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## YALE LAW & POLICY REVIEW

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### The Distance Between Principle and Practice in the Obama Administration's Targeted Killing Program: A Response to Jeh Johnson

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#### INTRODUCTION

On December 17, 2009, a U.S. cruise missile struck a village in southern Yemen, killing forty-one members of two families—half of whom were children,<sup>1</sup> ages one to fifteen.<sup>2</sup> The target was an alleged al Qaeda-affiliated training camp in the same region,<sup>3</sup> but according to the Yemeni parliamentary committee that investigated the strike, “there were errors in the geographic coordinates and the determination of the location.”<sup>4</sup> The United States initially refused to comment, while Yemeni authorities claimed that it had been their own fighter

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1. See Press Release, Amnesty International, *Yemen: Images of Missile and Cluster Munitions Point to US Role in Fatal Attack* (June 7, 2010), <http://www.amnesty.org/en/for-media/press-releases/yemen-images-missile-and-cluster-munitions-point-us-role-fatal-attack-2010->.
2. Drones Team, *Yemen: Reported US Covert Actions 2001-2011*, BUREAU OF INVESTIGATIVE JOURNALISM (Mar. 29, 2012), <http://www.thebureauinvestigates.com/2012/03/29/yemen-reported-us-covert-actions-since-2001> (reporting the December 17, 2009 strike and listing victims' ages).
3. Comm. in the Provinces of Lahj and Abyen, *Investigating Committee's Report on Security Events in the Province of Abyen*, COUNCIL OF REPRESENTATIVES OF THE REPUBLIC OF YEMEN 5, 7 (Feb. 7, 2010), [http://ccrjustice.org/files/2010-02-07%20-%20The%20Yemeni%20Parliamentary%20Report\\_ENG.pdf](http://ccrjustice.org/files/2010-02-07%20-%20The%20Yemeni%20Parliamentary%20Report_ENG.pdf).
4. *Id.* at 7.

jets that had killed dozens of “militants” in simultaneous operations.<sup>5</sup> Nearly a year after the strike, however, the media reported government cables obtained by Wikileaks that made the United States’ role clear: during a conversation between former CIA Director David Petraeus and then-Yemeni President Ali Abdullah Saleh, the Yemeni leader assured Petraeus that the Yemenis would “continue saying the bombs are ours, not yours.”<sup>6</sup>

The attack in al-Majalah was the second known U.S. strike in Yemen since 9/11,<sup>7</sup> and the first authorized by the Obama Administration.<sup>8</sup> Since then, the United States has carried out dozens of operations in Yemen as part of an expanding program of “targeted killing.”<sup>9</sup> While the government deployed cruise missiles in the strike in al-Majalah in 2009 and today relies largely on unmanned drones in targeted killing operations, its underlying claim of authority is the same—that pursuant to the Authorization for the Use of Military Force<sup>10</sup>

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5. See, e.g., Jeremy Scahill, *The Dangerous US Game in Yemen*, NATION, Apr. 18, 2011, at 15 (reporting the Pentagon’s initial refusal to comment on the strike and quoting the Yemeni government’s statement claiming responsibility for the “simultaneous raids killing and detaining militants”); Robert F. Worth, *Yemen Says Strikes Against Qaeda Bases Killed 34*, N.Y. TIMES, Dec. 17, 2009, <http://www.nytimes.com/2009/12/18/world/middleeast/18yemen.html> (reporting that “Yemeni security forces” conducted the strike on militant bases).
  6. Michael Isikoff, *Yemen Cable Gives al-Qaida New ‘Recruiting’ Tool*, MSNBC, Nov. 30, 2010, [http://www.msnbc.msn.com/id/40423710/ns/us\\_news-security/t/yemen-cable-gives-al-qaida-new-recruiting-tool/#.UMbs2JPjnyP](http://www.msnbc.msn.com/id/40423710/ns/us_news-security/t/yemen-cable-gives-al-qaida-new-recruiting-tool/#.UMbs2JPjnyP) (quoting a Wikileaks cable’s account of a January 4, 2010 meeting in Yemen between CIA Director David Petraeus and Yemeni officials); see Scahill, *supra* note 5, at 17.
  7. The first credibly reported U.S. strike in Yemen post-9/11 was by an unmanned CIA drone that killed six people—including an American citizen—on November 3, 2002. Special Rapporteur on Extrajudicial, Summary or Arbitrary Executions, *Report of the Special Rapporteur on Extrajudicial, Summary or Arbitrary Executions: Study on Targeted Killings*, ¶ 19, Human Rights Council, U.N. Doc. A/HRC/14/24/Add.6 (May 28, 2010) (by Philip Alston); see Dana Priest, *CIA Killed U.S. Citizen in Yemen Missile Strike; Action’s Effectiveness, Legality Questioned*, WASH. POST, Nov. 8, 2002, <http://pqasb.pqarchiver.com/washingtonpost/access/234203541.html?FMT=ABS&FMTS=ABS:FT&date=Nov+8%2C+2002&author=Dana+Priest&pub=The+Washington+Post&edition=&startpage=A.01&desc=CIA+Killed+U.S.+Citizen+In+Yemen+Missile+Strike%3B+Action%27s+Legality%2C+Effectiveness+Questioned>.
  8. See Drones Team, *supra* note 2 (describing the strike as “the first known US attack in Yemen in seven years”).
  9. See *Covert War on Terror - the Data*, BUREAU OF INVESTIGATIVE JOURNALISM, <http://www.thebureauinvestigates.com/category/projects/drone-data/> (last visited Jan. 8, 2013) [hereinafter BII, *Covert War*] (documenting U.S. strikes in Pakistan, Yemen, and Somalia).
  10. Pub. L. No. 107-40, 115 Stat. 224 (2001) (codified at 50 U.S.C. § 1541 note).

passed by Congress in response to 9/11 and pursuant to international law,<sup>11</sup> the United States may kill suspected terrorists outside of the usual constraints on the use of lethal force, potentially anywhere targets may be found. As high-ranking Administration officials have discussed,<sup>12</sup> the government may conduct such killings on the premise of a global armed conflict with al Qaeda, the Taliban, and “associated forces,” and as a matter of national self-defense. Conducted by the CIA and the covert Joint Special Operations Command (JSOC) of the U.S. military, these operations target individuals not just in the battlefield in Afghanistan, but also routinely or increasingly in Pakistan, Yemen, Somalia, and perhaps beyond.<sup>13</sup> The program that President Obama claims to keep tethered “on a very tight leash”<sup>14</sup> has nonetheless killed between 2,000 and 4,000 people, according to various estimates,<sup>15</sup> though the Administration refuses to

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11. This Essay focuses on the Administration’s claimed international law authority to conduct targeted killings globally, outside of traditional battlefield contexts.
  12. See, e.g., John O. Brennan, Assistant to the President for Homeland Sec. & Counterterrorism, *The Ethics and Efficacy of the President’s Counterterrorism Strategy* (April 30, 2012) (transcript available at <http://www.wilsoncenter.org/event/the-ethics-and-ethics-us-counterterrorism-strategy>) (“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 prohibits us from using lethal force against our enemies outside of an active battlefield . . .”).
  13. See, e.g., *July 2012 Update: US Covert Actions in Pakistan, Yemen and Somalia*, BUREAU OF INVESTIGATIVE JOURNALISM (Aug. 1, 2012), <http://www.thebureauinvestigates.com/2012/08/01/july-2012-update-us-covert-actions-in-pakistan-yemen-and-somalia/> (referencing news sources reporting possible U.S. drone strikes in the Philippines in 2006 and February 2012).
  14. See *Obama Defends US Drone Strikes in Pakistan*, BBC NEWS, Jan. 31, 2012, <http://www.bbc.co.uk/news/world-us-canada-16804247> (quoting President Obama’s responses to questions posed during an online “hangout” on Google’s social network, Google+).
  15. See BIJ, *Covert War*, *supra* note 9 (estimating between 2,604 and 3,407 deaths from 2004 through 2012 in Pakistan, between 371 and 1,077 deaths from 2002 through 2012 in Yemen, and between 58 and 170 deaths from 2007 through 2012 in Somalia); Counterterrorism Strategy Initiative, *The Year of the Drone: An Analysis of U.S. Drone Strikes in Pakistan, 2004-2012*, NEW AM. FOUND., <http://counterterrorism.newamerica.net/drones> (last visited Jan. 8, 2013) (estimating between 1,919 and 3,224 deaths from drone strikes from 2004 through 2012 in Pakistan); Bill Roggio & Alexander Mayer, *Charting the Data for US Airstrikes in Pakistan, 2004-2012*, LONG WAR J., <http://www.longwarjournal.org/pakistan-strikes.php> (last updated Jan. 6, 2013, 1:54 PM) (estimating 2,592 deaths from 2006 through 2012 in Pakistan); Bill Roggio & Bob Barry, *Charting the Data for US Air Strikes in Yemen, 2002-2012*, LONG WAR J., <http://www.longwarjournal.org/multimedia/Yemen/code/Yemen-strike.php> (last updated Jan. 3, 2013, 2:50 PM) (estimating 380 deaths from 2002 through 2012 in Yemen); see also Greg

release its own data. Indeed, the CIA still maintains in litigation that the program's very existence is a secret that it can neither confirm nor deny.<sup>16</sup>

In discussing the Administration's counterterrorism strategy during his address at Yale Law School in February 2012,<sup>17</sup> Jeh Johnson, then the General Counsel of the U.S. Department of Defense, articulated several sound statements of principle and policy, but none account for the Obama Administration's targeted killing program. This Essay traces the distance between principle and practice with respect to four aspects of that program: the premise of a world-ranging armed conflict, the scope of who can be targeted, the Administration's continued withholding of information, and its opposition to judicial review.

## I. INDEFINITE WORLDWIDE WAR

*"All of us recognize that this should not be the normal way of things . . . ."*<sup>18</sup>

For more than eleven years, the United States has been involved in a declared "war on terror"<sup>19</sup> or "armed conflict with Al Qaeda."<sup>20</sup> The full costs

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Miller, *Plan for Hunting Terrorists Signals U.S. Intends To Keep Adding Names to Kill Lists*, WASH. POST, Oct. 23, 2012, [http://www.washingtonpost.com/world/national-security/plan-for-hunting-terrorists-signals-us-intends-to-keep-adding-names-to-kill-lists/2012/10/23/4789b2ae-18b3-11e2-a55c-39408f6e6a4b\\_story.html](http://www.washingtonpost.com/world/national-security/plan-for-hunting-terrorists-signals-us-intends-to-keep-adding-names-to-kill-lists/2012/10/23/4789b2ae-18b3-11e2-a55c-39408f6e6a4b_story.html) ("The number of militants and civilians killed in the [U.S.] drone campaign over the past ten years will soon exceed 3,000 by certain estimates . . . .").

16. Brief for Appellee at 43, *ACLU v. CIA*, No. 11-5320 (D.C. Cir. May 21, 2012) ("Notwithstanding widespread reports that drone strikes occur, the CIA has never confirmed or denied whether it has any involvement or intelligence interest in any of those drone strikes, or whether it maintains any records relating to those drone strikes.").
17. Jeh Charles Johnson, *National Security Law, Lawyers, and Lawyering in the Obama Administration*, 31 YALE L. & POL'Y REV. 141 (2013).
18. *Id.* at 149.
19. See, e.g., President George W. Bush, Address to the Joint Session of the 107th Congress (Sept. 20, 2001), in *SELECTED SPEECHES OF PRESIDENT GEORGE W. BUSH, 2001 - 2008*, at 65, 68 (White House ed. 2011) ("Our war on terror begins with Al Qaeda, but it does not end there. It will not end until every terrorist group of global reach has been found, stopped and defeated.").
20. Harold Hongju Koh, Legal Advisor, U.S. Dep't of State, *The Obama Administration and International Law* (Mar. 25, 2010) (transcript available at <http://www.state.gov/s/l/releases/remarks/139119.htm>) ("[T]he United States is in an armed conflict with al-Qaeda, as well as the Taliban and associated forces, in response to the horrific 9/11 attacks . . . .").

cannot be quantified, but tens of thousands of people have been killed<sup>21</sup> and detained,<sup>22</sup> millions have been displaced,<sup>23</sup> and trillions of dollars have been spent and committed.<sup>24</sup> Public opposition to the war in Afghanistan reached an all-time high last year, and individuals from across the political spectrum now agree that the United States should end its involvement in that conflict—the longest in U.S. history.<sup>25</sup> But even as the Administration signals a weakening al Qaeda<sup>26</sup> and moves to withdraw from Afghanistan, and even as President Obama assures that after “more than a decade under the dark cloud of war . . . we can see the light of a new day on the horizon,”<sup>27</sup> the Administration admits that its global war with al Qaeda will continue.<sup>28</sup> Recent interviews with senior Ad-

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21. See *Afghanistan: 15,500 - 17,400 Civilians Killed*, COSTS OF WAR, <http://costsofwar.org/article/afghan-civilians> (last updated Nov. 2012) (reporting that at least 15,500 civilians have been killed in Afghanistan since 2001); *Iraqi Civilians: 122,000 - 132,000 Civilians Killed*, COSTS OF WAR, <http://costsofwar.org/article/iraqi-civilians> (last updated Nov. 2012) (reporting that at least 122,000 civilians have been killed in Iraq since 2003); *US and Allied Killed*, COSTS OF WAR, <http://costsofwar.org/article/us-killed-o> (last updated Nov. 2012) (reporting that over 6,600 U.S. troops, at least 2,871 private contractors working for the Pentagon, and at least 24,824 uniformed Afghans, Iraqis, and other allies have died in Iraq and Afghanistan since 2001).
  22. See Eisenhower Study Grp., *The Costs of War Since 2001: Iraq, Afghanistan, and Pakistan*, COSTS OF WAR 10-11 (June 2011), <http://costsofwar.org/sites/default/files/Executive%20Report%20Costs%20of%20War%20December%202011.docx> (reporting that the United States has detained hundreds of thousands of individuals in Afghanistan, Iraq, and elsewhere, with at least 100,000 detained in Iraq alone).
  23. See *id.* at 6 (categorizing 7,815,000 Afghan, Iraqi, and Pakistani civilians as war-related refugees or displaced persons).
  24. See *Economic Costs Summary: \$3.2 - 4 Trillion and Counting*, COSTS OF WAR, <http://costsofwar.org/article/economic-cost-summary> (last visited Dec. 20, 2012) (tabulating between 3.2 and 4 trillion dollars in U.S. war-related outlays from 2001 through 2011).
  25. See James Dao & Andrew W. Lehren, *In Toll of 2,000, New Portrait of Afghan War*, N.Y. TIMES, Aug. 21, 2012, <http://www.nytimes.com/2012/08/22/us/war-in-afghanistan-claims-2000th-american-life.html>; Ann Gearan, *AP-GfK Poll: Support for War in Afghanistan at New Low of 27 Percent*, ASSOCIATED PRESS, May 9, 2012, <http://ap-gfkipoll.com /uncategorized/may-2012-poll-findings>; Elisabeth Bumiller & Allison Kopicki, *Support in U.S. for Afghan War Drops Sharply, Poll Finds*, N.Y. TIMES, Mar. 26, 2012, <http://www.nytimes.com/2012/03/27/world/asia/support-for-afghan-war-falls-in-us-poll-finds.html>.
  26. See Brennan, *supra* note 12 (“In short, al-Qa’ida is losing badly.”).
  27. President Barack Obama, Address to the Nation from Bagram Air Base, Afghanistan (May 1, 2012) (transcript available at <http://www.whitehouse.gov/the-press-office/2012/05/01/remarks-president-address-nation-afghanistan>).
  28. See Jeh Charles Johnson, Gen. Counsel, U.S. Dep’t of Defense, *The Conflict Against Al Qaeda and Its Affiliates: How Will It End?* (Nov. 30, 2012) (transcript

ministration officials suggest that the “war” has only reached its “midpoint,” and evidence shows that the Administration is ramping up, not winding down, the targeted killing program.<sup>29</sup> Despite the rhetoric of a new day dawning, officials acknowledge that the targeted killing program is “something that is potentially indefinite.”<sup>30</sup>

As Johnson recognized, this should not be the “normal way of things.”<sup>31</sup> Armed conflict is an exceptional situation, defined as intense violence between organized armed groups.<sup>32</sup> Those exceptional conditions trigger exceptional

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available at <http://www.lawfareblog.com/2012/11/jeh-johnson-speech-at-the-oxford-union>) (“In the current conflict with al Qaeda, I can offer no prediction about *when* this conflict will end, or whether we are . . . near the ‘beginning of the end.’”). *But see id.* (stating that there will come “a tipping point” where al Qaeda has been “effectively destroyed” and U.S. efforts “should no longer be considered an ‘armed conflict’ against al Qaeda and its associated forces”).

29. Miller, *supra* note 15 (assessing interviews with dozens of current and former national security officials to examine the evolution of U.S. counterterrorism policies); see Michael Hastings, *The Rise of the Killer Drones: How America Goes to War in Secret*, ROLLING STONE, April 16, 2012 (discussing “the increasingly central role that drones now play in American foreign policy”).
30. Miller, *supra* note 15.
31. Johnson, *supra* note 17, at 149; see Johnson, *supra* note 28 (“‘War’ must be regarded as a finite, extraordinary and unnatural state of affairs. . . . In its 12th year, we must not accept the current conflict . . . as the ‘new normal.’”).
32. See, e.g., Prosecutor v. Tadic, Case No. IT-94-1-I, Decision on Defence Motion for Interlocutory Appeal on Jurisdiction, ¶ 70 (Int’l Crim. Trib. for the Former Yugoslavia Oct. 2, 1995) (finding that an “armed conflict exists whenever there is a resort to armed force between States or protracted armed violence between governmental authorities and organized armed groups or between such groups within a State”); Prosecutor v. Haradinaj, Case No. IT-04-84-T, Judgment, ¶¶ 90-99 (Int’l Crim. Trib. for the Former Yugoslavia Apr. 3, 2008) (finding that “daily clashes between the [Kosovo Liberation Army] and the Serbian forces” and the “unprecedented scale of deployment of the [Yugoslav Army] forces” met the “intensity requirement” necessary to classify the hostilities as an armed conflict); Prosecutor v. Akayesu, ICTR-96-4-T, Judgement, ¶¶ 619-25 (Sept. 2, 1998) (recognizing that “an armed conflict is distinguished from internal disturbances by the level of intensity of the conflict and the degree of organization of the parties to the conflict”); see also Rome Statute of the International Criminal Court, July 17, 1998, art. 8(2)(f), 2187 U.N.T.S. 90 (conferring jurisdiction over “armed conflicts that take place in the territory of a State when there is protracted armed conflict between governmental authorities and organized armed groups or between such groups”); European Commission for Democracy through Law (Venice Commission), *Opinion on the International Legal Obligations of Council of Europe Member States in Respect of Secret Detention Facilities and Inter-State Transport of Prisoners*, Opinion No. 363/2005, CDL-AD (2006) 009 (Mar. 17, 2006), ¶ 78 (suggesting that “sporadic bombings and other violent acts which terrorist networks perpetrate in different places around the globe and the ensuing counter-terrorism measures . . . cannot be said to amount to an ‘armed conflict’”); 3 COMMENTARY ON THE GE-

rules—the laws of war—that permit deprivations of life and liberty that would normally be prohibited.<sup>33</sup> The resort to armed force as a means of self-defense—the Administration’s additional rationale for targeted killing<sup>34</sup>—is also an extreme measure, one traditionally reserved to justify an armed response to an “armed attack.”<sup>35</sup> The international community intended for the international law of war and self-defense to apply in limited, extraordinary circumstances.<sup>36</sup> Yet the Administration claims the authority to apply these rules globally and indefinitely in carrying out a U.S. killing program that has been escalating for years.<sup>37</sup>

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NEVA CONVENTIONS OF 12 AUGUST 1949, at 35-36 (Jean S. Pictet ed., 1960) (listing “convenient criteria” for recognizing an “armed conflict”).

33. See Declaration of Mary Ellen O’Connell ¶ 7, *Al-Aulaqi v. Obama*, 727 F. Supp. 2d 1 (D.D.C. 2010) (No. 10-cv-01469) (“The combatant’s privilege is necessitated by the exigencies of military conflict.”); Jennifer C. Daskal, *The Geography of the Battlefield: A Framework for Detention and Targeting Outside the “Hot” Conflict Zone*, 161 U. PA. L. REV. (forthcoming 2013) (manuscript at 21) (on file with author) (discussing the author’s view that “[t]he exigencies that justify application of war-time rules simply do not apply outside zones of active hostilities”).
34. Koh, *supra* note 20.
35. U.N. Charter art. 2, para. 4 (“All Members shall refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any state, or in any other manner inconsistent with the Purposes of the United Nations.”); *id.* 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.”); see also Special Rapporteur on Extrajudicial, Summary or Arbitrary Executions, *supra* note 7, ¶ 45 (recognizing that “state practice” recognizes the right to use force in self-defense against a “real and imminent threat”).
36. See Gabor Rona, *Interesting Times for International Humanitarian Law: Challenges from the “War on Terror,”* FLETCHER F. WORLD AFF., Summer/Fall 2003, at 55, 63-64 (“[The] inapplicability of humanitarian law to aspects of the War on Terror that do not meet the criteria [for armed conflict] should be viewed as a benefit rather than an obstacle or collision. . . . Where the *lex specialis* of humanitarian law is active . . . humanity is denied some very fundamental protections provided by other legal regimes.”); 31st International Conference of the Red Cross and Red Crescent, Nov. 28 - Dec. 1, 2011, *International Humanitarian Law and the Challenges of Contemporary Armed Conflicts*, 10-11, I.C.R.C. Doc. 31IC/11/5.1.2 (Oct. 2011) [hereinafter I.C.R.C. Report] (“It should be borne in mind that [international humanitarian law] rules governing the use of force . . . are less restrictive than the rules applicable outside of armed conflicts governed by other bodies of law. . . . [I]t is believed to be inappropriate and unnecessary to apply [international humanitarian law] to situations that do not amount to armed conflict.”).
37. See BIJ, *Covert War*, *supra* note 9; see also Hastings, *supra* note 29 (“Obama’s drone program . . . amounts to the largest unmanned aerial offensive ever conducted in military history; never have so few killed so many by remote control.”).

The geographic scope of the program is expanding in part because of whom the Administration believes it can target in connection with its armed conflict. Outside of Afghanistan, the targets are largely “associated forces” of al Qaeda that the Administration asserts are “cobelligerents,” analogizing controversially to the relationship between third-party states and warring parties in situations of international armed conflict. Even if the analogy were appropriate, it is far from clear that the groups at issue are sufficiently organized and “associated” with al Qaeda to render them cobelligerents under international law. To the extent these groups are untethered to the armed conflict between the United States and al Qaeda, the laws of war do not apply. Domestic and international human rights law is the correct framework. Outside of the United States, this is not controversial. It is the framework that the international community has generally recognized as appropriate for dealing with acts of terrorism, and the one that close allies of the United States have applied in responding to attacks on their own soil, including after 9/11. Indeed, it is the framework the United States itself upheld in condemning targeted killings by other countries before 9/11.<sup>38</sup>

The broad geographic scope of the program is also based on the Administration claims that the laws of war permit the United States to target individuals potentially anywhere they are located, even in areas that do not exhibit the battlefield conditions that justify those exceptional rules.<sup>39</sup> That position is not only highly legally contested,<sup>40</sup> including by some of the United States’ closest

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38. See Scott Shane, *Election Spurred a Move to Codify U.S. Drone Policy*, N.Y. TIMES, Nov. 24, 2012, <http://www.nytimes.com/2012/11/25/world/white-house-presses-for-drone-rule-book.html> (“For years before the Sept. 11, 2001, attacks, the United States routinely condemned targeted killings of suspected terrorists by Israel, and most countries still object to such measures.”).
39. Eric Holder, U.S. Attorney Gen., Address at Northwestern University School of Law (Mar. 5, 2012) (transcript available at <http://www.justice.gov/iso/opa/ag/speeches/2012/ag-speech-1203051.html>) (“Our legal authority is not limited to the battlefields in Afghanistan. . . . We are at war with a stateless enemy, prone to shifting operations from country to country.”); see also Brennan, *supra* note 12 (discussing the U.S. practice of targeting “beyond hot battlefields like Afghanistan”).
40. See, e.g., I.C.R.C. Report, *supra* note 36, at 10 (“It should be reiterated that the ICRC does not share the view that a conflict of global dimensions is or has been taking place.”); Special Rapporteur on Extrajudicial, Summary or Arbitrary Executions, *supra* note 7, ¶¶ 53-56 (expressing skepticism that the United States is in armed conflict with al Qaeda outside Afghanistan and Iraq); Mary Ellen O’Connell, *Combatants and the Combat Zone*, 43 U. RICH. L. REV. 845, 858 (2009) (“In addition to exchange, intensity, and duration [of fighting], armed conflicts have a spatial dimension. It is not the case that if there is an armed conflict in one state—for example, Afghanistan—that all the world is at war, or even that Afghanis and Americans are at war with each other all over the planet.”); Daskal, *supra* note 33 (manuscript at 20-29) (distinguishing between the rules that should apply within zones of active hostilities and elsewhere); Ben Emmerson, Special Rapporteur on Counter-Terrorism & Human Rights, United Nations, Speech at



allies,<sup>41</sup> but also dangerous: according to the International Committee of the Red Cross, “the notion that a person ‘carries’ a [noninternational armed conflict] with him when he moves to the territory of a nonbelligerent state should not be accepted.”<sup>42</sup> Accepting such a view, and the attendant “proposition that harm or damage could lawfully be inflicted on [civilians or civilian objects] in operation of the [International Humanitarian Law] principle of proportionality because an individual sought by another state is in their midst . . . would in effect mean recognition of the concept of a ‘global battlefield.’”<sup>43</sup>

The Administration has responded to accusations that it employs armed force “whenever or wherever [it] want[s]” by citing respect for other nations’ sovereignty as a constraint on its own actions.<sup>44</sup> Indeed, the UN Charter protects the right to state sovereignty and generally prohibits one nation from using aggressive force in another’s territory.<sup>45</sup> The Charter does establish a narrow exception to this prohibition: a nation may use extraterritorial force to respond in self-defense to an “armed attack.”<sup>46</sup> But the Administration’s interpretation of “self-defense” has significantly broadened that exception. First, where a for-

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Harvard Law School (Oct. 25, 2012) (transcript available at <http://harvardhumanrights.files.wordpress.com/2012/10/harvard-speech.doc>) (“The global war paradigm was always based on the flimsiest of reasoning, and was not supported even by close allies of the US. The first term Obama administration initially retreated from this approach, but over the past 18 months it has begun to rear its head once again, in briefings by administration officials seeking to provide a legal justification for the drone programme of targeted killing in Pakistan, Yemen and Somalia.”).

41. See John O. Brennan, Assistant to the President for Homeland Sec. & Counterterrorism, *Strengthening Our Security by Adhering to Our Values and Laws* (Sept. 16, 2011) (transcript available at <http://www.whitehouse.gov/the-press-office/2011/09/16/remarks-john-o-brennan-strengthening-our-security-adhering-our-values-an>) (“An area in which there is some disagreement is the geographic scope of the conflict. 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. . . . Others in the international community—including some of our closest allies and partners—take a different view of the geographic scope of the conflict, limiting it only to the ‘hot’ battlefields.”); see also Daskal, *supra* note 33 (manuscript at 29) (recognizing that key European allies of the United States view the conflict with Al Qaeda as limited to “hot” battlefields); Emmerson, *supra* note 40 (“The [global] war paradigm . . . was not supported even by close allies of the US.”).
42. I.C.R.C. Report, *supra* note 36, at 22.
43. *Id.*
44. Holder, *supra* note 39; see Brennan, *supra* note 12 (“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.”).
45. U.N. Charter art. 2, para. 4.
46. *Id.* art 51.

eign state has not consented to the use of force, the Administration asserts that it may nevertheless use force if that state is “unable or unwilling to deal effectively with a threat to the United States.”<sup>47</sup> Whether force is permissible in “unable or unwilling” situations is an unsettled question,<sup>48</sup> but even scholars who view the test as proper argue that it is too indeterminate to serve as a meaningful constraint.<sup>49</sup> Second, while state practice supports the use of force in response to an imminent threat of armed attack—where “the necessity of . . . self-defence is instant, overwhelming and leaving no choice of means, and no moment of deliberation”<sup>50</sup>—the Administration has argued for the oxymoronic notion of “elongated imminence.”<sup>51</sup> Even when the use of force does not violate a state’s sovereignty, however, the question of whether it violates the rights of the targeted individual and bystanders is separate and distinct.<sup>52</sup> Unless target-

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47. Holder, *supra* note 39; see Brennan, *supra* note 12 (“There is nothing in international law 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.”).
  48. See Ashley S. Deeks, “Unwilling or Unable”: Toward a Normative Framework for Extraterritorial Self-Defense, 52 VA. J. INT’L L. 483, 488 (2012) (“It is worth noting that this test is not the only standard around which states could have coalesced.”); *id.* at 488-89 & n.16 (noting alternate regimes that the Article does not explore in detail); Kevin Jon Heller, *The Law of Neutrality Does Not Apply to the Conflict with Al-Qaeda, and It’s a Good Thing, Too: A Response to Chang*, 47 TEX. INT’L L.J. 115, 140 (2011) (“It is no longer clear whether such uses of force [in unwilling or unable situations] are ever permissible in the Charter era . . . .”); Mary Ellen O’Connell, Comment, *Seductive Drones: Learning from a Decade of Lethal Operations*, 21 J.L. INFO. & SCI. 116, 128-33 (2011) (arguing that neither the U.N. Charter nor the decisions of the International Court of Justice permit one state to use lethal force in another state because that second state is “weak,” but recognizing debate among scholars).
  49. See, e.g., Deeks, *supra* note 48, at 503-33 (2012) (recognizing the theory’s “lack of clear legal content” but suggesting ways to define and apply the test more clearly).
  50. Special Rapporteur on Extrajudicial, Summary or Arbitrary Executions, *supra* note 7, ¶ 45 (quoting R.Y. Jennings, *The Caroline & McLeod Cases*, 32 AM. J. INT’L L. 82, 89 (1938)).
  51. DANIEL KLAIDMAN, KILL OR CAPTURE: THE WAR ON TERROR AND THE SOUL OF THE OBAMA PRESIDENCY 218 (2012) (discussing Department of State Legal Advisor Harold Koh’s views of the circumstances in which the use of force outside of battlefields would be permissible in self-defense); see also Brennan, *supra* note 41 (arguing for “a more flexible understanding of ‘imminence’”).
  52. See Special Rapporteur on Extrajudicial, Summary or Arbitrary Executions, *supra* note 7, ¶ 44 (“[E]ven if the use of inter-state force is offered as justification for a targeted killing, it does not dispose of the further question of whether the killing of the particular targeted individual or individuals is lawful.”); see also I.C.R.C. Report, *supra* note 36, at 21 (recognizing that the legality of extraterritorial targeting “requires an analysis of the lawfulness of the resort to force by one state in the

ing occurs in the context of armed conflict, the laws of war do not apply, and the legality of the killings depends instead on domestic and international human rights law.<sup>53</sup>

While the Administration's broad and tenuous legal interpretations have thus helped to "sustain[] a seemingly permanent war" through the targeted killing program,<sup>54</sup> the peculiarities of the Administration's new weapons arsenal also play a role. Precision-guided munitions and unmanned drones have made killing cheaper and easier than ever before.<sup>55</sup> Remote-controlled, unmanned drones render domestic blowback from troop casualties a nonissue.<sup>56</sup> The accretion of foreign casualties, though steady, is slow and, moreover, denied by the government. Indeed, the continuing opacity surrounding the targeted killing program allows the Administration to continue insisting that only "militants" are being killed. Finally, the advanced technical capabilities of drones can lead to a dangerous conflation of precision with lawfulness and legitimacy.<sup>57</sup> As some scholars have warned, drones create the potential for perpetual asymmetric war.

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territory of another and an analysis of the international legal framework governing the way in which force is used").

53. See Special Rapporteur on Extrajudicial, Summary or Arbitrary Executions, *supra* note 7, ¶ 44 ("The legality of a specific killing depends on whether it meets the requirements of [international humanitarian law] and human rights law (in the context of armed conflict) or human rights law alone (in all other contexts)."); I.C.R.C. Report, *supra* note 36, at 21.
54. Miller, *supra* note 15.
55. See Hastings, *supra* note 29 (recognizing the "low cost" and "lethal convenience" of drones, and arguing that the "immediacy and secrecy of drones make it easier than ever for leaders to unleash America's military might"); see also Mary Dudziak, *Law, War, and the History of Time*, 98 CALIF. L. REV. 1669, 1694-96 (discussing the 1991 Iraq War, which relied largely on air power, not ground troops, as establishing a "new American way of conflict . . . that was not meant to feel like a war").
56. See Hastings, *supra* note 29 (noting that drones "limit[] U.S. casualties" and consequently "provoke no 'political cost' in the U.S."); John Kaag & Sarah Kreps, *The Moral Hazard of Drones*, N.Y. TIMES: OPINIONATOR (July 22, 2012, 5:15 PM), <http://opinionator.blogs.nytimes.com/2012/07/22/the-moral-hazard-of-drones>.
57. See Brennan, *supra* note 12 ("[W]e 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."); Kaag & Kreps, *supra* note 56.

## II. SCOPE OF TARGETS

“[W]e must guard against aggressive interpretations . . . that will discredit our efforts, provoke controversy, and invite challenge.”<sup>58</sup>

One of the most controversial aspects of the targeted killing program—even among those who accept the premise that an armed conflict with al Qaeda permits targeting beyond actual battlefields—is the Administration’s view of whom it can target within such a conflict.<sup>59</sup> That view, contrary to the restrained approach that Johnson advocated in his address,<sup>60</sup> is based upon novel and aggressive interpretations of international law that have indeed generated intense opposition, not least from people directly affected.

As an initial matter, the Administration claims that it may target “associated force[s]” of al Qaeda as “cobelligerent[s].”<sup>61</sup> The Administration reaches that conclusion by drawing an analogy to a separate concept from the law of neutrality, which originated in the nineteenth century to regulate the conduct of states during international armed conflicts. According to established principles of the law of neutrality, third-party states have the right to neutrality by

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58. Johnson, *supra* note 17, at 145.

59. See, e.g., Jens David Ohlin, *Targeting Co-Belligerents* 64 (Cornell Law Faculty Working Papers, Paper No. 92, 2011) (explaining that “there are multiple problems associated with linking an individual to the larger terrorist organization that is engaged in an armed conflict with the United States”); Kenneth Anderson, *Self Defense and Non-International Armed Conflict in Drone Warfare*, VOLOKH CONSPIRACY (Oct. 22, 2010, 6:31 AM), <http://www.volokh.com/2010/10/22/self-defense-and-non-international-armed-conflict-in-drone-warfare> (“The non-international armed conflict goes where the participants go; and likewise if new groups engage in co-belligerent action, then they become part of the armed conflict. But it has seemed to me in the past several years that some of these groups are in other places and not obviously connected, except by a forced abstraction, to the groups under the AUMF.”); Gabor Rona, *Thoughts on Brennan’s Speech*, OPINIO JURIS (May 2, 2012, 3:18 AM), <http://opiniojuris.org/2012/05/02/thoughts-on-brennans-speech/> (objecting to Brennan’s assertion that individuals who are “part of al-Qa’ida or its associated forces” are legitimate targets as a “sweeping and incorrect claim of who is targetable under international law”). *But see* Curtis A. Bradley & Jack L. Goldsmith, *Congressional Authorization and the War on Terrorism*, 118 HARV. L. REV. 2047, 2109-16 (2005) (advancing a broader understanding of which individuals and organizations are included within the AUMF and noting that “all members of Al Qaeda” may be targeted).

60. Johnson, *supra* note 17.

61. *Id.* at 146 (“An ‘associated force,’ as we interpret the phrase, has two characteristics: (1) it is an organized, armed group that has entered the fight alongside al Qaeda, and (2) it is a cobelligerent with al Qaeda in hostilities against the United States or its coalition partners.”).

default.<sup>62</sup> When they violate neutrality in favor of one party, however, those third-party states may be designated “cobelligerents” of the favored party and become subject to lawful attack.<sup>63</sup> As traditionally understood, the concept of a “cobelligerent” under the law of neutrality referred to state entities.<sup>64</sup> While the law of neutrality has been invoked in certain situations of noninternational armed conflict involving nonstate groups,<sup>65</sup> it became appropriate in such contexts only after states recognized such groups as legitimate cobelligerents, with the same rights and privileges as the opposing state’s armed forces.<sup>66</sup> Applying the concept to irregular terrorist groups as the Administration does here—for example, analogizing the relationship between al Shabaab and al Qaeda to the

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62. See, e.g., 2 L. OPPENHEIM, INTERNATIONAL LAW § 307 (H. Lauterpacht ed., 8th ed. 1952) (explaining that a state is and remains neutral until it chooses to become a cobelligerent or participates in the hostilities).

63. See, e.g., *id.* §§ 357-60 (discussing circumstances that terminate neutral status); Bradley & Goldsmith, *supra* note 59, at 2112 (explaining that a state can become a cobelligerent by “participat[ing] in acts of war by the belligerent,” “supply[ing] war materials to a belligerent,” or “permit[ting] belligerents to use its territory to move troops or munitions, or to establish wartime communication channels”). *But see* Rebecca Ingber, *Untangling Belligerency from Neutrality in the Conflict with Al-Qaeda*, 47 TEX. INT’L L.J. 75, 87-88 (2011) (explaining that actions favoring one belligerent party to a conflict do not necessarily bring neutrality to an end).

64. See, e.g., 2 OPPENHEIM, *supra* note 62, § 293 (defining neutrality as “the attitude of impartiality adopted by third States towards belligerents and recognised by belligerents . . . creating rights and duties between the impartial States and the belligerents”); Tess Bridgeman, *The Law of Neutrality and the Conflict with Al Qaeda*, Note, 85 N.Y.U. L. REV. 1186, 1197 (2010) (“Broadly speaking, the law of neutrality regulates the coexistence of states at war and states at peace.”).

65. See Heller, *supra* note 48, at 118 (noting that the law of neutrality is capable of applying in the noninternational armed conflict context of civil war).

66. See *id.* at 122 (explaining that neutrality law has applied to insurgencies where: “(1) a general armed conflict was underway within the state; (2) the insurgents controlled a significant portion of national territory; (3) the insurgents respected the laws of war and engaged in hostilities through organized armed forces under responsible command; and (4) the hostilities affected third states to the point that they needed to adopt a position concerning the legal status of those hostilities”).

relationship between Vichy France and Germany in World War II<sup>67</sup>—finds no support in state practice or *opinio juris*.<sup>68</sup>

Even assuming that the concept can be logically applied in this context, however, it is far from clear that the targeted nonstate groups are sufficiently related to al Qaeda to qualify as its cobelligerents. According to Johnson, more than a shared ideology is required to establish the cobelligerent relationship.<sup>69</sup> Nevertheless, the list of al Qaeda “affiliates” and “adherents” whom the U.S. has already targeted—or whom it suggests it will target in the future—raises questions about how much more is required.<sup>70</sup> While Johnson stated that U.S.

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67. See, e.g., Ingber, *supra* note 63, at 90 n.63 (describing as an “archetypal example of co-belligerency . . . the entrance of Vichy France into the conflict alongside Germany in World War II”); see also Oona Hathaway et al., *The Power To Detain: Detention of Terrorism Suspects After 9/11*, 38 YALE J. INT’L L. (forthcoming 2013) (manuscript at 12 n.50) (on file with author) (recognizing Vichy France as the “regularly cited example of the United States’s past practice in targeting cobelligerents”).
68. John C. Denn & Kevin Jon Heller, Debate, *Targeted Killing: The Case of Anwar Al-Aulaqi*, 159 U. PA. L. REV. PENNUMBRA 175, 200 (2011), [http://www.pennumbra.com/debates/pdfs/Targeted\\_Killing.pdf](http://www.pennumbra.com/debates/pdfs/Targeted_Killing.pdf) (“There are actually numerous reasons why cobelligerency does not apply to nonstate actors in NIAC. The most important, of course, is the complete absence of state practice or *opinio juris* supporting the existence of such a customary rule.”); see *Al-Bihani v. Obama*, 590 F.3d 866, 873 (D.C. Cir. 2010) (describing as “folly” an “attempt to apply the rules of co-belligerency” to a nonstate entity); see also Int’l Comm. of the Red Cross, *International Humanitarian Law and the Challenges of Contemporary Armed Conflicts*, 89 INT’L REV. RED CROSS 719, 725 (2007) (“To say that a global international war is being waged against groups such as Al-Qaeda would mean that, under the laws of war, their followers should be considered to have the same rights and obligations as members of regular armed forces. It was already clear in 1949 that no nation would contemplate exempting members of non-State armed groups from criminal prosecution under domestic law for acts of war that were not prohibited under international law—which is the crux of combatant and prisoner-of-war status.”).
69. Johnson, *supra* note 17, at 146 (“[A]n “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.”).
70. See Brennan, *supra* note 12 (mentioning al Shabaab in Somalia, Al Qaeda in the Arabian Peninsula (AQAP) in Yemen, Al Qaeda in the Islamic Maghreb (AQIM) in North and West Africa, and Boko Haram in Nigeria as “affiliates” and “adherents” of Al Qaeda that threaten the United States). But see, e.g., Daniel L. Byman, *Breaking the Bonds Between Al-Qa’ida and Its Affiliate Organizations* 12 (Saban Ctr. for Middle E. Policy at Brookings, Analysis Paper, 2012) (“[T]he Shebaab is still largely independent [from the Al Qaeda core].”); Stephanie Hanson, *Al-Shabaab*, COUNCIL FOREIGN REL., <http://www.cfr.org/somalia/al-shabaab/p18650> (last updated Aug. 10, 2011) (“[M]ost analysts believe al-Shabaab’s organizational links to al-Qaeda are weak . . . . The strongest tie between al-Shabaab and al-Qaeda seems

courts have upheld the “associated force[s]” concept by analogy to cobelligerency,<sup>71</sup> only the D.C. district and circuit courts have addressed the issue, and in the detention context.<sup>72</sup> Moreover, those courts’ opinions do not usefully illuminate the definition of a cobelligerent, since—in most instances—each group found to be associated either had been engaged in combat in Afghanistan in 2001 alongside the Taliban or al Qaeda, or had been concretely facilitating attacks against U.S. forces there.<sup>73</sup> The courts have not addressed the “outer contours” of the concept—and they have certainly not approved the aggressive interpretations on which the Administration has based its targeted killing operations.<sup>74</sup>

In addition to its novel and aggressive legal theory with respect to *groups* associated with al Qaeda and the Taliban in the “armed conflict” with the United States, the Administration has also insisted upon a controversial interpretation with respect to *individuals* who may be targeted as part of those groups. In his speech in April, Deputy National Security Advisor John Brennan asserted that the government has the authority to target “individuals who are part of al-Qa’ida or its associated forces . . . just as we target[ed] enemy leaders in past conflicts, such as German and Japanese commanders during World War II.”<sup>75</sup> However, in contrast to situations of international armed conflict between states, where states may target each other’s military forces by virtue of the non-civilian status of the combatants, the law is more protective in armed conflicts that involve nonstate groups—where the line distinguishing civilian from fighter is far less clear.<sup>76</sup> In such contexts, the relevant inquiry is about conduct, not

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to be ideological.”); Declaration of Bernard Haykel ¶ 13, *Al-Aulaqi v. Obama*, 727 F. Supp. 2d 1 (D.D.C. 2010) (No. 10-1469) (“The relationship between Al Qaeda Central . . . and AQAP is not organizationally close.”).

71. Johnson, *supra* note 17, at 146.

72. See, e.g., *Hamlily v. Obama*, 616 F. Supp. 2d 63, 70 (D.D.C. 2009) (“The authority also reaches those who were members of ‘associated forces,’ which the Court interprets to mean ‘co-belligerents’ as that term is understood under the law of war.”).

73. See *Khan v. Obama*, 655 F.3d 20, 32 (D.C. Cir. 2011); *Al-Bihani*, 590 F.3d at 872; *Barhoumi v. Obama*, 609 F.3d 416, 419-20 (D.C. Cir. 2010). Moreover, the court in *Hamlily*, 616 F. Supp. 2d 63, merely mentioned the cobelligerency concept without analysis.

74. Ingber, *supra* note 63, at 90 n.65.

75. Brennan, *supra* note 12.

76. See I.C.R.C. Report, *supra* note 36, at 44 (“In practice, civilian direct participation in hostilities is likely to entail significant confusion and uncertainty in the implementation of the principle of distinction. . . . In case of doubt, the person in question must be presumed to be protected against direct attack.”); see also Gabor Rona, *Brennan’s Speech: A Response to Bobby Chesney*, OPINIO JURIS (May 3, 2012, 11:40 AM), <http://www.opiniojuris.org/2012/05/03/brennans-speech-response-to-bobby-chesney> (“[International humanitarian law], which above all seeks to pro-

status: the Administration must determine not whether individuals are “part of” a fighting force, but whether they are “directly participating in hostilities.”<sup>77</sup> The Administration thus casts a far wider net than the law allows when it identifies as lawful targets all individuals who are “part of” al Qaeda or its associated forces. Indeed, this policy offends the fundamental law-of-war principle of distinction.<sup>78</sup> While the Administration has stated that it prioritizes individuals who pose a “significant threat” over the “thousands” of individuals it could theoretically target, that standard, nebulous as it still is, is a matter of policy, not legal obligation.<sup>79</sup>

The reported statements of Administration officials that “all military-age males” within a strike zone are presumed to be “combatants” adds to concerns about the outer bounds of the Administration’s standards.<sup>80</sup> This manner of classification may explain how the Administration continues to claim that its strikes result in few civilian casualties,<sup>81</sup> despite evidence to the contrary.<sup>82</sup>

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tect civilians from the ravages of war, places a heavier burden and stricter limitations on killing people outside of ‘armed forces’ than within them.”).

77. Rona, *supra* note 59; see Bradley & Goldsmith, *supra* note 59, at 2115 (noting that individuals may be targeted if they take “direct part” in hostilities).
78. See I.C.R.C. Report, *supra* note 36, at 18-19 (describing the principle of distinction as “first among” the basic rules governing the conduct of hostilities, requiring the parties to “at all times distinguish between civilians, civilian objects and military objectives”).
79. Brennan, *supra* note 12 (“There are, after all, literally thousands of individuals who are part of al-Qaida, the Taliban, or associated forces, thousands upon thousands.”).
80. Jo Becker & Scott Shane, *Secret “Kill List” Proves a Test of Obama’s Principles and Will*, N.Y. TIMES, May 29, 2012, <http://www.nytimes.com/2012/05/29/world/obamas-leadership-in-war-on-al-qaeda.html>. The presumption holds “unless there is explicit intelligence posthumously proving them innocent.” *Id.*
81. See Mark Landler, *Civilian Deaths Due to Drones Are Not Many, Obama Says*, N.Y. TIMES, Jan. 30, 2012, <http://www.nytimes.com/2012/01/31/world/middleeast/civilian-deaths-due-to-drones-are-few-obama-says.html>.
82. See, e.g., STANFORD LAW SCH. INT’L HUMAN RIGHTS AND CONFLICT RESOLUTION CLINIC & N.Y.U. SCH. OF LAW GLOBAL JUSTICE CLINIC, *LIVING UNDER DRONES: DEATH, INJURY, AND TRAUMA TO CIVILIANS FROM US DRONE PRACTICES IN PAKISTAN* 32-35 (2012) (discussing the underreporting of civilian casualties by U.S. government sources); BIJ, *Covert War*, *supra* note 9.



## III. TRANSPARENCY

*“[W]e must adopt legal positions that comport with common sense and fit well within the mainstream of legal thinking in the area . . . .”*<sup>83</sup>

While the legality, morality, and wisdom of the targeted killing program have been the subject of much dispute, there has been relative consensus about at least one issue: the need for transparency about the program. To some extent, the Administration has responded to the call. In a series of speeches in 2012, including by Johnson, senior Administration officials have outlined various aspects of the program: its legal rationale, principles that inform targeting decisions, and the program’s geographic scope.<sup>84</sup> In interviews with the media, named and anonymous officials—even President Obama himself—have defended and discussed certain specific targets and operations.<sup>85</sup> While the Administration’s legal position still requires further explanation, and although data about the impact of the program still depends entirely on the work of nongovernmental sources, the program’s existence and basic contours are by now beyond dispute. Indeed, in an address last April, Deputy National Security Advisor Brennan unambiguously acknowledged: “Yes, in full accordance with the law . . . the United States Government conducts targeted strikes against specific al-Qaida terrorists, sometimes using . . . drones.”<sup>86</sup> Brennan made clear that he was specifically referring to strikes beyond the “hot” battlefield of Afghanistan.<sup>87</sup>

Given these and numerous other official public statements and leaks, the Administration takes an incongruous position in the courtroom.<sup>88</sup> In litigation, the government continues to maintain that the very existence of the drone program—at least to the extent that the CIA is involved—is a secret. On that basis, the Administration has fought to withhold information about the program—including reported legal memoranda justifying the killing of American citi-

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83. Johnson, *supra* note 17, at 149.

84. See Brennan, *supra* note 12; Holder, *supra* note 39; Johnson, *supra* note 17; Koh, *supra* note 20.

85. See, e.g., Becker & Shane, *supra* note 80 (reporting interviews with Administration officials regarding the targeted killings of Baitullah Mehsud and Anwar al-Awlaki); Landler, *supra* note 81 (reporting President Obama’s “unusually candid public discussion of the Central Intelligence Agency’s covert program”).

86. Brennan, *supra* note 12.

87. *Id.*

88. See *New York Times Co. v. U.S. Department of Justice*, No. 11-9336, 2013 U.S. Dist. LEXIS 979, at \*4 (S.D.N.Y. Jan. 3, 2013) (granting the government’s motion for summary judgment in a FOIA case seeking records about the targeted killing of U.S. citizens, but acknowledging that the Administration “has engaged in public discussion of the legality of targeted killing, even of citizens, but in cryptic and imprecise ways”).

zens—in pending lawsuits under the Freedom of Information Act (FOIA).<sup>89</sup> Under the Administration's theory, it can neither confirm nor deny whether it even possesses relevant records because doing so would reveal the classified fact of whether a program exists. The Administration's position has been widely criticized, including by scholars who generally support its authority to carry out drone strikes.<sup>90</sup> As one critic put it, "[t]here is no doubt that the executive branch has manipulated the secrecy system to permit it to tell the public a lot about a classified program without (as yet) suffering any of the disclosure obligations that normally come from talking about a classified program."<sup>91</sup> As a result, the Administration can make—and has made—self-serving claims about the legality and legitimacy of the program without drawing the public scrutiny that would ordinarily follow from fuller disclosures.

The Administration has invoked the need for secrecy about the program not only to prevent public scrutiny in the FOIA context, but also to oppose judicial scrutiny when fundamental individual rights have been at stake. In *Al-Aulaqi v. Obama*, which challenged the widely reported authorization for the targeted killing of a U.S. citizen in Yemen,<sup>92</sup> the Administration argued that litigating the plaintiff's due process and other constitutional and human rights claims would require disclosure of state secrets and should be barred at the outset on that ground alone.<sup>93</sup> While the state-secrets privilege recognizes that a

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89. See, e.g., Brief for Appellee at 43, *ACLU v. CIA*, No. 11-5320 (D.C. Cir. May 21, 2012) (seeking to bar the ACLU's FOIA request for records pertaining to the CIA's program).

90. See, e.g., Arthur S. Brisbane, *The Secrets of Government Killing*, N.Y. TIMES, Oct. 8, 2011, <http://www.nytimes.com/2011/10/09/opinion/sunday/the-secrets-of-government-killing.html> (reporting American University law professor Kenneth Anderson's self-professedly "relentless" criticism of the Obama Administration's refusal to comment on drone strikes and quoting Anderson's statement that "essentially conducting the foreign policy of the U.S. by leaked journalism . . . is [not] acceptable"); Jack Goldsmith, *More on al-Aulaqi and Transparency*, LAWFARE (Oct. 5, 2011, 2:17 PM), <http://www.lawfareblog.com/2011/10/more-on-al-aulaqui-and-transparency> ("[I]t is wrong . . . for the government to maintain technical co-vertness but then engage in continuous leaks, attributed to government officials, of many (self-serving) details about the covert operations and their legal justifications. It is wrong because it is illegal.").

91. Jack Goldsmith, *Thoughts on Today's Important Drone FOIA Oral Argument in DC Circuit*, LAWFARE (Sept. 20, 2012, 6:34 AM), <http://www.lawfareblog.com/2012/09/thoughts-on-todays-important-drone-foia-oral-argument-in-dc-circuit>.

92. See Complaint, *Al-Aulaqi v. Obama*, 727 F. Supp. 2d 1 (D.D.C. 2010) (No. 1:10-cv-01469).

93. Government's Opposition to Plaintiff's Motion for Preliminary Injunction and Memorandum in Support of Defendant's Motion to Dismiss, *Al-Aulaqi*, 727 F. Supp. 2d 1 (No. 10-cv-1469). The district court did not reach the state secrets issue, but rather dismissed the case on standing and political question grounds. 727 F. Supp. 2d at 54.

private litigant's right of redress must sometimes yield to the executive's obligation to safeguard military secrets, the invocation of the privilege in *Al-Aulaqi*—to foreclose judicial review of claims involving a threatened deprivation of life—was unprecedented. Indeed, when it comes to the deprivation of liberty in the criminal context, the Supreme Court has recognized that it would be “unconscionable to allow [the government] to undertake prosecution and then invoke its governmental privileges to deprive the accused of anything which might be material to his defense.”<sup>94</sup> In other words, if the government had criminally prosecuted Anwar al-Aulaqi, rather than targeting him for death without charge or trial, invocation of the state-secrets privilege to bar adjudication would have been impermissible.<sup>95</sup>

#### IV. JUDICIAL REVIEW

*“History shows that, under the banner of ‘national security,’  
much damage can be done . . . .”*<sup>96</sup>

Johnson stated in his speech, as the Administration has argued in court,<sup>97</sup> that targeting decisions are not appropriate for judicial review—even when such decisions call for the use of lethal force against American citizens.<sup>98</sup> Implicit in the Administration's position is the claim that judicial review is not only inappropriate, but also unnecessary. Lawyers on the President's national security team debate and scrutinize each other's opinions, the Administration insists, so all targeting decisions are subject to legal review.<sup>99</sup> But notwithstanding the importance of internal diligence, Johnson himself recognized that unchecked executive policies that have been promulgated in the name of national security can result in grave harms.<sup>100</sup> Such historical examples warn against relying on internal processes without meaningful outside review to protect against error and abuse.

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94. *United States v. Reynolds*, 345 U.S. 1, 12 (1953).

95. See Reply Memorandum in Support of Plaintiff's Motion for a Preliminary Injunction & in Opposition to Defendants' Motion to Dismiss at 47-49, *Al-Aulaqi*, 727 F. Supp. 2d 1 (No. 10-cv-01469).

96. Johnson, *supra* note 17, at 149.

97. See Government's Opposition to Plaintiff's Motion for Preliminary Injunction and Memorandum in Support of Defendant's Motion to Dismiss, *Al-Aulaqi*, 727 F. Supp. 2d 1 (No. 10-cv-1469).

98. Johnson, *supra* note 17, at 148. (“[C]ontrary to the view of some, targeting decisions are not appropriate for submission to a court.”); see also Holder, *supra* note 39 (discussing due process considerations with respect to the targeting of U.S. citizens and asserting that “[d]ue process’ and ‘judicial process’ are not one and the same, particularly when it comes to national security”).

99. Johnson, *supra* note 17, at 148.

100. *Id.* at 149.

Guantánamo is an apt example. From 2001 to 2004, the executive held nearly 800 men on the basis of secret information and secret unilateral determinations.<sup>101</sup> While the government contended that the men detained were dangerous terrorists who were intent on doing harm to the United States, it withheld their names—indeed, fought FOIA requests for their disclosure<sup>102</sup>—and opposed detainees’ attempts to seek judicial review. In response to the first habeas petitions filed, the government made familiar arguments: the United States was engaged in a global armed conflict against al Qaeda and its supporters; judicial review would put the federal courts “in the unprecedented position of micromanaging the executive’s handling of captured enemy combatants” and “second-guessing the military’s determination as to which captured aliens pose a threat to the United States”; and the absence of judicial review did not mean the detentions were without scrutiny—from Congress and the public.<sup>103</sup> Years later, judicial review would reveal that the government’s internal processes for status determinations were woefully inadequate<sup>104</sup> and, ultimately, that many men had been wrongfully held and abused for years.<sup>105</sup> In rejecting the government’s arguments that judicial review should be denied, the Supreme Court recognized that there is considerable risk of error inherent in any process that is “closed and accusatorial,” even in the presence of diligence and good faith.<sup>106</sup> According to the Court, where “the consequence of error may be detention of persons for the duration of hostilities that may last a generation or more, this is a risk too significant to ignore.”<sup>107</sup> Indeed, if the risk of prolonged arbi-

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101. *The Guantanamo Docket: The Detainees*, N.Y. TIMES, <http://projects.nytimes.com/guantanamo/detainees> (last visited Jan. 31, 2013) (indicating that 779 people have been detained at the U.S. military prison at Guantánamo).
  102. Andrew Selsky, *Pentagon Releases Gitmo Detainees’ Names*, WASH. POST, May 15, 2006, <http://www.washingtonpost.com/wp-dyn/content/article/2006/05/15/AR2006051500905.html>.
  103. Brief for Respondents at 1, 12, 43, 47-50, *Rasul v. Bush*, 542 U.S. 466 (2004) (Nos. 03-334, 03-343).
  104. See *Boumediene v. Bush*, 553 U.S. 723, 767 (2008) (discussing the inadequacy of “enemy combatant” determinations by the Combatant Status Review Tribunals as a substitute for habeas review).
  105. See, e.g., *Al Gincio v. Obama*, 626 F. Supp. 2d 123, 129 (D.D.C. 2009) (finding that the petitioner was not “part of” Taliban or Al Qaeda forces when he was taken into U.S. custody and discussing evidence that he was tortured into giving a false confession); *Boumediene v. Bush*, 579 F. Supp. 2d 191, 197 (D.D.C. 2008), *rev’d*, *Bensayah v. Obama*, 610 F.3d 718 (D.C. Cir. 2010) (finding the government’s basis for the detention of five petitioners to rest on “so *thin* a reed” as to be inconsistent with the Supreme Court’s admonition to protect petitioners from the risk of erroneous detention).
  106. *Boumediene v. Bush*, 553 U.S. at 785 (quoting *Bismullah v. Gates*, 514 F.3d 1291, 1296 (D.C. Cir. 2008) (Ginsburg, C.J., concurring in denial of reh’g en banc)).
  107. *Id.*

trary deprivation of liberty was sufficient to mandate judicial review in the Guantánamo context, the risk associated with the targeted killing program—of irreparable deprivation of life—ought to require judicial review *a fortiori*.

The Obama Administration professes that its actions are *not* unchecked because Congress retains “robust” oversight.<sup>108</sup> But the reporting of CIA and JSOC operations is generally limited to intelligence and armed services committees in the House and Senate—and sometimes only to the leaders of those committees.<sup>109</sup> While covert actions by the CIA must be reported to the intelligence committees, unacknowledged military operations by JSOC are not subject to this requirement.<sup>110</sup> The latter may be reported to the armed services committees, but such reports are not mandatory. Indeed, unlike the requirement for notification of covert actions, there is no mandatory reporting requirement for unacknowledged JSOC military operations.<sup>111</sup> As a result, not only are the vast majority of lawmakers in the dark about the Administration’s targeted killing program, but even those members of Congress who do receive information have far from a complete and unobstructed view.<sup>112</sup> Add to that the concern that JSOC operates with even less general oversight than the CIA, and the Administration’s avowal of “robust” oversight rings hollow.<sup>113</sup>

Without the information necessary to make sense of the Administration’s asserted legal interpretations, and certainly without actual facts to help assess

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108. Holder, *supra* note 39 (“[Opposing judicial review] is not to say that the Executive Branch has . . . the ability to target any such individuals without robust oversight. . . . [T]he 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.”).
109. Robert Chesney, *Military-Intelligence Convergence and the Law of Title 10/Title 50 Debate*, 5 J. NAT’L SECURITY L. & POL’Y 539, 611 (2012).
110. *Id.* at 543, 613-15; see Greg Miller, *Under Obama, an Emerging Global Apparatus for Drone Killing*, WASH. POST, Dec. 13, 2011, [http://www.washingtonpost.com/national/national-security/under-obama-an-emerging-global-apparatus-for-drone-killing/2011/12/13/gIQANPdILP\\_story\\_4.html](http://www.washingtonpost.com/national/national-security/under-obama-an-emerging-global-apparatus-for-drone-killing/2011/12/13/gIQANPdILP_story_4.html) (“The disclosure of these operations is generally limited to relevant committees in the House and Senate and sometimes only to their leaders.”).
111. Chesney, *supra* note 109, at 613-15.
112. See Miller, *supra* note 110 (acknowledging congressional “concern with emerging blind spots” regarding drone strikes).
113. See, e.g., COLUMBIA LAW SCH. HUMAN RIGHTS CLINIC & CTR. FOR CIVILIANS IN CONFLICT, *THE CIVILIAN IMPACT OF DRONES: UNEXAMINED COSTS, UNANSWERED QUESTIONS* 62 (2012) (“[JSOC] operates with a level of secrecy and freedom from scrutiny that matches, and in some cases exceeds, that of the CIA.”). See generally Dana Priest & William M. Arkin, “Top Secret America”: A Look at the Military’s Joint Special Operations Command, WASH. POST, Sept. 2, 2011, [http://articles.washingtonpost.com/2011-09-02/world/35273073\\_1\\_navy-seal-joint-special-operations-command-drones](http://articles.washingtonpost.com/2011-09-02/world/35273073_1_navy-seal-joint-special-operations-command-drones).

the government's claims about the targeted killing program, public debate and scrutiny will remain limited. In the absence of a meaningful public or congressional check on the program, or any judicial one, the Administration's assurances and self-selected disclosures about the legality and efficacy of its actions are essentially what remain. That cannot be enough.