Professor Harold Hongju Koh: *How to End the Forever War? 9/11+13*

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1. "How to End the Forever War," *Oxford Union*, May 7, 2013. http://www.lawfareblog.com/wp-content/uploads/2013/05/2013-5-7-corrected-koh-oxford-union-speech-as-delivered.pdf
2. "How to End the Forever War: A Progress Report" *Just Security Blog*, October 28, 2013. http://justsecurity.org/2634/ending-war-progress-report/
3. Senate Foreign Relations Committee Testimony Regarding Authorization for Use of Military Force After Iraq and Afghanistan. May 21, 2014. http://www.foreign.senate.gov/imo/media/doc/Koh_Testimony.pdf
4. "Ending the Forever War: One Year After President Obama's NDU Speech," Just Security Blog, May 23, 2014. http://justsecurity.org/10768/harold-koh-forever-war-president-obama-ndu-speech/
5. "The Lawful Way to Fight the Islamic State," *Politico*, August 29, 2014. http://www.politico.com/magazine/story/2014/08/the-lawful-way-to-fight-the-islamic-state-110444_full.html?print#.VAC-7_ldXTo

# "How to End the Forever War?"

**Harold Hongju Koh***

**Oxford Union, Oxford, UK**
**May 7, 2013**

Thank you, Mr. President and Members of the Union, for inviting me here to speak. I am honored to return to this University, where I first came 38 years ago, and to this Union, where over the centuries, so many thoughtful individuals have discussed and debated so many serious issues.

As your President said, until a few months ago, I had the honor of serving for nearly four years as Legal Adviser to the U.S. Department of State, giving advice to President Obama and Secretary of State Clinton on issues of both international and domestic law. For four years, my job was to promote, ensure and defend the legality of the foreign policy of the United States of America.

But tonight, let me emphasize that what I say here represents my personal views. After four intense years, I have many friends in all branches of the U.S. government who work extraordinarily hard, every day, on the most difficult problems facing U.S. foreign policy. In particular, I support President Obama and the current Secretary of State John Kerry and I wish them success. But tonight, I speak only for myself, not for anyone in the State Department or the U.S. government.

Only four months from now, this coming September 11, the United States' armed conflict with Al Qaeda will turn twelve years old. That is eight years longer than the Civil War or World War II, and nearly four years longer than the Revolutionary War. So much ink has been spilled on such topics as torture, Afghanistan, Guantanamo and drones, that this conflict has come to feel like a Forever War: it has changed the nature of our foreign policy and consumed our new Millennium. It has made it hard to remember what the world was like before September 11.

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Now that I have returned to the academy, I tend to hear three common misperceptions from friends on both the left and the right: first, that what some call the Global War on Terror has become a perpetual state of affairs; second, that "the Obama approach to that conflict has become just like the Bush approach;" and third, that we have no available strategy to bring this conflict to an end in the near future. Tonight, let me reject all three propositions.

Let me ask what the real question is that faces us, suggest the right approach to addressing it, and outline three elements of an answer. In a nutshell, our question should be: "How to End the Forever War?" Our Approach should be what I would call: "Translate, not Black Hole." And our three-part answer should be: "(1) Disengage from Afghanistan, (2) Close Guantanamo, and (3) Discipline Drones."

First and most important, our overriding goal should be to *end* this Forever War, not to engage in a perpetual "global war on terror," without geographic or temporal limits. As this Administration has acknowledged, we are not fighting against everyone—past, present, and future—who ever has or will dislike the United States or wish it harm. Instead, ever since Congress passed its Authorization for the Use of Military Force (AUMF) one week after September 11, we have engaged in an armed conflict with a knowable enemy—the Taliban, al-Qaeda, and associated forces—that does not limit its activities to a single country's borders.[1] Our public declaration "that our enemy consists of those persons who are part of the Taliban, al-Qaeda or associated forces … has been embraced by two U.S. Presidents, accepted by our courts, and affirmed by our Congress."[2]

Second, in conducting this conflict, the United States is bound by law. It is not free and it never has been free to conduct that conflict outside the law.

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[1] The AUMF authorized the President "to use all necessary and appropriate force against those nations, organizations, or persons he determines planned, authorized, committed, or aided the terrorist attacks that occurred on September 11, 2001 … in order to prevent any future acts of international terrorism against the United States by such nations, organizations or persons." In a March 2009 Memorandum filed by the Justice Department, the Obama Administration clarified that the President has "the authority to detain persons who were part of, or substantially supported, Taliban or al-Qaida forces or associated forces that are engaged in hostilities against the United States or its coalition partners."

[2] Jeh Charles Johnson, Jr., "The Conflict Against Al Qaeda and its Affiliates: How Will It End?", Speech to the Oxford Union, November 30, 2012, http://www.lawfareblog.com/2012/11/jeh-johnson-speech-at-the-oxford-union/ .

This conflict is not a legal black hole where anything goes. Instead, as this Administration has repeatedly acknowledged, the U.S. must fight this conflict consistent with both domestic and international law.[3] But precisely what the legal rules are has been debated. The Geneva Conventions envisioned two types of conflict—first, international armed conflicts between nation-states and second, non-international armed conflicts between states and insurgent groups within a single country—for example, a government versus a rebel faction located within that country. But September 11 made clear that the term "non-international armed conflicts" can include transnational battles that are not between nations: for example, between a nation-state (the United States) and the transnational nonstate armed group (Al Qaeda) that attacked it. As our Supreme Court has instructed, instead of treating this situation as a "black hole" to which no law applies because the Geneva Conventions are considered "quaint," our task is to translate the existing laws of war to this different type of "non-international" armed conflict.[4]

Third, this is not a conflict without end. At this very podium last November, my friend and former colleague Jeh Johnson, then-General Counsel of the United States Department of Defense, gave an important speech called "The Conflict Against Al Qaeda and its Affiliates: How Will It End?" He said, in words with which I agree:

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[3]As I told the American Society of International Law in March 2010, "We live in a time, when, as you know, the United States finds itself engaged in several armed conflicts. As the President has noted, in the conflict occurring in Afghanistan and elsewhere, we continue to fight the perpetrators of 9/11: a non-state actor, al-Qaeda (as well as the Taliban forces that harbored al-Qaeda). … *Let there be no doubt: the Obama Administration is firmly committed to complying with all applicable law, including the laws of war, in all aspects of these ongoing armed conflicts*. " Harold Hongju Koh, The Obama Administration and International Law, March 25, 2010, http://www.state.gov/s/l/releases/remarks/139119.htm (emphasis in original).

[4] In applying the international law of armed conflict to the post-9/11 situation in *Hamdan* **v**. *Rumsfeld,* 548 U.S. 557 (2006), the Supreme Court conducted just such a translation exercise, reasoning that the "term 'conflict not of an international character' is used here in contradistinction to a conflict between nations," adopting a residual view of the applicability of Common Article 3. It found that this provision "affords some minimal protection, falling short of full protection under the Conventions, to individuals associated with neither a signatory nor even a nonsignatory [state] who are involved in a conflict 'in the territory of' a signatory. The latter kind of conflict is distinguishable from the conflict described in Common Article 2 chiefly because it does not involve a clash between nations (whether signatories or not). In context, then, the phrase 'not of an international character' bears its literal meaning."

> "[O]n the present course, there will come a tipping point – a tipping point at which so many of the leaders and operatives of al Qaeda and its affiliates have been killed or captured, and the group is no longer able to attempt or launch a strategic attack against the United States, such that al Qaeda as we know it, the organization that our Congress authorized the military to pursue in 2001, has been effectively destroyed. At that point, we must be able to say to ourselves that our efforts should no longer be considered an "armed conflict" against al Qaeda and its associated forces; rather, a counterterrorism effort against *individuals* who are the scattered remnants of al Qaeda, or are parts of groups unaffiliated with al Qaeda, for which the law enforcement and intelligence resources of our government are principally responsible, in cooperation with the international community – with our military assets available in reserve to address continuing and imminent terrorist threats.[5]

As I know Jeh Johnson would acknowledge, the key question going forward will thus be whether or not we treat new groups that rise up to commit acts of terror as "associated forces" of Al Qaeda with whom we are already at war. The U.S. Government has made clear that an "associated force" must be (1) an organized, armed group that (2) has actually entered the fight alongside al Qaeda against the United States, thereby becoming (3) a co-belligerent with al Qaeda in its hostilities against America. Just because someone hates America or sympathizes with Al Qaeda does not make them our lawful enemy. Under both domestic and international law, the United States has ample legal authority to respond to new groups that would attack it without declaring war forever against anyone who is hostile to us. But make no mistake: if we are too loose in who we consider to be "part of" or "associated with" Al Qaeda going forward, then we will always have new enemies, and the Forever War will continue forever.

My second point: in reviewing where we have been, it should be clear that the Obama Administration's approach to these issues has not been just like George W. Bush's. To state just the three most obvious differences:

First, the Obama Administration has not treated the post-9/11 conflict as a Global War on Terror to which no law applies, in which the United States is authorized to use force anywhere, against anyone. Instead, it has acknowledged that its authority under domestic law derives from Acts of

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[5] See Johnson speech, *supra* note 2 (emphasis in original).

Congress, not just the President's s vague constitutional powers. Under international law, this Administration has expressly recognized that U.S. actions are constrained by the laws of war. So rather than treating this conflict as a Black Hole, this Administration has worked to translate the spirit of those laws and apply them to this new situation.

Second, in conducting this more limited conflict, the Obama Administration has shown an absolute commitment to the humane treatment of Al Qaeda suspects. You have not heard claims that this Administration has conducted torture, waterboarding, or enhanced interrogation tactics. To underscore that commitment, this would be an opportune moment, as Vice President Joe Biden pointed out on April 26, to make public the Senate Select Intelligence Committee's as-yet-unreleased six-thousand-page report regarding the CIA's former notorious "enhanced interrogation" program.

A third critical difference between this Administration and its predecessor is the Obama Administration's determination *not* to address Al Qaeda and the Taliban solely through the tools of war. As Secretary Clinton made clear on the tenth anniversary of September 11, in the short term, we have an inescapable need for "precise and persistent force [that] can significantly degrade … al-Qaida. So we will continue to go after its leaders and commanders, disrupt their operations and bring them to justice. … attack its finances, recruitment, and safe havens." But our longer term objective must be what Secretary Clinton called a "smart power" approach: using force for limited and defined purposes within a much broader nonviolent frame, with our overarcing objective being to use diplomacy, development, education, and people-to-people outreach to challenge Al Qaeda's "ideology, counter its propaganda, and diminish its appeal, so that every community recognizes the threat that extremists pose to them and … deny them protection and support. [In doing so, she said, w]e need effective international partners in government and civil society who can extend this effort to all the places where terrorists operate."[6]

Because force makes up only part of a much broader "smart power" approach, this Administration has not rejected Law Enforcement tools in favor of exclusive use of tools of war. Instead, it has combined a Law of War approach with Law Enforcement and other approaches to bring all

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[6] Secretary of State Hillary Rodham Clinton, Smart Power Approach to Counterterrorism (September 9, 2011), http://www.state.gov/secretary/rm/2011/09/172034.htm .

available tools to bear against Al Qaeda. Thus, if the United States should encounter an Al Qaeda leader like Obama bin Laden in a remote part of Afghanistan, a law of war approach might be appropriate; but if it should find him in London or New York, a law enforcement approach would obviously be more fitting. In either case, the relevant question would not be one of *labels*—i.e., "should we call this person an "Enemy Combatant?"—but rather, one of *facts:* "Do the facts show that this particular person is actually "part of" Al Qaeda or Associated Forces"? The U.S. response to a particular person thus turns critically on *who he is and what he has done*, not on what label he is given. It is because these decisions are so fact-intensive that I spent a sobering, but crucial, part of my last four years learning not the resumes of promising students like you, but rather, the names of Al Qaeda leaders of roughly your age, learning their life stories, and grasping how their life trajectories led them not to education and political leadership, as yours will, but to desperate terrorist missions of violence and hatred.

To be clear, the United States is not at war with any idea or religion, with mere propagandists or journalists, or even with sad individuals—like the recent Boston bombers-- who may become radicalized, inspired by al Qaeda's ideology, but never actually join or become part of al Qaeda. As we have seen, such persons may be exceedingly dangerous, but they should be dealt with through tools of civilian law enforcement, not military action, because they are not part of any enemy force recognizable under the laws of war.[7]

That brings me to the third and final part of this lecture: if we want to end the Forever War, through a "Translate, not Black Hole" approach, our three-part answer should be: (1) Disengage from Afghanistan, (2) Close Guantanamo, and (3) Discipline Drones. What few realize is that all three goals already happen to be announced aims of U.S. policy. So the main question going forward is how the Obama Administration can fully implement its previously announced objectives?

As I speak, the first goal—disengaging from Afghanistan—is fully underway. To end the conflict in Afghanistan – in President Obama's words a "conflict that America did not seek, … in which we are joined by forty-three other countries…in an effort to defend ourselves and all nations from

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[7] See generally Johnson speech, *supra* note 2.

further attacks"[8] -- we need a security transition, a political transition, and an economic transition, particularly implementation of an economic plan now known as "The New Silk Road." The Administration has outlined a three-part plan to further those transitions, consisting of: (1) Declining Military Engagement; (2) Continued Civilian Engagement, with enhanced efforts to develop the Afghan economy and civil society; and (3) a sustained and intense Diplomatic Surge to build a regional architecture for a secure, stable Afghanistan. That diplomatic surge started in 2010 in Lisbon, intensified in 2011 in Istanbul and Bonn, and reached fruition in 2012 at the Chicago NATO and Tokyo Economic Summits. In that robust diplomatic sequence, Afghanistan and its international partners charted a blueprint for a full transfer of security responsibility: in the Strategic Partnership Agreement that went into effect in 2012, Afghanistan's designation as a major non-NATO ally of the United States, and the negotiation of agreements on bilateral security, detention transfer and the like.

No part of this disengagement will be easy, but three particular challenges stand out. First, in transferring control of detention facilities, the U.S. must ensure that transfers comply with our obligations under international law not to return detainees to persecution or torture, and that future detentions comply with fair process and treatment obligations. Second, the U.S. must work closely with the Afghans to help secure what Secretary Kerry has called a "credible, safe, secure, all-inclusive, … transparent, and accountable presidential election" to succeed Hamid Karzai in 2014.[9] Third, the Afghan government must tackle the difficult and controversial task of negotiating with the Taliban, as President Karzai recently proposed to do in Doha, Qatar. Understandably, many human rights defenders fear that such negotiations may trigger regression to grotesque Taliban abuses. But as Secretary Clinton described in her February 2011 speech to the Asia Society:

> " [S]ecurity and governance gains produced by the military and civilian surges have created an opportunity to get serious about a responsible reconciliation process, led by Afghans and supported by intense regional diplomacy and strong U.S.-backing. Such a process would have to be

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[8] Remarks by President Barack Obama at the Acceptance of the Nobel Peace Prize, Oslo, Norway, December 10, 2009.

[9] Secretary's Remarks: Remarks With President Hamid Karzai After Their Meeting, Presidential Palace, Kabul, Afghanistan, March 25, 2013

> accepted by all of Afghanistan's major ethnic and political blocs. For … this effort to succeed there are three "unambiguous red lines for reconciliation with the insurgents: They must renounce violence; they must abandon their alliance with al-Qaida; and they must abide by the constitution of Afghanistan [as] necessary outcomes of any negotiation."[10]

Our crucial emphasis must be on building upon advances in Afghan civil society that have occurred in the last decade. Ordinary Afghans must believe that even if some Taliban return, their society need not regress to the bleak days before September 11. A recent United Nations report showed that Afghanistan has made faster gains in human development over the last 10 years than any other country in the world.[11] When Afghan civil society development resumed a decade ago, there were few in school and almost no women. Now there are nearly 10 million attending school, almost evenly divided between men and women. Kabul is the fifth fastest-growing city in the world. In the last decade, the GDP (Gross Domestic Product) of Afghanistan has nearly quintupled. Health facilities like hospitals have quadrupled; access to electricity has tripled. Life expectancy is up 50 percent. In the last decade, more roads have been built than in the entire previous history of this country. Cellphone contracts have gone from 20,000 to 3 million, and access to the internet has gone from nonexistent to more than 1.5 million users.[12] This, in short, is what a smart-power strategy looks like. As more and more Afghans become convinced that they-- and not the Taliban-- control their political, economic, and security future, they will see U.S. disengagement as necessary to give them ownership of their own country and to bring civil society closer to self-reliance, self-determination, and self-governance.[13]

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[10] Hillary Rodham Clinton, Secretary of State, Remarks at the Launch of the Asia Society's Series of Richard C. Holbrooke Memorial Addresses, February 18, 2011, http://www.state.gov/secretary/rm/2011/02/156815.htm

[11] Secretary's Remarks with President Karzai, supra note 9.

[12] Internet Usage Statistics: Asia Internet Stats > Asia Links > Afghanistan, at http://www.internetworldstats.com/asia/af.htmc (Afghanistan has1,520,996 Internet users as of June 30, 2012).

[13] Secretary's Remarks: Meeting With Staff and Families at U.S. Embassy Kabul, Afghanistan, March 26, 2013 .

What about the second plank of this plan: closing Guantanamo? As I speak, 166 detainees remain at Guantanamo, 76 fewer than when the President first took office.[14] More than 100 of the detainees are on hunger strike, and many are being force-fed, a situation that President Obama candidly acknowledged was "not sustainable" and "contrary to who we are." As a human rights lawyer who first visited Guantanamo in 1991, I have long said that closing Guantanamo forever is past overdue. At his news conference last week, President Obama correctly declared:

> I continue to believe that we've got to close Guantanamo. …Guantanamo is not necessary to keep America safe. It is expensive. It is inefficient. It hurts us in terms of our international standing. It lessens cooperation with our allies on counterterrorism efforts. It is a recruitment tool for extremists. It needs to be closed. …

I could not agree more. And so I applauded when he said, "I'm going to go back at this. I've asked my team to review everything that's currently being done in Guantanamo, everything that we can do administratively, and I'm going to re-engage with Congress to try to make the case that this is not something that's in the best interests of the American people."

What the President's team should recognize is that he does not need a new policy to close Guantanamo. He just needs to put the full weight of his office behind the sensible policy that he first announced in January 2009, reiterated at the National Archives in 2010, and reaffirmed in March 2011. To do that, he must take four steps:

First, and foremost, he must appoint a senior White House official with the clout and commitment to actually make Guantanamo closure happen. There has not been such a person at the White House since Greg Craig left as White House Counsel in early 2010. There must be someone close to the President, with a broad enough mandate and directly answerable to him, who wakes up each morning thinking about how to shrink the Guantanamo population and close the camp.

Second, this White House Envoy need not develop a new paradigm for closing Guantanamo. He or she merely needs to implement the National Archives framework that the President announced three years ago. The

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[14] The Guantanamo Docket, N.Y. Times, http://projects.nytimes.com/guantanamo/ .

White House Envoy should lead the Administration's efforts to implement the three-part framework for closure of the Guantanamo detention facility specified in the President's 2010 speech at the National Archives. That speech described a framework for how this closure could happen: through diplomatic *transfers* of those individuals who could be safely transferred, *prosecution* of those who can be tried before civilian courts when possible and military commissions where that is the only option, and third, by commencing the long-overdue legally mandated *periodic review* of so-called Law of War Detainees to see if any can be released, because of changes either in their attitude or in the conditions of the country to which they could be transferred.

As a start, the Special Envoy should work on the diplomatic steps needed to transfer either individually or *en bloc* some 86 detainees who were identified three years ago as eligible for repatriation to their home countries or resettlement elsewhere by an administration task force that exhaustively reviewed each prisoner's file. This was a task previously performed ably by State Department Special Envoy for Guantanamo Closure Ambassador Dan Fried. The President should send the Envoy to Yemen to negotiate the block transfer, to a local rehabilitation facility, of those Yemeni detainees who were cleared for transfer, before those transfers were put on hold because of instability in that country.

Starting in 2010, Congress has used authorization bills to impose a series of counterproductive restrictions on the transfer of Guantánamo prisoners. But some of those restrictions are subject to waiver requirements and all must be construed in light of the President's authority as commander-in-chief to regulate the movement of law-of-war detainees, as diplomat-in-chief to arrange diplomatic transfers, and as prosecutor-in-chief to determine who should be prosecuted and where. If Congress insists on passing such onerous and arguably unconstitutional conditions in the next National Defense Authorization Act, the President should call its bluff and forthrightly veto that legislation.

Third, those on Guantanamo who can be prosecuted should be prosecuted in civilian courts where possible, and in military commissions only if no other option remains. As two seasoned New York federal prosecutors have exhaustively documented, recent cases--like Warsame of Al Shababb, the "Shoe Bomber" Richard Reid, the "Christmas Day Bomber" Abdulmutallab, and the "Times Square Bomber" Faisal Shahzad-- all show that civilians

courts are more than able to handle and punish complex terrorism cases.[15] While here too, Congress has tried to restrict the movement of Guantanamo detainees to the U.S. to stand trial, there is no reason why the plea bargains of Guantanamo detainees could not be taken in U.S. courts, followed by U.S. detention, or why, as my Yale colleagues Bruce Ackerman and Eugene Fidell have recently suggested, U.S. civilian judges could not be sent to Guantanamo to try the triable, so that Guantanamo can be closed.[16] And it is letting the tail wag the dog for Guantanamo to remain open so that military commissions cases can be heard there, when such cases may be safely heard in military bases on the continental United States such as the military base in South Carolina.

Fourth and finally, the Administration must begin the process of periodic review for about four dozen detainees who are not presently under charges but who an interagency task force concluded should remain held under rules of war that allow detention without charge for the duration of hostilities. In theory, this group could be moved to the mainland U.S., but many human rights advocates understandably oppose creating a new system of detention without charge for terrorism suspects on American soil. Here, we should recall Jeh Johnson's description of a "tipping point" where Al Qaeda would become so decimated that the armed conflict would be deemed over. If this became true, that would eliminate the legal justification for these law of war detentions without charge and further the claim that such long-term detainees should be released after more than a decade in custody.

Whether the core of Al Qaeda can in fact be decimated brings me to the final issue that has recently dominated public discussion: namely, disciplining drones. I am sometimes asked, "as a human rights advocate, how could you criticize torture, while as a government lawyer, you defended the legality of drones?" My answer is sad but simple: in all its forms, torture is always illegal as a matter of state policy. But as regrettable as killing always is, killing those with whom you are at war may be lawful, so long as

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[15] Richard B. Zabel & James J. Benjamin Jr., In Pursuit of Justice: Prosecuting Terrorism Cases in the Federal Courts, 2009 Update and Recent Developments (New York and Washington, DC: *Human Rights First*, 2009).

[16] Bruce Ackerman & Eugene Fidell, Send Judges to Guantánamo, Then Shut It, New York Times, May 3, 2012, at http://www.nytimes.com/2013/05/04/opinion/send-civilian-judges-to-guantanamo-then-shut-it.html?pagewanted=print .

you strictly follow the laws of war. Few dispute that targeted killing may on balance promote human rights if it targets only sworn leaders—like bin Laden himself--to save the lives of many innocent civilians from unprovoked attack. As Legal Adviser, I found it the inescapable duty of the laws of war--and the government lawyers who administer it--to draw difficult lines: to police the line between those violent acts that are lawful and unlawful, and to distinguish between those uses of force that do and do not on balance promote the human rights of innocent civilians.

Some mistakenly think of drones as inherently evil, even though they are a weapon that if precisely and accurately targeted, could be far more discriminate and lawful than such inherently indiscriminate weapons as chemical weapons or nuclear bombs. To illustrate why, consider this thought experiment: Suppose we are back at Sept 18, 2001, and Congress has just passed the AUMF against Al Qaeda. Suppose the President –let's assume for the sake of argument that it was the winner of the popular vote, Al Gore--gives a speech where he says:

> 'We just have been attacked in the worst attack on our soil since Pearl Harbor. Some 3000 innocent people were killed, simply for going to work one day, in what all must acknowledge was an obscene human rights violation. We must respond firmly and lawfully, consistent with our values. As of today, we are at war with Al Qaeda, the Taliban and associated forces. Our aim must be to defeat Al Qaeda and to prevent it from proliferating. So here is what we will not do, and here is what we must do.
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> We will not do anything foolish, illegal or inconsistent with American values. That means we will not invade Iraq. We will not torture anyone. We will not open offshore prison camps like Guantanamo. We will not create military commissions, because our existing civilian and military courts can do the job. We will not violate foreign sovereignty or international law. We will not claim that we are in a Global War on Terror. We are in a particular battle with a particular foe—Al Qaeda—that we hope to defeat in time.
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> That is what we will not do. But here is what we must do.
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> We must incapacitate—by capture if possible, by killing if necessary — Osama bin Laden and his senior operational leaders –several hundred in

> all--who pose a direct threat to the United States. We will use law enforcement methods when they are available and military measures when they are not. We will take every available step to prevent civilian casualties. *But we will also use every technological method available to us, including drones.*
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> In using these tools, we will work closely with our allies. We will be as transparent as we can be: we will keep Congress and the public fully informed. We will adhere to domestic and international law, and where that law is murky, we will work hard to clarify the governing international norms. We will reach out to moderate Islam and isolate extremists. And in all cases we will respect the US Constitution, international law, and the human rights of those who so grossly violated human rights.
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> This will not be easy. It will take time and lives will be lost. Nor will everything be public. But I pledge this will be a bipartisan effort. There is no political advantage in turning this into a political football. Unlike other wars, from which we could walk away, this is a conflict we must win if our families are to live free from fear. So please give us your support."

I hope you will agree that that speech would have received a 100% approval rating. But that, sadly, was the road not taken. What this thought experiment should tell you is that the main problem is not drones, but that the Bush Administration grossly mismanaged its response to 9/11. Instead of acting firmly and surgically against Al Qaeda, it squandered global good will by invading Iraq, committing torture, opening Guantanamo, flouting domestic and international law, and undermining civilian courts. By taking the wrong path, the last Administration sacrificed legitimacy, and took its eye off the ball, leaving the next administration to pick up the pieces. President Obama's Administration got off to a promising start with his January 2009 executive orders, his 2009 Nobel Prize speech, and his 2010 National Archives Speech. And in early 2010, I gave a speech to the American Society of International Law outlining the basic legal standards the U.S. government applied to such actions.[17]

But since then, to be candid, this Administration has not done enough

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[17] See Koh speech, *supra* note 3.

to be transparent about legal standards and the decisionmaking process that it has been applying. It had not been sufficiently transparent to the media, to Congress, and to our allies. Because the Administration has been so opaque, a left-right coalition running from Code Pink to Rand Paul has now spoken out against the drone program, fostering a growing perception that the program is not lawful and necessary, but illegal, unnecessary and out of control. The Administration must take responsibility for this failure, because its persistent and counterproductive lack of transparency has led to the release of necessary pieces of its public legal defense too little and too late.

As a result, the public has increasingly lost track of the real issue, which is not drone *technology per se*, but the need for transparent, agreed-upon domestic and international legal process and standards. It makes as little sense to attack drone technology as it does to attack the technology of such "new" weapons, in their time, as spears, catapults, or guided missiles. Cutting-edge technologies are often deployed for military purposes; whether or not that is lawful depends on whether they are deployed consistently with the laws of war, *jus ad bellum* and *jus in bello*. Because drone technology is highly precise, if properly controlled, it could be more lawful and more consistent with human rights and humanitarian law than the alternatives. And finally, given that other technologies, particularly conflict with cybertools, are fast achieving more prominence, obsessing about drones may soon be overtaken by events, as drone technology gives way to even more technologically sophisticated tools of war such as cyberwar or more advanced robotics.

So what is to be done? In the area of cyberconflict, I have already argued as part of an official U.S. position, we must use a "translate, not black hole" approach of the kind I have urged here.[18] With respect to drones, the Obama Administration should similarly be more transparent and more consultative. It should also be more willing to discuss international legal standards for use of drones, so that our actions do not inadvertently empower other nations and actors who would use drones inconsistent with the law.

First, as President Obama has indicated he wants to do, the Administration should make public and transparent its legal standards and

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[18] See Harold Hongju Koh, International Law in Cyberspace, http://www.state.gov/s/l/releases/remarks/197924.htm , reprinted in http://www.harvardilj.org/2012/12/online_54_koh/ .

institutional processes for targeting and drone strikes. Second, it 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. Third, it should clarify its method of counting civilian casualties, and why that method is consistent with international humanitarian law standards. Fourth, 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.

After transparency, the key is consultation. The Administration should send witnesses to explain its legal standards to Congress, consult with Congress about its methodologies, standards and processes, and patiently explain why the use of force was warranted in particular, well-publicized cases. The Administration should use those same facts and standards to consult with our allies on what the global standards on drone use should be going forward, and to reassure them that we are not applying a standard that we would consider unlawful if espoused to justify the use of drones by say, China, North Korea, or Iran.

Most important, the Administration should remember that the real issue facing us is not drones, but how to end the Forever War. As suggested above, the war against Al Qaeda, the Taliban and Associated Forces is not one in which we can simply declare victory and go home. If the Obama Administration cannot persuade its citizens, Congress and its closest allies that its drone program is legal, necessary and under control, it will be hard for President Obama to see this war to its much-needed conclusion or to take the other steps necessary to secure the peace.

I strongly disagree with those who claim that new legislation is now necessary to authorize the Administration to fight against new enemies. The burden of proving that such legislation would be either necessary or wise should fall on the proponents. As a lifelong international and constitutional lawyer who has worked on these legal issues for a decade, I see no proof that the U.S. lacks legal authority to defend itself against those with whom we are genuinely at war or who pose to us a genuine and imminent threat. Significantly, Congress has never declared war against an enemy when the

President has not asked for such a declaration. Nor would adopting new domestic legislation make actions in preemptive self-defense lawful under international law. And unless we can clearly define just who the new enemies are--and why existing legal authorities are insufficient to defend ourselves against them--we have no basis for passing new laws that would perpetuate the Forever War against shadowy foes whose association with those who have attacked us on 9/11 cannot be proven.

In closing let me repeat: These issues are hard. Reasonable people can disagree. We are all weary of war and tired of fighting. But that is all the more reason to keep our eye on the real issues that face us: how to end "The Forever War," the conflict between the United States and Al Qaeda, the Taliban, and Associated Forces originally triggered by the September 11, 2001 attacks. Those attacks launched neither a Perpetual nor a Global War on Terror. And while the Obama Administration's approach has been far from perfect—and I have frankly discussed my disagreements with it—neither should it be confused with the misguided policies of its predecessor nor it is a policy whose aspirations, as defined by President Obama himself, are incorrect.

In sum, it is still possible for President Obama to end the Forever War, piece by piece, during his second term. It is still possible to disengage from Afghanistan, to close Guantanamo and to discipline the use of drones through transparency, consultation, and international standard-setting. It is still possible in a time of terror to defend our security consistent with our values, without creating recruiting tools for our enemies or further staining our national record for obeying the law, safeguarding justice and protecting human rights.

Because I am an American who loves his country, I have served it for ten years of my professional career. My former professor and former Legal Adviser Abram Chayes once said, after he had sued the United States government from the academy, "I have always thought there is nothing wrong with an American lawyer holding the United States to its own best standards."[19] It is in that spirit that tonight, from this important podium, I call my country to its own best values and principles. As President Lincoln famously said, there is still time--indeed, it is high time-- for Americans

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[19] Professor Abram Chayes (1922-2000), http://www.law.harvard.edu/news/spotlight/ils/fellowships/professor-abram-chayes.html .

once again to answer to the "better angels" of our national nature.[20] As the United Kingdom is America's closest ally with whom it enjoys a most special relationship, I hope you can join me in this call.

Thank you very much for your kind attention.

[20] President Abraham Lincoln, First Inaugural Address, March 4, 1861, http://www.bartleby.com/124/pres31.html .

# "Ending the Forever War": A Progress Report

By *Harold Hongju Koh*

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This past May, President Obama gave an historic speech at the National Defense University framing his counterterrorism strategy. In that speech, he committed himself to a concept that I had flagged in an Oxford lecture several weeks earlier: "Ending the Forever War." The simple idea of both speeches was that after twelve long years, it is high time to take the United States off a permanent war footing and to end all three conflicts that President Obama inherited: with Iraq, Afghanistan, and with Al Qaeda, the Taliban and Associated Forces.

But where exactly does this project stand today, five months after Obama's NDU speech? In Washington, where the urgent too often drives out the important, the critical project of ending the war with Al Qaeda and its allies has been successively pushed from the headlines by the sequester, Syria, the government shutdown, the debt ceiling fight, and now, the rocky health care rollout. International lawyers and national security experts have been successively directed to the Kenya Westgate Mall attack, the recent U.S. raids in Libya and Somalia, NSA surveillance, and most recently, the critical NGO and U.N. reports on drones as new proof that Obama has lost his way on counterterrorism. So is Obama's effort to end the Forever War with Al Qaeda effectively stalled?

Reading the tea leaves, my impression is that it is not. Of the three wars the President promised to end, he has now essentially ended the first (Iraq), made progress on the second (Afghanistan), and in his NDU speech, firmly committed himself to the third. In this progress report, I would argue that all signs show that Obama is making slow but steady progress toward ending this third war: with Al Qaeda, the Taliban and Associated Forces. As my Oxford speech suggested, that progress is best measured by his efforts to achieve four goals: (1) Disengaging from Afghanistan; (2) Closing Guantanamo, (3) Disciplining Drones, and (4) Clarifying that Kill and Capture are only small pieces of a much broader "smart power" strategy toward counterterrorism. I conclude by suggesting how the Administration might respond to renewed pleas for transparency that have followed the latest outpouring of drone reports.

**I. Disengaging from Afghanistan:** The President's announced three-part Afghan strategy was: (1) to reduce U.S. military engagement –i.e., ending the U.S. combat mission after December 2014, based on enhanced Afghan military capabilities ; (2) to

continue civilian engagement with Afghan civil society; and (3) to expand diplomatic engagement both inside and outside of Afghanistan to build an architecture for a secure, stable Afghanistan.

In pursuit of the first goal, the U.S. military presence in Afghanistan has steadily diminished, with 16,000 of the remaining 60,000 U.S. troops set to leave in February of 2014. Washington's hopes that the Afghan National Security Forces (ANSF) might fill the resulting military vacuum was bolstered by a recent report that with this year's fighting season nearly over, the ANSF had mostly held their own against Taliban attacks. While the Taliban held their ground in Helmand Province, maintained their grip on southern Afghanistan, and on October 15, assassinated the provincial governor of eastern Logar Province in a provincial mosque, this fighting season, the ANSF reduced the number of assassinations and largely thwarted the Taliban's announced goals of making a series of decisive blows against the ANSF.

Tempering that news, however, was a recent prediction by a high-level U.S. military officer in Afghanistan that he expects the Taliban to use this coming winter not to rest and regroup, but to carry out an aggressive offensive in a last-ditch effort to disrupt the crucial presidential elections now set for April 2014. For the U.S. to disengage with credibility, the April 2014 elections must go off as scheduled; any delay to a later date would only encourage the Taliban to keep disrupting with further attacks. For the United States to proceed with its plan to disengage by December 2014, it must continue to define and refine the scope of two missions that will determine how many U.S. forces will be left in-country after December 2014: (1) a "train, advise and assist" mission, whereby the U.S. forces continue to support the ANSF in their efforts to pacify the country; and (2) a continuing counterterrorism mission, whereby the two militaries adopt a cooperative framework for intelligence-sharing, joint actions, and pursuit of residual transnational threats.

What does all this mean for our "diplomatic surge?" Having concluded a strategic partnership agreement in April 2012, three rounds of talks between President Karzai and Secretary of State Kerry have now focused on reaching closure on an Afghan bilateral security agreement. That agreement, which would provide the legal framework for both missions, has now been under negotiation for eleven months. As anonymous State Department briefers recently described it, the bilateral security agreement is plainly not a mutual defense pact, but rather a "concept of cooperation," whereby residual U.S. forces would help the Afghans to deal with their internal and external threats, including self-defense measures against the Haqqani Network and other terrorist groups.
Consummation of that deal currently turns on several thorny, but tractable issues, particularly the legal status of any U.S. forces that might remain in Afghanistan past 2014. In particular, the U.S. government's lawyers must negotiate what legal jurisdiction

would be permitted over any remaining U.S. military personnel, immunities, assurances, guarantees for rights of self-defense, force protection, and other aspects governing status of forces. But at this writing, these negotiations seem to be progressing and are apparently quite far along. In the words of one State Department official, "[w]e've agreed on language that can be put to the Loya Jirga for their consideration." That is optimistic diplomatic language that suggests general bilateral accord on important principles.

The Afghan disengagement strategy has two other diplomatic faces. The first is the diplomatic campaign with allies that Secretary Clinton launched in 2011 to complement President Obama's 2009 military surge: using all available instruments of smart power to support Afghanistan, including development assistance, private-sector investment, and support for civil society expressed through pledging conferences among supportive national and international organizations in Istanbul, Bonn, Chicago and Tokyo. Those conferences were designed to send the Taliban the message that the international community would not abandon, but would continue to support, Afghanistan both politically and militarily after 2014.

The second diplomatic challenge is for the Afghans to revive the U.S.-supported negotiations with the Taliban along lines recently pursued from mid -2011 to March 2012. As proof that this effort may still be viable, the government of Pakistan recently released the Afghan Taliban's second-in-command Mullah Baradar, supposedly to catalyze the Afghan-Taliban peace process. Any renewed negotiations would turn on three end-conditions first specified by Secretary Clinton in the fall of 2011, that would require the Talban to renounce violence, abandon al Qaeda, and abide by the constitution of Afghanistan, including its protections for women and minorities. Following from those principles, as former AfPak Special Representative Marc Grossman recently described, the 2011 U.S. talks with the Taliban aimed at creating a series of confidence-building measures designed to open the door for Afghans to talk with other Afghans about the future of Afghanistan, including a requirement that the Taliban make a public statement distancing themselves from international terrorism and accepting the need for an Afghan political process, opening a Taliban political office in Doha for the main purpose of facilitating diplomacy, the possible transfer of Taliban prisoners from Guantanamo, and the release of US Army Sergeant Bowe Bergdahl, who has been held by the Taliban since 2009.

While the most likely outcome remains to be seen, "[m]aybe the best outcome," one unnamed U.S. military officer told the *New York Times*, "would be the Taliban in villages and the [Kabul] government in the district centers." But while the Taliban military commission may want to keep fighting, at least some in the Taliban political commission seem to prefer a negotiated end to the long conflict, which creates diplomatic space for

further discussions. As In any waning conflict, we may well be entering that paradoxical period where the opposing parties are both fighting and talking at the same time. But on reflection, in any sustained conflict, such periods are inevitable. As Secretary Clinton likes to say, it so happens that "[y]ou don't make peace with your friends."

**II. Closing Guantanamo:** Since the President's May NDU speech, only two of the 166 detainees have left Guantanamo, fueling a popular perception that the Guantanamo closure effort remains hopelessly stalled. Undeniably, progress has been painfully slow, but there have been several recent, positive steps that could bear fruit, if sufficiently backed by presidential capital. My Oxford lecture called on the Administration to live up to its overdue commitment to close Guantanamo by taking four steps: (1) appointing senior officials "with the clout and commitment to actually make Guantanamo closure happen;" and (2) implementing the National Archives Framework announced by the President in May 2009 by transferring those detainees who could be safely transferred; (3) prosecuting those who can be tried, before civilian courts or as a last resort in military commissions; and (4) beginning periodic review of Law of War Detainees to see if any of them can be released. Although the pace has been agonizingly slow, each of these four steps has in fact finally started to happen.

First, the President tasked Lisa Monaco, his Deputy National Security Adviser for Counterterrorism, to drive the interagency process from the White House. Among senior White House officials, there seems to be a renewed conviction that the best way to bring down the detainee numbers is to reduce particular "buckets" of detainees to create renewed momentum for Guantanamo closure. To replace the admirable Dan Fried, Secretary Kerry appointed a talented Washington lawyer and former Associate White House Counsel's office, Cliff Sloan, as his Special State Department Envoy for Guantanamo Closure. Sloan is energetic, talented and dedicated, and has already recruited an outstanding staff from the State Department and elsewhere. Showing that it can be done, Sloan also successfully completed the negotiation of the long-delayed transfer of the two Algerians.

Better late than never, the Defense Department has now finally appointed its own Special Envoy, who will start November 1: Paul Lewis, former Minority Counsel of the House Armed Services Committee. The Office of Detainee Affairs at DOD formerly headed by Bill Lietzau has been reorganized so that its key operations–particularly its able deputy, Alan Liotta –will work under Lewis's direction. And while Lewis is not a former 2 or 3-star general accustomed to wringing results out of the Defense bureaucracy, he should have helpful legislative experience and insight on how to certify Guantanamo transfers in a way that would meet congressional scrutiny. In that effort, he will need help from the new DOD General Counsel, Stephen Preston, who is familiar with these issues from his more than four years as General Counsel of the CIA.

Second, the best way to break the logjam is bring the numbers down on Guantanamo by identifying and then reducing distinctive "buckets" of detainees. If the Administration commits itself to transferring those in the "non-Yemeni transfer bucket" in the first instance, it could notify and transfer off between 25-30 detainees before the end of this calendar year. Obama's NDU speech also lifted his own self-imposed ban against repatriation of some 56 Yemeni detainees who previously had been cleared for transfer by the interagency transfer task force that operated at the start of his administration. Yemenis constitute the largest group of detainees on Guantanamo, more than 90 in all, a group that currently straddles three buckets: (1) the "transfer bucket;" (2) "conditional detainees," whose return turns on conditions in Yemen; and (3) some 24 continuing Law of War detainees not currently slated for transfer in the near future under any circumstance. The hopeful new development in this area came this past August, when the *Washington Post* reported that Yemeni President Hadi visited the White House to discuss repatriation efforts and declared that he intended to start "an extremist rehabilitation program." What this meant, the report suggested, is that Sloan "is negotiating the terms of prisoner repatriation to Yemen to determine how the government intends to prevent their return to the battlefield," including "a short-term detention on return, regular monitoring, or participation in a reintegration program [of a kind], which has proven successful in Saudi Arabia and Kuwait." More recently, there are reports that a United Nations steering group advised by a retired U.S. general knowledgeable about Afghan detention is finally moving toward helping to establish a Yemen rehabilitation facility. Should these Yemeni efforts bear fruit, it may be possible for the Administration to cut the Guantanamo population nearly in half by negotiating the block transfer, to a local rehabilitation facility, of those Yemeni detainees who were cleared for transfer.

U.S. courts represent a third "off-ramp" from Guantanamo. The D.C. Circuit's *en banc* review of the Al Bahlul case –whose oral argument was recently post mortemed on this blog–has cast considerable uncertainty over what kinds of charges may validly be brought before a Military Commission. Yet at the same time, civilian trials against terrorist suspects, which elsewhere in the world would likely be seen as a more credible form of justice, seem to be moving forward in Article III courts. As others have noted, the recent Article III criminal prosecutions of bin Laden's son-in-law Abu Ghaith, the Somali operative Warsame, the al Qaeda operative Harun (extradited from Italy to United States last year), and the recent binding over of the Libyan al-Libi to the Southern District of New York all suggest renewed possibilities for trying terrorist suspects in civilian courts, where federal prosecutors have enjoyed extraordinary success.

Another significant judicial development, again little noticed by the media, came in early October when Judge Royce Lamberth granted the unopposed petition for the writ of habeas corpus by Ibrahim Idris, a Sudanese detainee whose lawyers claimed that his

mental illness was too significant to render him a continuing threat. To my knowledge, DOJ has only conceded the writ twice before: in the case of Uighurs, where the U.S. government abandoned its defense of their detention in Fall 2008, and in the case of Jawad, an Afghan child soldier who was released on habeas in 2009 by Judge Ellen Huvelle after the Justice Department dropped its argument that he was detainable under the Authorization for Use of Military Force (AUMF). Thus, the *Idris* ruling is doubly significant: first, because it signals that there may be a "medical bucket," a group of Guantanamo detainees whose medical condition after long-term detention may lead the U.S. to acquiesce in their release; and second, because it confirms that the Justice Department can facilitate releases from Guantanamo simply by conceding the writ in cases where there is no current reason to hold a detainee.

All of these cases raise the question whether the Administration should create a "plea bargain" bucket, by offering current Guantanamo detainees plea bargains either in military commissions or in U.S. civilian courts cases in where they have been or can be charged with Title 18 criminal offenses. Many Guantanamo detainees have now been held without charges for eleven years or more. If they were now brought into the U.S. and offered say, twelve- or thirteen-year plea bargain terms, wouldn't there be more than a few takers? Admittedly, Congress might object that restrictions under the National Defense Authorization Act prevent such detainees from being brought onto American soil even for the purpose of taking brief plea bargains. But what plausible threat to U.S. national security would result from a brief plea hearing that led to a detainee's swift transition into federal criminal custody? In any event, this is precisely the kind of issue that shows how overly limiting the NDAA's current restrictions are, and could therefore be negotiated by the Special Envoys with the relevant congressional committees, if it proved helpful in speeding the movement of more detainees out of Guantanamo.

Fourth, after long delays, Periodic Review Boards (PRBs) have finally begun for Guantanamo detainees. This process, which may end up bearing some resemblance to parole boards, creates yet another possibility: a "PRB Bucket," whereby Periodic Review Boards could support the goal of closing Guantanamo by reviewing and revisiting prior detention determinations in light of the current circumstances and intelligence, to determine whether particular additional detainees may be designated for transfer from Guantanamo.

In sum, if the Administration could put together some or all of these pieces, it could finally begin to make steady progress on emptying the various "buckets" of detainees on Guantanamo. That progress would in turn build momentum and foster a collective impression that Guantanamo closure is indeed possible. In time, that impression could

become a self-fulfilling prophecy. If by the end of the President's term, the numbers are substantially reduced, he would have the option of one last "big bang," where he could clear the prison as he left office, and keep his promise to close Guantanamo.

Of course, the wild card in this whole process remains Congress. Yet here too, after the shutdown debacle, there are many possibilities. In his NDU speech, President Obama proposed to "refine and ultimately repeal his existing authority" under the 2001 AUMF. Congressman Adam Schiff's proposal to sunset the 2001 AUMF after the end of 2014 was defeated in the House, but it could easily be reintroduced, especially because it has the appeal of linking the end of the war against Al Qaeda, the Taliban and Associated Forces to the December 2014 end of U.S. combat operations in Afghanistan. The resumption of negotiations with the Taliban would set the stage for release of the Afghan Taliban detainees on Guantanamo, creating yet another "bucket" among the existing pool of detainees. Moreover, ending the war with Al Qaeda and the Taliban would eliminate the Administration's legal authority to hold law of war detainees on Guantanamo going forward based solely on their Al Qaeda membership.

With respect to the next iteration of the National Defense Authorization Acts, the Senate Armed Services Committee (SASC) version of the bill is currently more favorable to the Administration, for example, permitting removal of Guantanamo detainees to the U.S. for medical treatment. Typically, the current House Armed Services Committee version is more restrictive. But if President Obama is serious about closing Guantanamo, he should draw from his recent experience during the shutdown and start signaling early that he will veto any version of the NDAA that makes it more difficult for him to carry out his announced objective of closing Guantanamo. In this time of fiscal consciousness, the Administration should also underscore loudly the budget considerations that cut against keeping Guantanamo open. Incredibly, each Guantanamo detainee currently costs the United States an annual cost of $903,614 per prisoner, 15 times what it costs to hold the average super-max prisoner and more than 30 times what it costs to hold a federal prisoner for the same period of time!

**III. Disciplining Drones**: Perhaps the most overlooked phrase in the President's NDU Speech was his announcement that "over the last four years, my administration has worked vigorously to establish a [legal and policy] framework that governs our use of force against terrorists –- insisting upon clear guidelines, oversight and accountability *that is now codified in Presidential Policy Guidance that I signed*" on May 22, 2013 (emphasis added). The cryptic fact sheet that accompanied the speech apparently summarizes that Presidential Policy Guidance by stating the following standards:

> **Standards for the Use of Lethal Force**:

Any decision to use force abroad – even when our adversaries are terrorists dedicated to killing American citizens – is a significant one. Lethal force will not be proposed or pursued as punishment or as a substitute for prosecuting a terrorist suspect in a civilian court or a military commission. 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;
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.

These are serious and welcome standards. They obviously encapsulate many classified pages of Presidential Policy Guidance. Now that the United States government finally has clearly stated standards that reflect and govern its own executive practice, this would be a good time –as after Congress passed the Foreign Corrupt Practices Act regulating foreign payments by U.S. corporations—for the United States to lead a "race to the top" by engaging Congress and our allies in a more public effort to state and publicize global standards regarding targeting practices.

While some suggest that recent events show that the United States does not follow its own rules, the successful capture of al Libi in Libya and the truncated attempt to capture Al Shababb leader Ikrimah in southern Somalia in fact suggest the opposite. As Mary DeRosa and Marty Lederman demonstrated in their well-crafted post on that subject, the al Libi operations closely followed five points of the blueprint laid out in the President's NDU speech and accompanying briefings: (1) the primacy of capture over kill operations; (2) the strict requirement of near certainty of avoiding civilian casualties; (3) the preference for Article III trials; (4) the focus on targeting Al Qaeda under the AUMF, rather than engaging in a Global War on Terror (GWOT) based on unenumerated constitutional powers; (4) the focus on preventing future threats to U.S persons; and (5) a clearly stated preference for military over covert operations.

While some have questioned whether the U.S. has in fact followed its final stated principle regarding respect for sovereignty, recent media revelations indicate: (1) that the Libyan government in fact consented to the al-Libi raid, (2) that a secret agreement with Yemen gave the U.S. broad authority to carry out lethal missions in Yemen, and (3) that "[d]espite repeatedly denouncing the CIA's drone campaign, top officials in Pakistan's government have for years secretly endorsed the program and routine received classified briefings on strikes and casualty counts." The Libya and Somalia operations also show that this Administration has not treated the conflict with Al Qaeda as an either-or option in which the U.S. Government uses either only Law of War or only Law Enforcement tools. Instead, it has combined a Law of War approach with Law Enforcement and other approaches to bring all available tools to bear against Al Qaeda. This mixed approach is well illustrated by al-Libi's case, where once he was captured, his interrogation bifurcated into a forward-looking and backward-looking phase that served two quite different purposes. The initial phase of interrogating al-Libi as a Law of War detainee was *not*

designed to get information regarding his past criminal activity. Indeed, the federal prosecutor had already sealed a criminal file against al-Libi, based upon a decade-old indictment. Thus, the goal of the initial interrogation phase was not to lead to a criminal prosecution in the SDNY; it was to lead to a change of our force posture to prevent *future* attacks on U.S. targets. The kinds of questions likely asked in the first phase were: "What is your network? What are they planning? What are their capabilities? How can this information protect American citizens against future attacks? " But once al-Libi stopped giving such future-oriented information, the interrogators stopped treating him as a Law of War detainee and moved to a second, criminal interrogation phase — where they presumably took a break, gave al-Libi access to the International Committee of the Red Cross, switched to an FBI clean team, gave him his *Miranda* warnings and access to a lawyer if he wanted one, then began to ask him questions about past federal crimes for which he could be charged before the US District Court for the Southern District of New York.

With regard to disciplining drones, the recent capture operations clarified two other issues. First, are United States forces in fact applying the President's announced rigorous standard of "[n]ear certainty that non-combatants will not be injured or killed [with the clarification that] it is not the case that all military-aged males in the vicinity of a target are deemed to be combatants?" The recent Somalia raid to capture Ikrimah illustrated the President's "near certainty of no-civilian-casualties" standard in action. Indeed, one American official briefed on the Ikrimah operation said the SEALs withdrew from the firefight precisely because they were not certain that they could avoid civilian casualties.

Second, "who is an "Associated Force" that is a co-belligerent with Al Qaeda?" Ikrimah, the target of the raid, was a Kenyan who was apparently deemed legally targetable for capture because he was part of the Al Shababb faction clearly associated with Al Qaeda, and thus fell within the lawful authority to target Al Qaeda or Forces granted by Congress in the Sept. 18, 2001 Authorization for Use of Military Force (AUMF) . Media accounts stressed that Ikrimah was also one of Al Shababb's "top planners for attacks beyond its base in Somalia, along with Abdi Godane, Al Shababb's No. 1 (in whose villa he was pursued) who along with Ikrimah has been two of the most notorious Al Shababb leaders for many years. But in its War Powers Reports to Congress, the Administration has taken pains to specify that "[i]n Somalia, the U.S. military has worked to counter the terrorist threat posed by al-Qa'ida *and al-Qa'ida-associated elements of al-Shabaab*. In a limited number of cases, the U.S. military has taken direct action in Somalia *against members of al-Qa'ida, including those who are also members of al-Shabaab, who are engaged in efforts to carry out terrorist attacks against the United States and our interests*." (emphasis added) Ikrimah met this strict legal standard. Crucially, to say that Ikrimah is part of Al Qaeda is not to say that all of Al Shababb is a co-belligerent of Al Qaeda, defined

as "(1) an organized, armed group that (2) has actually entered the fight alongside Al Qaeda against the United States, thereby becoming (3) a co-belligerent with Al Qaeda in its hostilities against America." While Ikrimah meets the rigorous test for co-belligerency, as my Oxford speech pointed out, "if we are too loose in who we consider to be 'part of' or 'associated with' Al Qaeda going forward, then we will always have new enemies, and the Forever War will continue forever."

**IV. Clarifying The Broader "Smart Power" Strategy:** In sum, since May, the Administration has made reasonable progress in achieving the three goals of disengaging from Afghanistan, closing Guantanamo, and clarifying its drone standards. But where President Obama has been notably less successful has been in persuading the interested publics– our allies, Congress, and the media (particularly the blogosphere)—that he has the counterterrorism situation well in hand. The most recent wave of drone reports –by NGOs Human Rights Watch and Amnesty International, and United Nations Special Rapporteur on counter-terrorism and human rights Ben Emmerson, and United Nations Special Rapporteur on Extrajudicial Killings Christof Heyns—have challenged whether the stated U.S. standards have in fact been applied in practice in Yemen, Pakistan and elsewhere. As Sarah Knuckey has detailed, the NGO reports do not seek to assess the total number or rate of civilian casualties for all U.S. drone strikes. 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. The most important part of the President's NDU speech was his recognition that:

> America is at a crossroads. We must define the nature and scope of this struggle, or else it will define us. We have to be mindful of James Madison's warning that "No nation could preserve its freedom in the midst of continual warfare." Neither I, nor any President, can promise the total defeat of terror. We will never erase the evil that lies in the hearts of some human beings, nor stamp out every danger to our open society. But what we can do – what we must do – is dismantle networks that pose a direct danger to us, and make it less likely for new groups to gain a foothold, all the while maintaining the freedoms and ideals that we defend. And to define that strategy, we have to make decisions based not on fear, but on hard-earned wisdom.

There is still time for the President is to win back the hearts and minds of his citizens and his allies for the challenging task of ending the Forever War with Al Qaeda. But to do so, he must return public focus to his broader "smart power" approach to counterterrorism.

He should make clear that drones are his tool, not his strategy. In the short term, he should make clear, the limited and constrained use of drones is only one of many tools deployed within a much broader strategy of public and private diplomacy, consultation, and standard-setting. In the long run, our goal is to persuade potential terrorists that they have far more to gain by cooperating with us, than by bombing us.

To support these goals, my Oxford speech urged four steps that remain pressing today: (1) that President Obama should make his legal standards governing drone use public and transparent;(2) 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;" (3) that the U.S. should "clarify its method of counting civilian casualties, and why that method is consistent with international humanitarian law standards;" and (4) that where factual disputes exist about the threat level against which past drone strikes were directed, the Administration should release the factual record," explain why it believed particular threats were imminent, what called for the immediate exercise of self-defense, and how sovereignty concerns about consent were satisfied. The Administration has not done so, to its own growing detriment. Especially if the Administration believes that claims of civilian casualties are inflated, it needs to state what its own civilian casualty numbers are and clarify its methodology for evaluating civilian casualties.

More broadly, this is a moment not just for transparency, but for consultation and standard-setting with both Congress and our allies. It may well be that greater transparency will cause trouble with some allies, but as the NSA surveillance contretemps shows, this Administration needs to work aggressively on transparency and candor, if only to get its allies back onside. Public commentaries daily show confusion about both what Obama's broader strategy is, and where particular tools fit within that strategy. The Obama Administration's own continuing lack of transparency, consultation, and public standard-setting has only furthered a cycle of public revelation and outrage that has fed this unfortunate confusion.

The recent drone reports have thrown down a challenge, but it is one that this President should treat as an opportunity. The President should clarify that his goal is not to use drones, the AUMF, or an elastic concept of "Associated Forces" to prolong a twelve-year war. To do so would let the means pervert the end. Instead, he should stay the course, and accelerate it. He should carry out his announced goal of ending the Forever War by explaining how the tools he is using are in fact combining to bring that war to an end. He should make clear that, slowly but surely, he is carrying out the smart-power strategy he outlined in May: disengaging from Afghanistan, closing Guantanamo, and using drones according to transparent and rigorous standards. Having explained to the public his *strategy,* he should now offer *standards and facts:* reasons to believe that he is sticking by

his announced standards, that he is in fact rigorously targeting only combatants, and that although there will always be terrorism, our Nation's concerted efforts are diminishing the threat of Al Qaeda and associated forces sufficiently that we may soon be responsibly able to declare the Forever War over.

FILED UNDER: *Executive & Military*, *Featured*, *International and Foreign*

## ABOUT THE AUTHOR

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SEND A LETTER TO THE EDITOR

# Statement by Harold Hongju Koh
# Sterling Professor of International Law
# The Yale Law School
# 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.[1] 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.[2] 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."[3]

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.[4] The President has declared his intent to withdraw combat troops from Afghanistan by the end of this calendar year.[5]

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[1] 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.

[2] 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.

[3] 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.

[4] *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.

[5] 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;[6] 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."[7]

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."[8] 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.[9]

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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.

[6] *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.").

[7] Obama NDU Speech, *supra* note 3.

[8] *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.

[9] *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.[10] The government witnesses you heard from earlier today have clarified how efforts in all three of those arenas continue.[11]

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.[12] 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."[13] 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:[14] (1) the priority of capture over kill;[15] (2) respect for

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[10] *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.

[11] 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.

[12] *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.").

[13] *Id*.

[14] *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 [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;[16] (3) the requirement that targets present a "continuing and imminent threat" to U.S. persons[17] 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.[18] Finally, the President committed himself to *transparency and consultation* with Congress and our allies,[19] and to considering future workable proposals to extend oversight of lethal actions outside of active warzones.[20] 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."[21] 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"[22] in both the President's targeting and

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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.").

[15] *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.").

[16] *Id*. ("America cannot take strikes wherever we choose; our actions are bound by consultations with partners, and respect for state sovereignty.").

[17] *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.").

[18] *Id*. ("Today, I once again call on Congress to lift the restrictions on detainee transfers from GTMO.").

[19] *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.").

[20] *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.").

[21] *See* Obama NDU Speech, *supra* note 3.

[22] *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.[23]

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.[24] 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.[25] 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.

[23] *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.

[24] 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*].

[25] *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.[26] While not part of the 2001 AUMF's wording, the term "associated forces" derived from a shared executive[27] and judicial interpretation of the statute's text[28] used to clarify the authority of the AUMF in aftermath of 9/11, which was later codified in the 2012 NDAA.[29] 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.[30]

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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[26] *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/.

[27] 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.

[28] 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).

[29] *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.

[30] *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."[31] 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."[32] 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.[33]

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."[34] 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[35] by virtue of: (1) engaging in "a concerted pattern of continuing armed activity"[36] 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"[37] against America.[38] In my judgment, this understanding of imminence is consistent

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[31] *See* United States v. Verdugo-Urquidez, 494 U.S. 259 (1990).

[32] *See* The Prize Cases, 67 U.S. (2 Black) 635, 668 (1863).

[33] 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).

[34] 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.

[35] *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.

[36] 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.

[37] *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.").

[38] 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.[39]

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."[40] 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,"[41] a threat that would require a range of tools. [42]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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[39] 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.).

[40] *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.

[41] *Id*.

[42] *See supra* note 24.

sectarian."[43]

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.[44] 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.[45]

B. Detention:

Nor should repealing the AUMF create any "legal gap" in detaining and trying future terrorist detainees in either American courts or elsewhere.[46] As President Obama reiterated in both his 2013 NDU speech and his 2014 State of the Union Address,[47] 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.[48] The end of major combat operations in Afghanistan may well also lead to renewed

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[43] *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. ("'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.").

[44] 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.

[45] *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.").

[46] *See generally* Daskal & Vladeck, *After the AUMF, supra* note 24.

[47] 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.").

[48] 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.[49] 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.[50] This "legacy issue" should not become "the tail wagging not only the debate over closing Guantánamo, but the debate over repealing/replacing the AUMF."[51] 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.[52]

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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[49] *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.").

[50] *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.

[51] Stephen I. Vladeck, *Detention After the AUMF*, 82 FORDHAM L. REV. 2189 (2014).

[52] 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.[53] 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.[54] Under laws passed since 9/11, the government should have ample authority, even without the AUMF, to pick up future terrorism suspects overseas.[55]

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.[56] 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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[53] 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.").

[54] 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.

[55] 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.").

[56] *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."[57] 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.[58]

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.[59]

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[57] *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.

[58] 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.

[59] 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.[60] 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.[61] 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.[62] These NGO reports do not assess the total number or rate of civilian casualties for all U.S. drone strikes.[63] 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.[64]

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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.").

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

[61] *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.

[62] *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; 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/.

[63] *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/.

[64] *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.[65] The President's own guidelines already state that targeting policies should be reviewed for legality.[66] 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.[67] Because European courts are showing increased initiative in reviewing European cooperation in targeting operations for compliance with domestic and international law, [68] 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."[69] 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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[65] 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.

[66] *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.").

[67] *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.").

[68] 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.").

[69] *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.

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 22nd 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 Lawye*r 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.

# Ending the Forever War: One Year After President Obama's NDU Speech

By *Harold Hongju Koh*

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Today, May 23, 2014, marks the one-year anniversary of President's important speech at the National Defense University (NDU) setting forth his proposed framework for post-9/11 counterterrorism strategy. The President's historic move in that speech was to call for the eventual repeal of the 2001 Authorization for the Use of Military Force (AUMF) and the end of what I had called at the Oxford Union the "Forever War." The President cogently 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. 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.

The latest moment to assess progress in ending the Forever War came two days ago, on May 21, when as others have noted (see Goldsmith posts here and here; Lederman post here; Human Rights First video here), the Senate Foreign Relations Committee heard testimony from four current and past government lawyers regarding the authorization for use of military force after Iraq and Afghanistan (video): Mary McLeod, Principal Deputy Legal Adviser, U.S. Department of State; Stephen Preston, General Counsel, U.S. Department of Defense; myself (Harold Hongju Koh); and Michael B. Mukasey, Debevoise & Plimpton, former U.S. Attorney General. Putting aside some aggressive questioning, there was far more agreement among all participants than may come through from reading the statements or watching the hearing. I would take away five basic messages.

First, we should keep trying to end the Forever War. Our eventual goal should be to repeal the AUMF. Almost thirteen years after 9/11, it is increasingly problematic to rely on the 2001 AUMF to conduct all of America's counterterrorism operations. We should not use a broadly worded 13-year old AUMF text drafted for a prior situation to conduct perpetual armed conflict against a mutating group of terrorist networks.

Second, at the right moment, AUMF repeal would leave no legal gaps. If Al Qaeda can be defeated on the ground, there will come a time when the President will no longer need AUMF authority, because the remnants of Al Qaeda will be better represented by the idea of a "continuing and imminent threat" to which the United States could respond with self-defense authorities than an organized armed group engaged in ongoing conflict of a particular intensity and duration. Only the latter characterization warrants treating the

members of Al Qaeda as continual belligerent combatants with whom we remain in daily war. The President would then not need the current breadth of AUMF authority to deal with that group of individuals, because they can be dealt with through other law, particularly as threats who can be addressed by the domestic and international law of self-defense, not as an organized armed group with whom we remain in daily struggle. (In my oral remarks I used the image of "belt and suspenders" – if the "suspenders" of self-defense law are sufficient to address the targeting and detention issues that remain, you could remove the "belt" of the AUMF without creating a gap in legal authority).

Third, with regard to detention, as I argued in my testimony, repealing the AUMF need not create any "legal gap" in detaining and trying future terrorist detainees in either American courts or elsewhere. While ending the conflict with Al Qaeda would affect U.S. legal authority to detain individuals on Guantanamo as belligerent combatants, other detention authorities under, for example, the criminal and immigration laws would continue. Nor should we consider detention the only solution when the Administration's primary tools to clear Guantanamo are transfer, criminal prosecution by the U.S. and other states, and military commission prosecutions. While some have expressed concern over so-called "unreleasable" prisoners still at Guantanamo, the Executive branch report submitted last week under the terms of the National Defense Authorization Act suggest a number of ways –with some of which I disagree—by which that problem could potentially be managed.

Fourth, what kind of post-repeal legal framework for counterterrorism should we have? Should we shift from the statutory framework of the AUMF, which has now been clarified by both executive branch and judicial interpretation, back to an Article II constitutional framework, guided solely by classified Presidential Policy Guidance? That would be legally possible, but would make uncomfortable all of us who urged throughout the last administration that we move away from broad assertions of Article II authority to a statutory framework based on shared responsibility between the legislative and executive branches for national security matters. Famously, in Category I of Justice Jackson's concurrence in Youngstown Sheet & Tube Co. v. Sawyer (here), the President's "authority is at its maximum, for it includes all that he possesses in his own right plus all that Congress can delegate." Both legal authority and political legitimacy would be maximized if Congress and the President could work together to ensure that the authority given to the President reflects the current threat facing the U.S., not the threat that existed on 9/11. Of course, that leaves a grave political problem: given the dysfunctionality of our legislative process and the reality that Congress and the executive branch have been out of sync on these issues for many years.

Fifth, this political reality creates three options for Congress going forward: one bad and two better. The bad option would be to pass new, broad legislation out of an understandable sense of bipartisan frustration with the apparent mismatch between the intention of the 2001 AUMF and the threats that the United States is actually facing today. If the timing isn't right—because of the evolving nature of the threat posed by non-state terrorists, because of the uncertainty surrounding the planned withdrawal of U.S. troops from Afghanistan by the end of this year, because Congress cannot come to a consensus on the best way forward—then no new legislation is better than bad new legislation. Bad legislation would expand the President's current authority over his objection, and codify the "Forever War." Such an option seems flatly contrary to President Obama's unambiguous statement in the NDU speech one year ago that he would not sign any law expanding the mandate of the 2001 AUMF (here). Moreover, such an expansion would be both unprecedented and extremely unwise. After more than three decades of studying 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 expand a war over the President's explicit objection. Now is not the time to start.

But if the time were right, Congress would have two better options, more consistent with President Obama's stated objective in his NDU speech to "refine, and ultimately repeal, the AUMF's mandate." The first option is "wait then repeal:" if and when conditions on the ground permit, Congress could simply repeal the 2001 AUMF. Even without an AUMF, the President would have ample authority to address current and future threats by relying on his inherent Article II authority as Commander-in-Chief to strike terrorists who pose a "continuing and imminent threat" to the U.S. But until then, the status quo is better than new legislation perpetuating and expanding armed conflict authorities that the President has not asked for. But if "wait then repeal" is the only option, repeal may never come. For as already noted, some members of Congress and the public are wary about forcing the President to rely on his Article II powers alone without congressional authorization or oversight.

So the third option is "narrow, then repeal." Congress could narrow the AUMF's mandate to recognize the evolving nature of the threat facing the U.S., and start the process of shifting legal authority from an "armed conflict" theory to a "current threat" theory. In my testimony, I suggested five possible elements of a narrowing statute:

1. A sunset clause, which would provide increased opportunities for congressional and executive dialogue and force debate and voting at timed intervals;
2. Statutory codification of the President's authority to act in self-defense consistent with both the Constitution and international law;

3. Strengthened congressional reporting requirements to require that the relevant committees regularly receive information on secret military and covert operations—to the extent permitted by operational security needs—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;
4. Strengthened public reporting requirements, which would require periodic public reporting on the number of combatants and civilians killed, as well as information regarding where and against whom the President is using military force under congressional authorization; and
5. Exploration and eventual implementation of some form of ex post review mechanism—judicial or otherwise—for evaluating targeting, particularly with respect to American citizens.

To be clear, I would not favor two proposals offered by former Attorney General Mukasey in his testimony, which I would see as expanding, not narrowing, the AUMF's mandate. His first proposal is a ten-year sunset clause. But do we really want to sanction ex ante a 23-year armed conflict? His second proposal echoed a Hoover Institution recommendation that Congress set forth general statutory criteria for presidential uses of force against new terrorist threats but require the executive branch to identify particular groups that are covered by that authorization of force, drawing on the State Department's Foreign Terrorist Organization designation process. Under this process, Congress charges the Secretary of State—pursuant to specific statutory standards, in consultation with other departments, and following a notification period to Congress—to designate particular groups as terrorist organizations and thereby create statutory consequences for those groups and their members.

For nearly four years as Legal Adviser, I engaged regularly with the FTO designation process, which I do not believe is a good one. Pretty much everyone I worked with in the executive branch thought it was a buck-passing, list-making exercise that should not be replicated elsewhere. Congress adopts a standard for generating lists that, through the vagaries of the legislative process, is hard to construe. It then delegates to the executive the responsibility to make and tier lists with various sanctions attached to the various tiers. The incentive created for everyone in the process is to be over-inclusive: you only get into trouble if a terrorist group that is involved in a strike was not on the list. But sometimes the friendly government of the country where the group operates opposes the designation on the ground that recognition through FTO designation by a country the size and stature of the United States would give that organization the very visibility and status they seek,

perversely strengthening the terrorist organization by helping with recruiting, raising resources, and the like. These designations are hard to change, forcing the executive to try to carve out exceptions from the sanctions when the inflexibility of the process bites in unanticipated ways: witness, for example, the struggle to lift the FTO designation for the African National Congress when it meant denying visas for Nelson Mandela (story here). So the FTO Designation proposal strikes me as an unwise one, which would not foster meaningful congressional engagement or oversight, but would instead expand and perpetuate, not help narrow and eventually end, the Forever War. If the President ever needed additional authority – because of a situation that turned from one requiring self-defense in response to an immediate threat into one that genuinely demanded an ongoing conflict with a new armed group that threatened our nation – the solution would be to ask Congress at that time. The straightforward step would be for him or her simply to ask Congress to authorize military force against that group, making the case for why a new AUMF is needed, and getting the requisite authority from Congress at that time.

Stepping back from the details, the broader message is this: one year after the NDU speech, it still seems possible for President Obama to reach his stated goal of "refining and ultimately repealing" the 2001 AUMF. Like much these days, the problem is not the law—it is the politics. No new legislation is better than bad new legislation. So our strategy should be either "wait then repeal" or "narrow then repeal," while keeping our eyes on the prize: finally ending America's Forever War.

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POLITICOMAGAZINE

WASHINGTON AND THE WORLD

# The Lawful Way to Fight the Islamic State

If the president wants to act in Syria, he needs congressional buy-in.

By HAROLD HONGJU KOH | August 29, 2014

All of Washington is asking: How can the United States lawfully address the threat from the Islamic State in Iraq and the Levant—ISIL, also known simply as the Islamic State—without provoking a wider war abroad and a constitutional crisis at home? That question raises complex issues of law and policy.

So far, President Obama has acted lawfully in response to this crisis. His uses of targeted military force in Iraq to rescue the Yazidi minority group, secure the Mosul Dam and counter ISIL's efforts to destabilize the wobbly Iraqi government have been limited and necessary to avert humanitarian disaster and to protect U.S. nationals and vital interests. The Iraqi government has consented to these strikes for limited purposes, which America's closest allies have broadly supported. As Vice President Biden clarified, the administration has used hard power in small doses to support a worthy "smart power" objective: to give breathing room in Iraq for a diplomatic and democratic process in the wake of Prime Minister Nuri al-Maliki's resignation. Although some legislators have complained of being inadequately consulted, Congress

has remained out of session, with most of its members eager to avoid a vote on whether to authorize force until at least after the November elections.

But Congress' return in September signals a new decision point. The more the president keeps bombing, the more Congress and the public will accuse him of committing U.S. forces to "hostilities" without congressional approval, beyond the 60-day time period specified by the War Powers Resolution. Under U.S. law, President Obama can hardly extend a conflict with ISIL to Syria based on claims of inherent constitutional authority, when he rightly criticized the Bush administration for pursuing a "Global War on Terror" based on similar sweeping claims.

Congress has enacted two Authorizations for the Use of Military Force (AUMFs) in the region, but both address different situations. The 2001 AUMF was enacted 13 years ago to prevent al Qaeda and its co-belligerents from attacking the United States, not to fight a distant battle against a terrorist group that did not exist on Sept. 11, 2001, and has now clearly split from al Qaeda. The 2002 AUMF for Iraq targeted the national security threat in Iraq, but was directed at Saddam Hussein, not ISIL, and at the unfounded fear that he possessed weapons of mass destruction.

Under international law, military strikes in Iraq with local consent could be justified in the near term, especially to protect U.S. nationals, or to prevent genocide against ethnic groups, such as the Kurds or the Yazidi. But inside Syria, President Bashar al-Assad's government would not openly consent to U.S. intervention. Moreover, the goal would be different—to attack ISIL leadership, not just to protect U.S. nationals or Syrian civilians, tens of thousands of whom have already died. If partner governments such as Iraq, Turkey and Jordan request strikes, the administration could plausibly argue that it is conducting limited military actions in Syria in collective self-defense to protect these countries from ISIL's threat to regional peace and security. And the administration could justify particular military actions in Syria that are demonstrably necessary to save American hostages—like the rescue attempt for James Foley—to prevent an imminent attack on U.S. citizens, or to avert a mass slaughter of innocents. The United States could also take necessary and proportionate actions to target particular senior ISIL leaders who have clearly taken up arms alongside al Qaeda against the United States. But absent a U.N. Security Council resolution, these limited rationales could not sustain more concerted military action against ISIL inside Syria.

That leaves the White House with three main options, only the third of which is acceptable. The first is to do nothing, avoid engaging Congress and keep bombing based on shifting legal rationales. Such an approach seems guaranteed to further weaken the president, by triggering an ill-timed constitutional battle over the president's prerogative to conduct unilateral war.

A second bad option would be to let congressional hawks take the lead and authorize a new expansive AUMF that would effectively perpetuate counterterrorist wars by giving the president broad new authority to attack whatever new dangerous groups may arise. But this president came into office to end, not perpetuate, wars. And in our history, Congress has never declared an open-ended "Forever War" against unspecified enemies. Not in 2001, not ever. A measured authorization clearly limited in time and scope is far more likely to receive sustained support from Congress, the public and our allies.

So the White House's third and best option is to engage Congress proactively to secure tailored legal authority to achieve those policy objectives that it shares with Congress and our allies. Those objectives vary according to context. In Iraq, the goal is to use U.S. airpower, but not boots on the ground, to prevent ISIL from seizing key assets, harming American citizens or civilian groups or disrupting the fragile post-Maliki democratic process. We should "re-contain" ISIL by using military force to stop it from metastasizing and "shrink ISIL back into ISIS" as a smaller, less ambitious non-state actor that limits its aspirations and activities to Syrian territory. Assad may be the enemy of our enemy, but he is not our friend, and our use of military force should not perversely strengthen his grip on power or improve his capacities to slaughter civilians. Outside of Iraq and Syria, our policy goal should be to systematically use aggressive diplomacy and tailored force, consistent with international law, to degrade ISIL's capacities so that it is less able to recruit foreign fighters, take hostages, destabilize peaceful governments or conduct brutal campaigns of terror.

To achieve these goals, the president needs durable legal authority, which will require action on both the domestic and international fronts. To secure a domestic legal ground for action, the administration should engage with Congress to develop an ISIL-specific AUMF. That statute would authorize the president to use such force against ISIL —inside and outside Iraq—as is necessary and appropriate to achieve agreed-upon, defined strategic objectives. Those could include acting in individual and

collective self-defense against ISIL and degrading its capacities to commit terrorist acts, to destabilize peaceful governments and to perpetrate future attacks on American citizens and vital interests.

Congress should place limits on that delegated authority by, for example, requiring the president to return to Capitol Hill for express approval should he wish to use force against any armed groups "associated with ISIL" or seek to introduce U.S. ground troops into the territory of Iraq or Syria as part of the conflict against ISIL. The resolution should include robust consultation and reporting requirements to ensure that the executive branch regularly provides information to relevant congressional committees, publicly whenever possible, and in closed classified sessions when absolutely necessary. These reports should identify when, where and under what circumstances lethal force has been used pursuant to the authorization, and how many civilian casualties have resulted from those actions. Finally, the bill should include a "sunset clause" that terminates the authorization at the end of one—or at most, two—years, to ensure that Congress affirmatively assesses progress before it assents to any continued use of force against ISIL.

On the international front, the administration should ramp up diplomatic efforts to enlist support for military operations against ISIL. It should seek a Security Council resolution defining the particular purposes for which multilateral action is authorized, including sanctions, humanitarian assistance, aid to responsible Syrian rebel groups who oppose both Assad and ISIL and the protection of civilians, refugees, NGO workers and journalists. When the Russians object, the coalition should point to Russian President Vladimir Putin's flagrant violation of Ukrainian sovereignty to isolate and shame the Russians from blocking a meaningful resolution. At the same time, U.S. diplomats should build support among the Arab League and NATO for anti-ISIL actions, with an eye toward breathing life back into the moribund Geneva II Syrian peace process.

President Obama and his team will be understandably leery about approaching Congress and our allies about authorizing force in Syria after last year's "red line" debacle. His critics on the left—and some on the right—will surely charge that he has opened a new front against ISIL, when his stated goal was to end the wars in Iraq, in Afghanistan and against al Qaeda. But even if Congress balks, it is always better—as a matter of constitutional principle and public accountability—for the president to

forthrightly demand its support for a long-term military engagement. The same reasoning favors working with U.S. allies to seek a Security Council resolution, given that without one, the strongest basis in international law for force against ISIS would be the shakier grounds of collective self-defense or a responsibility to avert humanitarian slaughter.

This president has repeatedly stated his commitment to use force only for carefully defined purposes, consistent with American law, values and a broader smart-power approach to national security. Should the conflicts in Iraq, Afghanistan and against al Qaeda recede, he can still seek to narrow or repeal the 2001 and 2002 AUMFs before leaving office. And he can do so having kept his promise to restore respect for the Constitution and the rule of law, while protecting our national security, taking us off a perpetual war footing and working with Congress and our allies to address the most vexing issues arising from the Arab Spring.

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