required To Intercept and Obstruct Terrorism (USA PATRIOT) Act of 2001*, Pub. L. No. 107-56, 115 Stat. 272.

<sup>59</sup> Such a provision would simply require as a matter of law what the President is already providing as a matter of policy. See Obama NDU Speech, *supra* note 3 (“After I took office, my administration began briefing all strikes outside of Iraq and Afghanistan to the appropriate committees of Congress. Let me repeat that: Not only did Congress authorize the use of force, it is briefed on every strike that America takes. Every strike. That includes the one instance when we targeted an American citizen—Anwar Awlaki, the chief of external operations for AQAP.

These confidential reporting provisions could be strengthened by adding public reporting requirements, which might include requiring the periodic public release of non-sensitive information as to where and against whom the President is using military force under congressional authorization. Such reports are regularly given in the context of the War Powers Resolution, and it should not unduly burden the Executive to require that similar information also be given here.<sup>60</sup> Nor do I see why the President should not be asked to issue a regular public report on the number of combatants and civilians killed by the United States' use of targeted lethal force abroad. Unfortunately, a similar provision was recently stripped out of congressional legislation, which would have required President Obama to make public each year the number of people killed or injured in targeted killing operations.<sup>61</sup> Such transparency would help rebut a wave of drone reports—by Human Rights Watch and Amnesty International, and the United Nations Special Rapporteur on Counter-terrorism and Human Rights and Extrajudicial Killings—that have challenged whether the strict standards stated in the President's NDU speech have in fact been consistently and rigorously applied.<sup>62</sup> These NGO reports do not assess the total number or rate of civilian casualties for all U.S. drone strikes.<sup>63</sup> Nor do they say that all U.S. targeted killings are illegal. They do, however, claim that dozens of civilians have been killed, and that the U.S. may be misinterpreting and misapplying existing law by applying broader notions of targetability and imminence than international law permits. These are serious charges that deserve serious responses from our government, which is why I argued a year ago, and continue to believe, that the Administration

Should make public its full legal explanation for why and when it is consistent with due process of law to target American citizens and residents. ... [I]t should clarify its method of counting civilian casualties, and what that method is consistent with international humanitarian law standards. [And] where factual disputes exist about the threat level against which past drone strikes were directed, the Administration should release the factual record. By so doing, it could explain what gave it cause to believe that particular threats were imminent, what called for the immediate exercise of self-defense, and what demonstrated either the express consent of the territorial sovereign or the inability and unwillingness of those sovereigns to suppress a legitimate threat.<sup>64</sup>

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This week, I authorized the declassification of this action, and the deaths of three other Americans in drone strikes, to facilitate transparency and debate on this issue and to dismiss some of the more outlandish claims that have been made.”).

<sup>60</sup> For examples of recent war powers reports that include drone strikes, see 2012 War Powers Resolution 6-Month Report, *supra* note 44.

<sup>61</sup> See Mark Mazzetti, *Senate Drops Bid to Report on Drone Use*, N.Y. TIMES, April 28, 2014, <http://www.nytimes.com/2014/04/29/world/senate-drops-plan-to-require-disclosure-on-drone-killings.html>.

<sup>62</sup> See Human Rights Watch, *Between a Drone and Al-Qaeda: The Civilian Cost of U.S. Targeted Killings in Yemen (2013)*, available at [http://www.hrw.org/sites/default/files/reports/yemen1013\\_ForUpload.pdf](http://www.hrw.org/sites/default/files/reports/yemen1013_ForUpload.pdf); Amnesty International, *Will I Be Next?: U.S. Drone Strikes in Pakistan (2013)*, available at <http://www.amnestyusa.org/sites/default/files/asa330132013en.pdf>; Philip Alston, *IHL, Transparency, and the Heyns' UN Drones Report*, JUST SECURITY (Oct. 23, 2013, 4:15 PM), <http://justsecurity.org/2013/10/23/ihl-transparency-heyns-report/>.

<sup>63</sup> See Sarah Knuckey, *Human Rights Groups Release Investigation Reports into US Targeted Killings: A Guide to the Issues*, JUST SECURITY (Oct. 22, 2013, 12:02 AM), <http://justsecurity.org/2013/10/22/hrw-ai-targeted-killings-guide-pakistan-yemen/>.

<sup>64</sup> See Koh Oxford Speech, *supra* note 8.

Finally, exploration and eventual implementation of some form of ex post review mechanism for targeting would be beneficial both as a policy and a legal matter.<sup>65</sup> The President's own guidelines already state that targeting policies should be reviewed for legality.<sup>66</sup> In his NDU speech, the President asked his lawyers to consider a special court or an executive review board as possible ways to extend oversight of lethal actions outside of the Afghan theater.<sup>67</sup> Because European courts are showing increased initiative in reviewing European cooperation in targeting operations for compliance with domestic and international law,<sup>68</sup> some form of ex post judicial review of these actions may prove inevitable in the near future, whether American officials favor it or not.

In sum, while I do not favor legislation for its own sake, until the AUMF is ultimately repealed, Congress need not be a passive rubber-stamp. If Congress wants to play a proactive role in resolving legal uncertainties, it could tighten the language of the current AUMF to narrow substantive scope and improve accountability. Amending the 2001 AUMF to narrow and refine its authority could enhance the legitimacy of our counter-terrorism operations in ways that would encourage information-sharing and multilateral cooperation going forward. As former FBI Director Robert S. Mueller III noted, "Our enemies live in the seams of our jurisdictions. No single agency or nation can find them and fight them alone. If we are to protect our citizens, working together is not just the best option, it is the only option."<sup>69</sup> Short-term refinements to the scope of the AUMF in anticipation of its eventual repeal could send a positive signal to the international community of the United States' commitment to complying with its domestic and international legal obligations and ending the Forever War.

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<sup>65</sup> One commentator has noted that proposals for a "drone court" modeled after the Foreign Intelligence Surveillance Court (FISC) face "formidable legal and policy obstacles," but urges as a first step toward creating a meaningful regime of judicial supervision "the codification of a statutory cause of action for nominal damages . . . for those unlawfully injured by [drones] . . .". Vladeck Drone Court, *supra* note 23.

<sup>66</sup> See Summary of White House PPG, *supra* note 14 ("Senior national security officials . . . and attorneys—including the senior lawyers of key departments and agencies—will review and determine the legality of proposals.").

<sup>67</sup> See Obama NDU Speech, *supra* note 3 ("The establishment of a special court to evaluate and authorize lethal action has the benefit of bringing a third branch of government into the process, but raises serious constitutional issues about presidential and judicial authority. Another idea that's been suggested—the establishment of an independent oversight board in the executive branch—avoids those problems, but may introduce a layer of bureaucracy into national security decision-making, without inspiring additional public confidence in the process. But despite these challenges, I look forward to actively engaging Congress to explore these and other options for increased oversight.").

<sup>68</sup> British officials were recently the subject of a domestic civil lawsuit for allegedly sharing intelligence used to conduct a drone strike outside the Afghan theater. See Noor Khan v. Secretary of State for Foreign and Commonwealth Affairs (2014), available at <http://www.bailii.org/ew/cases/EWCA/Civ/2014/24.html>. The German federal courts are currently considering whether the death of a German citizen in an alleged U.S. drone strike was conducted with the help of mobile phone data provided by the German government. See Louise Osborne, *Germany Denies Phone Data Sent to NSA Used in Drone Attacks*, THE GUARDIAN, Aug. 12, 2013, <http://www.theguardian.com/world/2013/aug/12/germany-phone-data-nsa-drone>. See also Frederik Rosén, *Extremely Stealthy and Incredibly Close: Drones, Control and Legal Responsibility*, J. CONFL. SECUR. LAW 24 (2013) ("The rapidly growing surveillance capacity of drone technology combined with ever more sophisticated armed capabilities may suggest a capability for exercising a degree of control and authority over territories and persons that may trigger the extraterritorial application of the European Convention of Human Rights.").

<sup>69</sup> See Robert S. Mueller III, *Defeating Terrorism Through Partnerships*, Fed. Bur. of Inves. (2008), available at [http://www.fbi.gov/news/stories/2008/april/mueller\\_040708](http://www.fbi.gov/news/stories/2008/april/mueller_040708).

#### IV. Conclusion

For the foregoing reasons, I believe that ending the war with Al Qaeda and its co-belligerents, eventually repealing the AUMF, and narrowing its mandate in the meantime are all important and achievable elements of this Administration's counterterrorism policy.

Thank you for your attention. I now look forward to answering any questions the Committee might have.

### *Appendix*

**Harold Hongju Koh** is Sterling Professor of International Law at the Yale Law School, where he has taught since 1985. Between 2009-13 he served as 22<sup>nd</sup> Legal Adviser to the U.S. Department of State for which he was awarded the Secretary of State's Distinguished Service Award. He earlier served as the fifteenth Dean of the Yale Law School and as the Martin R. Flug '55 Professor of International Law (on leave) from 2004 to 2009, and the Gerard C. and Bernice Latrobe Smith Professor of International Law from 1993 to 2009. From 1998 to 2001, he served as Assistant Secretary of State for Democracy, Human Rights and Labor, and from 1993 to 2001 he was Director of the Orville H. Schell, Jr. Center for International Human Rights at the Yale Law School. He teaches international law, the law of U.S. foreign relations, international human rights, international organizations and international regimes, international business transactions, international trade and civil procedure. The recipient of fourteen honorary doctorates and three law school medals, Professor Koh graduated from Harvard College 1975 (*summa cum laude* in Government), Magdalen College, Oxford University 1977 (Marshall Scholar and First Class Honours in Philosophy, Politics and Economics), and Harvard Law School 1980 (Developments Editor, *Harvard Law Review*), Professor Koh served as law clerk to Judge Malcolm Richard Wilkey of the D.C. Circuit (1980-81), and Justice Harry A. Blackmun of the U.S. Supreme Court (1981-82). Before coming to Yale, he practiced law at the Washington D.C. law firm of Covington and Burling and at the Office of Legal Counsel at the U.S. Department of Justice (1983-85). He has written more than 175 articles and authored or co-authored eight books: *Transnational Litigation in United States Courts* (2008 Foundation); *Foundations of International Law and Politics* (2004 Foundation with O. Hathaway); *The Human Rights of Persons with Intellectual Disabilities: Different But Equal* (2003 Oxford with S. Herr & L. Gostin); *Transnational Business Problems* (2014 Foundation with D. Vagts, W. Dodge & H. Buxbaum); *The Justice Harry A. Blackmun Supreme Court Oral History Project* (released 2004); *Deliberative Democracy and Human Rights* (1999 Yale with R. Slye); *Transnational Legal Problems* (2d ed. 1994 Foundation with H. Steiner & D. Vagts) and *The National Security Constitution* (Yale 1990), which won the American Political Science Association's award as best book on the American Presidency. Professor Koh is a member of the Council of the American Law Institute, a Fellow of the American Academy of Arts and Sciences and the American Philosophical Society, and on the Board of Editors of the Foundation Press Casebook Series. He has served as an Overseer of Harvard University and as an Editor of the *American Journal of International Law*. He has received Guggenheim and Century Foundation Fellowships, a Visiting Fellowship at All Souls College, Oxford and has given several dozen named lectures, including the 2014 Clarendon Law Lectures at Oxford University, the 2013 Oliver Smithies Lectures at Balliol College, Oxford, the 1997 Waynflete Lectures at Magdalen College, Oxford (where he is an Honorary Fellow). He currently sits on the board of directors of the American Arbitration Association and he has been on the boards of the Brookings Institution, the National Democratic Institute, and Human Rights First. He has received more than twenty awards for his human rights work, and was named by *American Lawyer* magazine as one of America's 45 leading public sector lawyers under the age of 45, and by *A Magazine* as one of the 100 most influential Asian-Americans of the 1990s. He received the 2005 Louis B. Sohn Award from the American Bar Association's Section on International Law and Practice and the 2003 Wolfgang Friedmann Award from Columbia Law School for his lifetime achievements in International Law. For a full *curriculum vitae*, see <http://www.law.yale.edu/faculty/HKoh.htm>.