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FSR is pleased to present an excerpt from Antonia Chayes' upcoming book

Borderless Wars:

Civil-Military Disorder and Legal Uncertainty

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About the Author:

Antonia Chayes, former Under Secretary of the U.S. Air Force, is Professor of Practice of International Politics and Law at the Tufts University Fletcher School of Law and Diplomacy. She has served on several Federal Commissions, including the Vice President's White House Aviation Safety and Security Commission, and the Commission on Roles and Missions of the U.S. States Armed Forces. As Board member of United Technologies Corporation for 21 years, she chaired its Public Issues Review Committee, and served on its Executive Committee until retiring in 2002. She is a member of the Council on Foreign Relations; serves as a consultant to the Office of Compliance, Adviser, Ombudsman of IFC and MIGA of the World Bank. She was elected to the Executive Council of the American Society of International Law in 2009. She is the author of numerous books & articles and co-author of The New Sovereignty.

1 Counterterrorism: The Unquiet Warfare of Targeted Killings

1.1 *Inter arma silent leges*

Within less than a decade of U.S. presence in Afghanistan, it became clear that the counterinsurgency strategy was not succeeding. The strategy was not initiated when the intervention began. Even after a strategic reassessment in 2009, and the efforts of General Stanley McChrystal, its stringent conditions for success were not met. The Taliban and its bloody insurgency had revived.[1] In Iraq, where it seemed for a time as if some form of counterinsurgency had turned the tide, hopes increasingly dimmed that the country might become a sustainable democracy. The United States and the world economy were in recession and had contracted dramatically. Attention was turning inward – away from these countries. The United States had withdrawn from Iraq in 2011, and had announced plans to substantially withdraw from Afghanistan in 2014.

However, the violent militant insurgency group ISIS, often called the Islamic State, changed both the situation and the boundaries in Iraq and Syria with mass recruitment and successful cross-border assaults. Despite war fatigue and donor disillusionment, the United States managed to cobble together a coalition to counteract the onslaught. The fragile coalition included several Arab nations with varying contributions, as well as the United Kingdom, Australia, France; and an opening to Turkish assistance.[2]

The threat of terrorism – not solely in Iraq and Afghanistan – has demanded many different strategies depending on the circumstances and the country. In Iraq and Syria, counterter-

[1] According to Sarah Chayes, the strategy in Afghanistan was developed for Iraq in 2007 and then imported back to Afghanistan in 2009. It was too late. General McKiernan, who was in charge of the International Security Assistance Force (ISAF) in 2008–2009 had been begging for more troops in Afghanistan, but President Bush did not supply them then. Admiral Mike Mullen expressed shock at the relative "poverty" of the force in Afghanistan when he first attended to the situation there. By the time President Obama made the decision to try counterinsurgency in late 2009, the mood and resources were already very different. Sarah Chayes, in discussion with the author, November 15, 2014.

[2] Dexter Filkins, "What We Left Behind," *The New Yorker*, April 21, 2014, http://www.newyorker.com/magazine/2014/04/28/what-we-left-behind (accessed December 12, 2014).

rorism was only part of a "hot" war fought with ground troops and conventional bombing. In Yemen and Somalia, it remained essentially a covert operation, until early 2015 when the Yemeni government was routed. In Afghanistan, the alternative strategy to counterinsurgency, counterterrorism, came to play a larger part beginning in late 2010, changing the make-up of the intervention.

One central component of a counterterrorism campaign – targeted killing, particularly the use of lethal unmanned aerial vehicles (UAVs or drones) – has led to a division of civilian and military roles, and the appropriateness of this division raises difficult questions. This is not a case of the military seeping into traditionally civilian domains; rather, it is one that raises the question of whether civilians – CIA personnel – are performing a military function. If so, what are the implications for appropriate "management of violence," and has there been a merger of roles? Moreover, the legal basis for such activity remains clouded and secretive, raising further doubts about who does what and about the operations generally.[3] Aspects of counterterrorism other than targeted killing may also raise important questions about civil-military relations and the boundaries of legality. Although worth pursuing, many of these operations are screened even further behind the wall of secrecy than targeted killing. But at least, certain counterterrorism practices, such as extreme rendition and aggressive interrogation amounting to torture, have been terminated.[4]

"We've been taking a lot of kinetic activities against them, actually," said General Petraeus, sent to Afghanistan by President Obama in June 2010 to work his Iraq-turnaround magic. "I don't know if there's an incident a day, but certainly close to it, where our intelligence, surveillance and reconnaissance assets are detecting a group planting [improvised explosive devices], and U.S. forces go after that group."[5] In the same interview, General Petraeus sought to explain how both approaches, counterinsurgency and counterterrorism, could be combined. But *The Washington Post* columnist David Ignatius, watching Petraeus at work, suggested the balance between the two might be shifting. He wrote:

> *[T]he real action has been "enemy-centric" – in stepped-up operations to capture or kill Taliban leaders, along with support for Karzai's attempt to cut a political deal with them. President Obama, having signed off in December on the counterinsurgency approach, is now watching his commander execute a strategy whose biggest successes have come from hard-nosed counterterrorist tactics – the midnight raid, kick-down-the-door ferocity of the Joint Special Operations Command.*[6]

[3]For an overview of eight legal arguments asserted since 2002 to justify U.S. counterterrorism drone attacks, see Mary Ellen O'Connell, "International Law and Drone Attacks Beyond Armed Conflict Zones," in *Drones and the Future of Armed Conflict, Ethical, Legal, and Strategic Implications* (D. Cortright et al eds., forth- coming May). See also Christine Gray, "Targeted Killings: Recent US Attempts to Create a Legal Framework," *Current Legal Problems* 66 no. 75 (2013): 75–106, http://clp.oxfordjournals.org/content/66/1/75.full.pdf+html (accessed April 18, 2015).

[4]Executive Order 13491, "Ensuring Lawful Interrogations," http://www.whitehouse.gov/thepressoffice/EnsuringLawfulInterrogations (accessed December 12, 2014). See also Senate Select Committee on Intelligence, *Committee Study on the Central Intelligence Agency's Detention and Interrogation Program*, December 3, 2014, http://www.intelligence.senate.gov/study2014/sscistudy1.pdf (accessed December 12, 2014).

[5]Spencer Ackerman, "Drones Surge, Special Ops Strike in Petraeus Campaign Plan," *Wired*, August 18, 2010, http://www.wired.com/dangerroom/2010/08/petraeus-campaign-plan/ (accessed November 10, 2014).

[6]David Ignatius, "Petraeus Rewrites the Playbook in Afghanistan," *Washington Post*, October 19, 2010, http://www.washingtonpost.com/wp-dyn/content/article/2010/10/18/AR2010101803596.html (accessed April 18, 2015).

1.2 Counterterrorism: Everyone's Job?

That the finely honed and multiple techniques of counterterrorism would be employed in the gray area that has characterized terrorism and insurgencies worldwide should be no surprise.[7] But this rapid expansion of a new war-fighting capability raises different questions about civil-military relations and about how the legal under- pinning for counterterrorism activities might affect role definition for and cooperation between civilian and military actors. Within the United States, responsibility for preventing would-be terrorists from carrying out attacks encompasses most major departments and agencies of government.[8] Apart from the obvious mandates of the Defense Department, CIA, and Department of State, the Departments of Justice, Homeland Security, Treasury, Agriculture, and Commerce are also deeply involved.[9] Even the federal judiciary has played an important part in managing American responses to terrorism in a series of Supreme Court and lower court opinions that altered the landscape of legally acceptable practices governing counterterrorism.[10] And states and cities have operations of their own, often well financed.

The military defined counterterrorism in the 2009 Joint Doctrine on Counterterrorism as "actions taken directly against terrorist networks and indirectly to influence and render global and regional environments inhospitable to terrorist networks."[11] Counterterrorism is considered, as is counterinsurgency, a necessary response to "irregular warfare."[12] Responsibility for counterterrorism within the military lies squarely with Special Operations Forces (SOF) under U.S. Special Operations Command (SOCOM).[13]

Established in 1987 following the passage of the Goldwater-Nichols Act and the Nunn-Cohen Amendment of 1986, SOCOM represented a consensus on the need to consolidate and modernize U.S. Special Operations Forces.[14] SOCOM's stated mission is to "provide fully capable

[7]The term "terrorism" does not lend itself to a precise definition in either scholar- ship or policy. To illustrate its complexity, a 2002 study by Leonard Weinberg, Ami Pedahzur, and Sivan Hirsch-Hoefler yielded seventy-three different definitions of terrorism from a survey of only fifty-five scholarly journal articles. The authors of the study compared their findings to an earlier study by Alex Schmid that arrived at twenty-two "definitional elements" of the term "terrorism," which had been distilled from 109 different definitions that Schmid had received when he surveyed scholars in 1988. See Leonard Weinberg, Ami Pedahzur, and Sivan Hirsch-Hoefler, "The Challenges of Conceptualizing Terrorism," *Terrorism and Political Violence* 16, no. 4 (Winter 2004): 777–794.

[8]As with counterinsurgency, a holistic approach to counterterrorism should entail not only capturing the individuals actively participating in violence but also work- ing to delegitimize their organizations, deradicalize their associates, and pro- mote civil society and good governance in their communities. See Daniel Byman, "U.S. Counterterrorism Options: A Taxonomy," *Survival* 49, no. 3 (Autumn 2007): 121–150.

[9]In fact, there are many U.S. domestic-focused agencies that have counterterrorism responsibilities. Among them are the U.S. Justice Department Counterterrorism Section, advising on law enforcement and legislation. See The United States Department of Justice, National Security Division, Counterterrorism Section, http://www.justice.gov/nsd/counter_terrorism.htm (accessed April 18, 2015); the U.S. Treasury Department's Office of Terrorism and Illicit Finance, drafting economic sanctions, http://www.treasury.gov/resource-center/terrorist-illicit-finance/ Pages/default.aspx (accessed April 18, 2015); and even the obscure U.S. Food and Drug Administration's Center for Veterinary Medicine's Counterterrorism Coordinator, addressing potential bioterrorism through livestock (see U.S. Food and Drug Administration, "Emergency Preparedness and Response: CVM and Counterterrorism," http://www.fda.gov/EmergencyPreparedness/ Counterterrorism/ucm122296.htm) (accessed April 18, 2015).

[10]See Hamdan v. Rumsfeld, 548 U. S. 557 (2006); Hamdi v. Rumsfeld, 542 U. S. 507 (2004); and Boumediene v. Bush, 553 U. S. 723 (2008).

[11]*Counterterrorism*, Joint Publication 3-26, November 13, 2009, vi.

[12]Ibid, viii.

[13]Of JSOC, Commander Admiral William H. McRaven stated: "We are the lead Combatant Command tasked with synchronizing the planning of global operations against terrorist networks." See Senate Armed Services Committee, 112th Congress (March 6, 2012) (posture statement of Admiral William H. McRaven), http://www.fas.org/irp/congress/2012_hr/030612mcraven.pdf (accessed December 12, 2014).

[14]The evolution of SOCOM can be traced from the failed Desert One Iranian hostage rescue attempt in 1980.

Special Operations Forces to defend the United States and its interests" and to "synchronize planning of global operations against terrorist networks," under the auspices of its three priorities: one of which was to "deter, disrupt, and defeat terrorist threats."[15] As of March 2012, SOCOM had for all its missions, approximately 66,000 active duty, reserve, and civilians assigned within its four components,[16] plus the Joint Special Operations Command, and operated in more than seventy-five countries.[17]

Although now under SOCOM's umbrella, Joint Special Operations Command (JSOC) predates the establishment of the Command by seven years.[18] Considered the most clandestine special operations organization, JSOC is reported to command the military's most elite and highly skilled special mission units (SMU), including the Navy's SEAL Developmental Group, popularly known as SEAL Team 6 or DEVGRU, which carried out the raid that killed Osama bin Laden,[19] as well as the Army's First Special Forces Operational Detachment-Delta. According to the government-sanctioned website, JSOC's purpose is "to study special operations requirements and techniques, ensure interoperability and equipment standardization, plan and conduct special operations exercises and training, and develop joint special operations tactics."[20] Special Operations forces, and JSOC's nimble and exacting force in particular, have constituted a key component of U.S. operations in both Iraq and Afghanistan. JSOC was a one-stop military shop that could begin to deal with al-Qaeda, which by 2003 had become a decentralized network of organizations.

In 2003, Osama bin Laden remained at large and al-Qaeda in Iraq (AQI) had become rampant. In an effort to make progress in the "war on terror" JSOC created Joint Task Force 714 to bolster its operations and permit it to respond with greater speed and efficiency than the enemy. This was expanded into Afghanistan in 2004 with the Joint Interagency Task Force under the U.S. forces mission (Operation Enduring Freedom or OEF). The Task Force sought ways for U.S. forces to "become a network" just like the enemy with whom they were dealing.[21] General Stanley McChrystal pointed out that this network brought the "CIA's human intelligence ... the National Security Agency's intercepted signals; the FBI's forensic and

For a complete history of SOCOM from its inception through its involvement in Somalia, Haiti, the Balkans, and the Global War on Terror, see *United States Special Operations Command History, USSOCOM*, 6th ed. (March 2008), http://www.socom.mil/Documents/history6thedition.pdf (accessed April 4, 2015). For a specific history on SOCOM operations from 1987 to 1995, see Wayne A. Downing, "Joint Special Operations," *Joint Forces Quarterly* (Summer 1995): 22–27.

[15]USSOCOM Public Affairs, *Fact Book: United States Special Operations Command 2014*, 41, http://www.socom.mil/News/Documents/USSOCOM_Fact_ Book_2014.pdf (accessed April 18, 2015).

[16]These four components include the military branch's special operations: the U.S. Army Special Operations Command, the Naval Special Warfare Command, the Air Force Special Operations Command, and the Marine Corps Special Operations Command.

[17]See the comprehensive Posture Statement of Admiral William H. McRaven before the Senate Armed Services Committee in which he stated "Since 9/11, our operations, ranging from peacetime engagement and building partner capacity, to direct action raids and irregular warfare, have contributed significantly to not only our own National Security, but global stability at large." http://www.armed-services.senate.gov/imo/media/doc/McRaven_03-11-14.pdf (accessed April 24 2015).

[18]Foreign Relations, 2013; Susan L. Marquis, *Unconventional Warfare: Rebuilding U.S. Special Operations Forces* (Washington, DC: Brookings Institution Press, 1997); Dana Priest and William M. Arkin, "Top Secret America: A Look at the Military's Joint Special Operations Command," *The Washington Post*, September 2, 2011, http://articles.washingtonpost.com/2011-09-02/world/35273073_1_navy-seal-joint-special-operations-command-drones (accessed December 12, 2014).

[19]Dana Priest and William M. Arkin, "Top Secret America: A Look at the Military's Joint Special Operations Command," *The Washington Post*, September 2, 2011, http://articles.washingtonpost.com/2011-09-02/world/35273073_1_navy-seal-joint-special-operations-command-drones (accessed December 12, 2014).

[20]See USSOCOM, Joint Special Operations Command, http://www.socom.mil/Pages/JointSpecialOperationsCommand.aspx (accessed April 18, 2015).

[21]Gideon Rose, "Generation Kill: A Conversation with Stanley McChrystal," *Foreign Affairs* 92, no. 2 (2013): 2–8, http://www.foreignaffairs.com/discussions/interviews/generation-kill (accessed November 3, 2014).

investigative expertise; the Defense Intelligence Agency's military reach; and the National Geospatial-Intelligence Agency's 'dazzling mapping ability' together in the Afghanistan theatre."[22] It also included CIA's Special Action Division. As the military and the CIA were thus brought closer together in the fight against al-Qaeda, the lines between their missions and responsibilities became blurred.

The CIA's role in counterterrorism, as described by its Counterterrorism Center, is "[to work] with other U.S. government agencies and with foreign liaison partners [to] target terrorist leaders and cells, disrupt their plots, sever their financial and logistical links, and roil their safe havens."[23] This work encompasses far more than either the CIA's classic intelligence or traditional covert action functions, verging more and more into direct military action. One manifestation of this increasing paramilitary role has been strikes by CIA-controlled UAVs. Although the concept of striking the enemy with unmanned aerial vehicles was first developed in World War II, its widespread use was early in the twenty-first century, by OEF in its first combat year, and by the CIA in Yemen in 2002.[24] The CIA increased its UAV operations from 2006 to 2008 in order to strike at al-Qaeda and its sympathizers "at a pace they could not absorb."[25]

1.3 Targeted Killing

The Alston Report on Extrajudicial, Summary, or Arbitrary Executions, presented to the UN General Assembly Human Rights Council in 2010, defines targeted killing as "the intentional, pre-meditated and deliberate use of lethal force by States or their agents under color of law or by an organized armed group in armed conflict against a specific individual who is not in the custody of the perpetrator."[26] That report also notes that such killings have been justified as a legitimate response to "terrorist threats" and as a necessary response to asymmetric warfare.[27] Although targeted assassinations are probably as old as humankind's history, technological advances provide an immediate opportunity to kill individuals or small groups by using remotely launched UAVs: armed Predators, the first generation of armed UAVs, Reapers, and Avengers, commonly called drones. They can strike "efficiently" without

[22]In 2011, General Stanley McChrystal noted: "In bitter, bloody fights in both Afghanistan and Iraq, it became clear to me and to many others that to defeat a networked enemy we had to become a network ourselves." General Stanley McChrystal, "It Takes a Network: The New Front Line of Modern Warfare," *Foreign Policy*, February 22, 2011, http://www.foreignpolicy.com/articles/2011/02/22/it_takes_a_network (accessed December 12, 2014).

[23]Central Intelligence Agency, *The Work of a Nation*, https://www.cia.gov/library/publications/resources/the-work-of-a-nation (accessed April 18, 2015).

[24]Andrew Callum "Drone Wars: Armed Unmanned Aerial Vehicles," *International Affairs Review*, XVIII no. 3 (Winter 2010), http://www.iar-gwu.org/node/144 (accessed April 2, 2015); see also Doyle McManus, "A U.S. License to Kill, a New Policy Permits the C.I.A. to Assassinate Terrorists, and Officials Say a Yemen Hit Went Perfectly. Others Worry About Next Time," *The Los Angeles Times*, January 11, 2003, http://articles.latimes.com/2003/jan/11/world/fg-predator11 (accessed April 2, 2015); see also Mark Mazzetti, "A Secret Deal on Drones, Sealed in Blood," The New York Times, April 6, 2013, http://www.nytimes.com/2013/04/07/world/asia/origins-of-cias-not-so-secret-drone-war-in-pakistan.html?r=0 (accessed December 12, 2014).

[25]Greg Miller, "At CIA, a Convert to Islam Leads the Terrorism Hunt," The Washington Post, March 24, 2012, http://www.washingtonpost.com/world/ national-security/at-cia-a-convert-to-islam-leads-the-terrorism-hunt/2012/03/23/gIQA2mSqYS_print.html (accessed December 12, 2014).

[26]United Nations, *Report of the Special Rapporteur on Extrajudicial, Summary or Arbitrary Executions Philip Alston*, UN Human Rights Council Report, UN Doc. A/HRC/14/24/Add. 6, May 28, 2010, 3, http://www2.ohchr.org/english/bodies/ hrcouncil/docs/14session/A.HRC.14.24.Add6.pdf (accessed December 12, 2014). After a detailed analysis of applicable law, the report also states: "The greater concern is because they make it easier to kill without risk to a State's forces, policymakers and commanders will be tempted to interpret the legal limitations on who can be killed and under what circumstances too expansively."

[27]Ibid, 6.

invasion or risk to targeting personnel, and arguably with less collateral damage than manned air strikes. U.S. drone attacks reportedly constitute 95 percent of targeted killings,[28] and have killed between 3,200 and 4,600 people in total as of early 2014.[29] They occur in areas, such as Somalia or Yemen, where there may be little or no other kinetic action by outside powers.

Since the terrorist threat to the homeland seems to be persistent and now worldwide, UAV strikes have seemed to be an effective response to widespread and mobile terrorism. The president's May 23, 2013 speech at the National Defense University first acknowledged what was already publicly known – that the United States was engaged in the wide use of drone strikes to target individuals and groups.[30] The lack of risk to the user makes their widespread use attractive.[31] Yet despite their efficiency, obviating the need for significant forces in country, widespread concern accompanies their increased use. The United States and its closest allies no longer have a monopoly on UAVs and therefore may soon become targets themselves. Many countries now possess surveillance drones, and a vastly increased number will soon have the capacity to strike.[32]

Additionally, the very secrecy of the program has heightened inherent ambiguities about which agencies of government – civilian or military – are, or should be, responsible for UAV operations and therefore which legal provisions might apply. From the inception of lethal UAV operations, both military officers and CIA operatives have conducted them. Publicly available information suggests that their roles have been intertwined; the distribution of activities seems to defy any conventional role division. The allocation seems to fit no logical model of civil-military relations – past or present.

Although targeted killing presents a different set of civil-military and legal issues from those of counterinsurgency, both fit into the same strategic environment of combating terrorism in gray area warfare. Greater civil-military role clarity, with public explanation, may ease some of the discomfort that secrecy generates. A number of legal issues also need further development. Strikes that have killed American citizens have required special justification under domestic law, and have caused intense debate. Both domestic and international legal issues have become intertwined with issues of sovereignty morality and accountability. International cooperation may be necessary to establish a sturdier, more widely acceptable legal framework if the use of targeted killing is continued.[33]

[28]Micah Zenko, *Reforming U.S. Drone Strike Policies: Council on Foreign Relations Report*, January 2013, 8, http://www.cfr.org/wars-and-warfare/reforming-us-drone-strike-policies/p29736 (accessed November 11, 2014).

[29]New America Foundation, Drone Wars Dataset, http://securitydata.newamerica .net/world-drones.html (accessed April 18, 2015); see also Bureau of Investigative Journalism, Covert Drone War Datasets, http://www.thebureauinvestigates.com/2012/09/06/covert-drone-war-the-complete-datasets/ (accessed December 15, 2014).

[30]President Barack Obama (speech, National Defense University, Washington, DC, May 23, 2013), http://www.whitehouse.gov/the-press-office/2013/05/23/remarks-president-national-defense-university (accessed December 12, 2014).

[31]John Kaag and Sarah Kreps raise ethical questions about the use of such warfare when there is "the ability to conduct military operations at ever lower costs and this presents a moral hazard – a situation where an actor takes on risky behavior while not shouldering the consequences or risks of said behavior." John Kaag and Sarah Kreps, *Drone Warfare* (Cambridge: Polity Press, 2014), 135.

[32]Guy Taylor, "U.S. Intelligence Warily Watches for Threats to U.S. Now that 87 Nations Possess Drones," *The Washington Times*, November 10, 2013, http://www.washingtontimes.com/news/2013/nov/10/skys-the-limit-for-wide-wild-world-of-drones/?page=all (accessed November 12, 2014). There are varying numbers given for armed drone proliferation, but all accounts agree that the numbers are substantial and growing enough to pose a threat to the United States and its allies. Thus far, only the United States, the United Kingdom, and Israel have actually used lethal drones to strike an enemy.

[33]Allen Buchanan and Robert O. Keohane, "International Institutional Regulation of Lethal Drones" (Unpublished Paper, Princeton University, October 5, 2014). A later version appears as "Toward a Drone Ac-

2 Civil-Military Issues in Targeted Killing by UAVs

Far off, like a dull rumour of some other war
What are we doing here?
- Wilfred Owen, "Exposure"

The fact that both the military and the CIA have carried out UAV operations[34] created problems of role definition that are almost the opposite of those in the counterinsurgency situation. There, reconstruction functions had traditionally been considered civilian, but persistent violence, shortages of civilian personnel and resources made it difficult to avoid military participation. In the case of targeted killing, the function seems more clearly a military one, but is also carried out by civilians in the CIA. While it is true that parts of the CIA have had a covert, quasi-military role since the passage of the National Security Act of 1947,[35] routine conduct of bombing operations, even remotely, seems closer to a traditional military function.

The reasons for public discomfort about widespread use of UAVs to strike terrorists are complex. Apart from legal issues, some of this concern amounts to more than just a feeling that it is more appropriate for the military to be responsible for conducting violence than the civilian CIA. Discomfort seems also to revolve around the institutional reputation of the CIA – its secrecy and history of acts of questionable legality.

First, although the CIA has long been involved in covert operations, its reputation has been increasingly tarnished since 9/11, even as it recovered somewhat from the Bay of Pigs disaster more than a half century ago, and even from the Church Committee findings in the 1970s.[36] Widespread abuses of enhanced interrogations, practices such as waterboarding, extraordinary renditions of suspects, maintenance of secret "black" sites, and even indications that CIA leadership has hidden some agency activities from high government officials have all heightened internal and international public impressions of the agency's rogue behavior.[37]

countability Regime," in *Ethics and International Affairs* 29, No. 1 (2015), 15–27.

[34]Henceforth, all references to UAV operations should be considered those operations using UAVs with lethal strike capabilities and not those used solely for intelligence, surveillance, and reconnaissance (ISR) missions.

[35]National Security Act of 1947: 50 U.S. Code § 3001, July 26, 1947.

[36]David M. Barrett. "The Two Stories about Bay of Pigs You Never Heard," *History News Network*, September 5, 2005, http://historynewsnetwork.org/article/14951 (accessed December 3, 2014). In fact, questionable CIA practices continued well into the 1970s, when the Church Committee, chaired by Senator Frank Church, uncovered a number of attempted assassinations of foreign government leaders as well as wide mail "eavesdropping." The concern about assassinations led President Ford to issue Executive Order 11905, replaced by President Reagan's Executive Order 12333 (still in existence today), and later raised questions about the legality of targeted killing. It was publicly announced in 2007 that two years earlier, the CIA had destroyed videotapes documenting severe interrogation methods used on terrorism suspects. See Mark Mazzetti, "C.I.A. Destroyed 2 Tapes Showing Interrogations," *The New York Times*, December 7, 2007, http:// www.nytimes.com/2007/12/07/washington/07intel.html?pagewanted=all&_r=0 (accessed November 16, 2014). This concern with the CIA was compounded in March 2014 with the accusation by Senator Dianne Feinstein that not only had the CIA blocked the declassification of a 6,000-page Senate Intelligence Committee's report on CIA interrogation methods since September 11, 2001, but that it monitored the computers of the Senate staffers drafting the report. See Patricia Zengerle and Richard Cowan, "U.S. Senate Leader Orders Probe of Alleged CIA Computer Hacking," *Reuters*, March 20, 2014 http://www.reuters.com/article/2014/03/20/us-usa-cia-interrogations-idUSBREA2J16F20140320 (accessed October 28, 2014). For an account of the 2014 torture report, see Jeremy Ashkenas, Hannah Fairfield, Josh Keller, and Paul Volpe, "7 Key Points from C.I.A. Torture Report," *The New York Times*, December 9, 2014, http:// www.nytimes.com/interactive/2014/12/09/world/cia-torture-report-key-points.html (accessed April 18, 2015).

[37]Mark Mazzetti, *The Way of the Knife: The CIA, a Secret Army and a War at the Ends of the Earth*, (New York: Penguin Press, 2014), 118–121. See also Greg Miller, Adam Goldman, and Ellen Nakashima, "CIA Misled Interrogation Program, Senate Report Says," *The Washington Post*, March 31, 2014,

Second, lack of public discourse about the legality of targeted killing has further heightened impressions of a lack of accountability.[38] This is discussed in the Chapter 8.

Third, the respective roles of the President, national security staff, the Director of the CIA, the Secretary of Defense, the Chairman of the Joint Chiefs of Staff, and the Secretary of State in developing the policy and defining targeting criteria remain opaque – as do decisions about when not to strike. And the lack of transparency continues to leave questions about the rationale for the current division of responsibility among the involved actors and whether the current role allocation makes sense and contributes to a careful and restrained policy.[39] The Edward Snowden revelations, though not specifically relevant to the use of UAVs, have heightened general concerns about secrecy and lack of accountability in all counterterrorism activities.[40]

The continuing silence about all of these issues and how they are intertwined has further magnified unease and lack of trust in government.[41] Some conclude that the only reason the

http://www.washingtonpost.com/world/national-security/cia -misled-on-interrogation-program-senate-report-says/2014/03/31/eb75a82a-b8dd-11e3-96ae-f2c36d2b1245_story.html?wpisrc=al_national (accessed October 28, 2014); Jane Mayer "A Reporter at Large: The Black Sites," *The New Yorker*, August 13, 2007, http://www.newyorker.com/reporting/2007/08/13/070813fa_fact_mayer?currentPage=all (accessed October 17, 2014); and Jane Mayer, *The Dark Side* (New York: Doubleday, 2008), 126–136. There was discontent with the administration that permitted the CIA action: "'Enhanced interrogation techniques are an example where people within the Administration, senior people, were fully briefed and oversight committees were briefed,' the former senior intelligence official says." Massimo Calabresi, "CIA Tapes Furor: A Legacy of Mistrust," *Time*, December 7, 2007, http://content.time.com/time/nation/article/0,8599,1692571,00.html (accessed December 12, 2014). Linda Greenhouse, referring to the Torture report, states: "What caught my eye, thanks to The Blog of Legal Times, was an episode recounted on pages 140 to 142 of the report's 499-page executive summary. On those few pages, the report recounts that in January 2004, shortly after the Supreme Court had shocked the administration of President George W. Bush by agreeing to decide whether the Navy base at Guantánamo Bay lay without the jurisdiction of the federal courts, the C.I.A. decided it might need to take pre-emptive action. Its general counsel raised with Bush administration lawyers the question of whether five high-value detainees being held there (including Abu Zubaydah and Ramzi bin al-Shibh) should be sent back to black sites in other countries to make sure they would remain out of the judiciary's reach. The answer was yes. In the publicly released report,the locations to which they were sent are blacked out." Linda Greenhouse, "Guantanamo Dreams," *The New York Times*, December 24, 2014, http:// www.nytimes.com/2014/12/25/opinion/guantnamo-dreams.html?ref=opinion (accessed December 25, 2014).

[38]There was a running public battle between Senator Diane Feinstein, supported by Senator Jay Rockefeller, and the CIA about the publication of a report on the CIA's interrogation program. The report was held up for more than two years. See Miller, Goldman, and Nakashima, "CIA Misled Interrogation Program." Dianne Feinstein and Jay Rockefeller, "Why the Senate Report on the CIA's Interrogation Program Should Be Made Public," *The Washington Post*, April 10, 2014, http:// www.washingtonpost.com/opinions/the-senate-report-on-the-cias-interrogat ion-program-should-be-made-public/2014/04/10/eeeb237a-c0c3-11e3-bcec-b71ee10e9bc3_story.html (accessed November 15, 2014); see also Mazzetti, *The Way of the Knife*, 235.

[39]As Peter Singer writes: "What troubles me – is how a new technology is short-circuiting the decision-making process for what used to be the most important choice a democracy could make. Something that would have previously been viewed as a war is simply not being treated like a war." Peter Singer, "Do Drones Undermine Democracy?," *The New York Times*, January 21, 2012, http://www.nytimes.com/2012/01/22/opinion/sunday/do-drones-undermine-democracy.html?pagewanted=all (accessed December 12, 2014).

[40]Katherine Jacobsen and Elizabeth Barber, "NSA Revelations: A Timeline of What's Come out Since Snowden Leaks Began," *Christian Science Monitor*, October 16, 2013, http://www.csmonitor.com/USA/2013/1016/NSA-revelations-A-timeline-of-what-s-come-out-since-Snowden-leaks-began/June-5-8-2013 (accessed December 12, 2014).

[41]According to the Pew Research Center and their ongoing polling of American trust of the U.S. government, the results of an October 2013 survey listed public trust at an all-time low of 19 percent. Pew Research Center for the People and the Press, "Public Trust in Government: 1958–2013," October 18, 2013, http://www.people-press .org/2013/10/18/trust-in-government-interactive/ (accessed June 18, 2014). This is in line with a Gallup survey conducted in September 2013 that indicated that Americans have dramatically lost trust in the U.S. government not only to address domestic issues but also to address international issues.

CIA has taken over the lion's share of UAV strikes is that CIA covert action is less subject to legal scrutiny and legal accountability – and therefore the CIA is more able to obfuscate legal violations. But is it really true that the U.S. military operates under tighter legal constraints and is subject to more supervision than the CIA?[42]

The Alston Report of 2010 argued so, noting that "unlike a state's armed forces, its intelligence agents do not generally operate within a framework which places appropriate emphasis on ensuring compliance with international humanitarian law, rendering violations more likely."[43] When I asked a high-ranking Pentagon official at a lecture to explain the division of responsibility, he said he "could not go there" but did state that the military operates under defined legal restraints and that its members are made cognizant of legal rules at every level.[44] Another military officer who operates drones explained to me that CIA decisions could be made faster, and time was often critical.[45]

The perception thus exists that the CIA is less accountable than the military, and reactions to CIA-conducted drone strikes have thus been both outspoken and acted upon. In May 2012, the U.S. Ambassador to Pakistan Cameron Munter resigned because he felt undermined in critical diplomatic moments by CIA-conducted drone strikes of which he had no knowledge and over which he had no control.[46]

The shorthand around military and intelligence circles in Washington is the "Title 10 v. Title 50" debate, referring to title numbers in the U.S. statutes that govern the military and intelligence services, respectively. What is implied, without a great deal of analysis, is that there are specified and separate roles and missions for the military and the intelligence agencies under U.S. law, and the statutory allocation should not be breached. The debate runs both ways – not only are involved Americans concerned about the increasing use of military force by intelligence agencies, but the intelligence community also complains that the military is encroaching on its functions.

In a 2011 article, Andru Wall, a former legal adviser to the U.S. Joint Special Operations

Joy Wilke and Frank Newport, "Fewer Americans than Ever Trust Government to Handle Problems," *Gallup Politics*, September 13, 2013, http://www.gallup.com/poll/164393/fewer-americans-ever -trust-gov-handle-problems.aspx (accessed June 18, 2014). Finally, a December 2013 Associated Press/University of Chicago poll indicated that when asked "How confident are you in the ability of the FEDERAL government to make progress on the important problems and issues facing the country in 2014?," 70 percent of respondents answered "Not at all/Not very." The Associated Press - NORC Center for Public Affairs Research, "The People's Agenda: America's Priorities and Outlook for 2014," http://www .apnorc.org/projects/Pages/the-peoples-agenda-americas-priorities-and-outlook.aspx (accessed April 24, 2015).

[42]See Greg Miller, Julie Tate, and Barton Gellman,"Documents Reveal NSA's Extensive Involvement in Targeted Killing Program," *The Washington Post*, October 16, 2013, http://www.washingtonpost.com/world/national-security/documents-reveal-nsas-extensive-involvement-in-targeted-killing-program/2013/10/16/29775278-3674-11e3-8a0e-4e2cf80831fc_story.html (accessed December 12, 2014); Micah Zenko, *Crumbling Wall between the Pentagon and CIA*, Council on Foreign Relations, April 28, 2011, http://www.cfr.org/united-states/crumbling-w all-between-pentagon-cia/p24812 (accessed December 12, 2014).

[43]United Nations, *Report of the Special Rapporteur on Extrajudicial, Summary or Arbitrary Executions Philip Alston*, UN Human Rights Council Report, UN Doc. A/HRC/14/24/Add. 6, May 28, 2010, 73. http://www2.ohchr.org/english/bodies/hrcouncil/docs/14session/A.HRC.14.24.Add6.pdf (accessed December 12, 2014).

[44]Senior military officer, in confidential discussion with the author, April 2014.

[45]Operational-level Air Force officer, in confidential discussion with the author, November 5, 2014.

[46]"Munter wanted the ability to sign off on drone strikes – and, when necessary, block them. Then-CIA director Leon Panetta saw things differently. Munter remembers one particular meeting where they clashed. He said, 'I don't work for you,' and I said, 'I don't work for you,' the former ambassador recalls." Tara McKelvey, "A Former Ambassador to Pakistan Speaks Out," *The Daily Beast*, November 20, 2012, http://www.thedailybeast.com/articles/2012/11/20/a-former-ambassador-to-pakistan-speaks-out.html (accessed December 12, 2014).

Command (JSOC), effectively debunks the idea of such encroachment: "Often unacknowledged, the essence of this concern is the belief that intelligence operatives live in a dark and shadowy world, while military forces are the proverbial knights on white horses."[47] Yet Wall also points out that the Secretary of Defense has significant authority over intelligence and covert activities, including joint supervision of the National Security Agency (NSA) and supervision over Cyber Command. The Defense Intelligence Agency is an intelligence-gathering agency within the Department of Defense (DoD), and JSOC is deeply involved in covert activities, including the raid that killed Osama bin Laden. Covert military operations under JSOC operate in secrecy and are less subject to scrutiny than overt military operations. In that respect, they share many characteristics of CIA covert action. The statutory distinction is illusory, even as perceptions remain palpable.

The argument that congressional oversight of intelligence operations is less intense than that of military matters also becomes less persuasive upon closer scrutiny. Since military and intelligence agencies operate under different legal authorities, they are subject to different congressional committee supervision. If a strike were a military operation, for example, directed by Central Command (CENTCOM), it would be taking place under a Title 10 authorization, accountable to the armed services committees of Congress.[48] These committees exercise detailed fiscal control over DoD expenditures and transfers of appropriated funds, and scrutinize the use of personnel.[49] A CIA action would come under Title 50, which requires presidential findings and notice to Congress.[50] The CIA reports to the Senate Select Committee on Intelligence (SSCI) as well as the Joint Intelligence Oversight Committee of Congress. Intelligence operations involving sensitive covert action require presidential approval and immediate notification of both the House Permanent Select Committee on Intelligence (HPSCI) and SSCI.[51]

One could argue that such divided responsibility for one type of action weakens supervision, but perhaps the reverse is true: More committees mean more questions.[52] It is not clear which set of congressional committees, if any, exercises closer supervision. The preference for military control is probably based more on a military tradition of law-abidingness than on active congressional supervision, particularly after the intelligence agency abuses during the first decade of the twenty-first century. If anything, the rigor of congressional oversight in both areas may be open to question – again a problem heightened by the Snowden revelations.[53] I discuss alternative ways for providing objective accountability in the concluding sections.

Secrecy in role definition has led also to the suspicion of a policy vacuum, as well as lack of effective oversight. It is unclear to the public, both in the United States and abroad, who decides which strikes are undertaken and by which agency, and which actions are eschewed. It is not apparent that the CIA and military possess different enough operational skills to

[47] Andru Wall, "Demystifying the Title 10 v. Title 50 Debate: Distinguishing Military Operations, Intelligence Activities and Covert Action," *Harvard National Security Law Journal* 3 (2011): 88.

[48] 10 U. S. Code sub. A, pt. I, ch. 3, §127 (2003).

[49] David Nather, "Drones: Tough Talk, Little Scrutiny," *Politico*, February 9, 2013, http://www.politico.com/story/2013/02/drones-tough-talk-little-scrutiny-87405.html (accessed December 12, 2014).

[50] Wall, "Demystifying the Title 10 v. Title 50 Debate," 102.

[51] Marshall Curtis Erwin, "Sensitive Covert Action Notifications: Oversight Options for Congress," Congressional Research Service, April 10, 2013, http://fas.org/sgp/crs/intel/R40691.pdf (accessed April 17, 2015).

[52] Nather, "Drones."

[53] Michael V. Hayden, "Beyond Snowden: An NSA Reality Check," *World Affairs Journal*, January/February 2014, http://www.worldaffairsjournal.org/ article/beyond-snowden-nsa-reality-check (accessed December 12, 2014); Darren Samuelsohn, "Hill Draws Criticism over NSA Oversight," *Politico*, March 2, 2014, http://www.politico.com/story/2014/03/hill-draws-criticism-over-nsa-oversight-104151.html (accessed December 12, 2014).

explain the division of responsibility. There have been a variety of assumptions about role allocation.

In one version, the CIA has responsibility for Pakistan, the DoD for Yemen, and both operate in Somalia. But it has been reported that the drone strike that hit Anwar al-Awlaki, a terrorist on the "kill list," was conducted by the CIA, while a military strike killed his son – though both were killed in Yemen.[54] One commentator thought all the assets belonged to the military but were leased to the CIA, which has command and control of an undefined number of missions and its own UAVs but has been asking for more.[55] Another said assets were traded back and forth. Some observers suggest that the allocation is a product of bureaucratic happenstance, like crooked streets in a town that has grown from cow paths. "But," as Mark Mazzetti observed, "for all the secrecy, drone warfare has been institutionalized, ensuring that the missions of the CIA and the Pentagon continue to bleed together as the two organizations fight for more resources to wage secret war."[56] In the area of targeted killing, as in counterinsurgency, contractors are widely used, and although the facts are classified, investigative reporters indicate that these contractors have been used in a military operational role. Accidents such as a contracted civilian drone operator's participation in a 2010 U.S. strike that killed fifteen innocent Afghans only underscores the degree of care required for targeted killing.[57] The commitment to high standards of certainty and accountability are hard to replicate outside of government personnel.[58] Even with government targeting, tragic mistakes occur, such as the killing of two western hostages, one of them a U.S. citizen, together with the terrorists that were holding them.[59]

Would there be fewer mistakes – like striking an innocent wed- ding party – if only the military were in charge? Would repercussions for those mistakes be more forthcoming? Does competition to strike the most enticing targets add friction to the relationship between actors? Does it lead to wasteful one-upmanship? Unfortunately, there is no way to determine whether the current division results in smooth operations or confused overlap. It is equally plausible that there is considerable civil-military tension as it is that the relationship runs smoothly.

The White House is said to have announced a move toward greater military control over drones in a classified policy paper issued the day after the president's address to the National Defense University on May 23, 2013. The president's intent was underscored by a direct statement a year later at West Point.[60] Although the move inspired press comments at the

[54]Mazzetti, *The Way of the Knife* (New York: Penguin Press, 2013), 310.

[55]Greg Miller, "CIA Seeks to Expand Drone Fleet, Officials Say," *The Washington Post*, October 18, 2012, http://articles.washingtonpost.com/2012-10-18/world/35502344_1_qaeda-drone-fleet-cia-drones (accessed December 12, 2014).

[56]Mazzetti, *The Way of the Knife*, 313. Mazzetti goes on to say: "Sometimes, as in Yemen, the two agencies run parallel and competing drone operations. Other times they carve up the world and each take part of the remote controlled war – the CIA in Pakistan and the Pentagon running the drone war in Libya." See also Micah Zenko, "Clip the Agency's Wings," *Foreign Policy*, April 16, 2013, http://www.foreignpolicy.com/articles/2013/04/16/clip_the_agencys_wings_cia_drones (accessed December 12, 2014).

[57]David S. Cloud, "Civilian Contractors Playing Key Roles in U.S. Drone Operations," *Los Angeles Times*, December 29, 2011, http://articles.latimes.com/2011/dec/29/world/la-fg-drones-civilians-20111230 (accessed December 12, 2014).

[58]Ibid. See also Mazzetti, *The Way of the Knife*, 53.

[59]Scott Shane, "Drone Strikes Reveal Uncomfortable Truth: U.S. is Often Unsure About Who Will Die" *New York Times*, April 23, 2015, http://www.nytimes.com/2015/04/24/world/asia/drone-strikes-reveal-uncomfortable-truth-us- is-often-unsure-about-who-will-die.html?rref=world/asia&module=Ribbon&version=context&region=Header&action=click&contentCollection=Asia%20 Pacific&pgtype=article&_r=0 (accessed April 24, 2015). See also "Report of the Special Rapporteur on the Promotion and Protection of Human Rights and Fundamental Freedoms While Countering Terrorism," Ben Emmerson, February 28, 2014, A/HRC/20/5.

[60]Tabassum Zakaria and Mark Hosenball, "Pentagon to Take Over Some CIA Drone Op-

time, doubts remain as to whether the change actually took hold. Even several years "after President Obama signaled his desire to shift the campaign to the Defense Department, the Central Intelligence Agency's drone operations center in Langley, Virginia is still behind the vast majority of strikes."[61]

Unfortunately, secrecy about roles even clouds whatever developments in cooperation may have occurred. For example, it was reported in June 2014 that Special Operations Forces and the FBI working together captured Ahmed Abu Khattala, the alleged mastermind of the Benghazi attack on the U.S. consulate that killed Ambassador J. Christopher Stevens in 2012.[62] This implies a degree of cooperation, in stark contrast to the successive drone strikes, the first by the CIA that killed al-Awlaki and the second by the military that killed his son a few weeks later. But, given the ongoing secrecy shrouding these activities, the public has not been informed whether such cooperation resulted from an improved process, and, if so, how, or whether it was simply more fortuitous ad hoc-ery. The past several years have undoubtedly witnessed more discussion about the use of drones – a slight lifting of the curtain of secrecy. Still, this budding conversation has only served to highlight questions about the relationship between civilian and military roles and the legal undergirding that supports that allocation in a democracy.

Isolated revelations do not portend open public discourse and debate, and issues remain about the program's compliance with law. As new facts are revealed, it remains a question whether the President of the United States controls or can control clandestine military or quasi-military operations in important detail.[63] Yet such control is a bedrock principle of the civilian control that is essential to democracy. Michael Glennon may be correct that the national security establishment is an unaccountable bureaucratic substratum.[64] Such a dual structure might explain the current situation, but it does not help resolve it. Or what has been occurring may be better summarized by more of Komer's phrase "bureaucracy does its thing," which at least allows for the possibility that senior civilian leaders could reassert control if they so chose to do so, and could then change direction. Since President Obama was said to be reportedly taking steps to transfer control of drone warfare to the military, but it might be somewhat reassuring to the public to know that whether such a shift actually has taken place, and if traditional military legal oversight is firmly in place. Regardless of whether CIA drone operators are more skilled, more dedicated, and still needed, if they were to report to military supervisors and be subject to the same legal constraints as the military,

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erations: Sources," *Reuters*, May 20, 2013, http://www.reuters.com/article/2013/05/21/us-usa-drones-idUSBRE94K03720130521 (accessed December 12, 2014); President Barack H. Obama (speech, United States Military Academy, West Point, NY, May 28, 2014), White House official website, http://www.whitehouse.gov/the-press-office/2014/05/28/remarks -president-united-states-military-academy-commencement-ceremony (accessed October 2, 2014); New York City Bar Association, *The Legality under International Law of Targeted Killings by Drone Launched by the United States*, June 2014, 58, http://www2.nycbar.org/pdf/report/uploads/20072625-TheLegalityofTargetedInternationalKillingsbyUS-LaunchedDrones.pdf (accessed October 2, 2014).

[61]Greg Miller, "CIA Remains behind Most Drone Strikes, Despite Effort to Shift Campaign to Defense," *The Washington Post*, November 25, 2013, http:// www.washingtonpost.com/world/national-security/cia-remains-behind-most-drone-strikes-despite-effort-to-shift-campaign-to-defense/2013/11/25/c0c07a86-5386-11e3-a7f0-b790929232e1_story.html (accessed December 12, 2014).

[62]Karen DeYoung, Adam Goldman, and Julie Tate, "US Captures Benghazi Suspect in Secret Raid," *The Washington Post*, June 17, 2014, http://www.washingtonpost.com/world/national-security/us-captured-benghazi-suspect-in-secret-raid/2014/06/17/7ef8746e-f5cf-11e3-a3a5-42be35962a52_story.html (accessed December 12, 2014).

[63]See Benjamin McKelvey, note in "Due Process Rights and the Targeted Killing of Suspected Terrorists: The Unconstitutional Scope of the Executive Killing Power," *Vanderbilt Journal of Transnational Law* 44 (2011): 1358.

[64]Michael J. Glennon, "National Security and Double Government," *Harvard National Security Journal* 5 (2014): 12. See also the discussion in Chapter 3.

this shift would be reassuring once made transparent. Any necessary legal adjustments should not prove insuperable.

3 The Legal Underpinnings for Targeted Killing by UAV: Framing the Issue

This book began with a quotation from the federal judge hearing the civil suit brought by the family of Anwar al-Awlaki in order to emphasize the fact that the variety of civilians involved in these shadowy conflicts even includes the judiciary, and to underscore the salience of legal issues to debates about how the United States should conduct operations in today's gray area of war. Those killings awakened the American public to the problems of UAV use and caused widespread international concern – even alarm – and an unusual amount of comment.[65] Questions about drone attacks reached the federal courts before the executive branch officially acknowledged their existence.[66] The leaked February 2013 Department of Justice White Paper that developed legal justification for targeted killings of Americans was a complex, intricately detailed memorandum that addressed both U.S. domestic law and international law. But it raised as many questions as it answered.[67] An even more detailed classified legal memorandum was supplied to select members of Congress, and a redacted version made public in mid-2014, when it first seemed that its author, David Barron, would not receive the necessary votes for confirmation as a U.S. appellate judge.[68] Although officials have outlined the legal rationale for such actions to specialized audiences,[69] it took a U.S. Court of Appeals decision to compel the government to reveal a more detailed legal basis for

[65]"[T]he Awlaki case adds another wound to the body of human-rights protections that had hitherto been sacred. This action carves out the legal pathway for a state to silence not only external but internal dissent, by defining the citizen as an 'enemy of the state.' Legally it matters little that in this case Awlaki was indeed an enemy of the state. With the evidence being kept secret, the precedent has been set." Maajid Nawaz, "U.S. Drone Killing of Anwar al-Awlaki Reinforces Terrorists," *The Guardian*, October 1, 2011, http://www.theguardian.com/ world/2011/oct/01/drone-killing-anwar-al-awlaki (accessed December 12, 2014). See also John J. Gibbons, "War on Terror: Life, Death, and Drones," *Los Angeles Times*, July 19, 2013, http://articles.latimes.com/2013/jul/19/opinion/la-oe -gibbons-targeted-killings-drones-20130719 (accessed December 12, 2014); Laura Raim, "The Legality of al-Awlaki's Death is in Question," trans., *Le Figaro*, October 10, 2011, http://www.lefigaro.fr/international/2011/10/01/01003-20111001ARTF IG00365-la-legalite-du-meurtre-d-al-awlaki-mise-en-question.php (accessed December 12, 2014); Harvey Silverglate, "Obama Crosses the Rubicon: The Killing of Anwar al-Awlaki," *Forbes*, October 6, 2011, http://www.forbes.com/ sites/harveysilverglate/2011/10/06/obama-crosses-the-rubicon-the-killing-of-anwar-al-awlaki/ (accessed December 12, 2014); and Ken Anderson, "Anwar Al-Aulaqi Killed in Drone Strike in Yemen," *Opinio Juris*, September 30, 2011, http://opiniojuris.org/2011/09/30/anwar-al-aulaqi-killed-in-drone-strike-in-yemen/ (accessed December 12, 2014).

[66]Nasser al-Awlaki filed an initial suit against the Obama administration for the deaths of his son and grandson in 2010. The case was dismissed for lack of standing and for raising "non-justiciable political questions." See al-Aulaqi v. Obama, 727 F. Supp. 2d 1 (D.D.C. 2010). A second complaint (al-Aulaqi v. Panetta) was filed in July 2012. For updated information, see al-Aulaqi v. Panetta, Legal Documents, American Civil Liberties Union, https://www.aclu.org/national-security/al-aulaqi-v-panetta-complaint (accessed December 12, 2014).

[67]Department of Justice White Paper, *Lawfulness of a Lethal Operation Directed against a U.S. Citizen Who Is a Senior Operational Leader of Al-Qa'ida or An Associated Force*, draft, November 8, 2011, http://www.fas.org/irp/eprint/doj-lethal.pdf (accessed December 12, 2014).

[68]Michael D. Shear and Scott Shane, "Congress to See Memo Backing Drone Attacks on Americans," *The New York Times*, February 6, 2013, http://www.nytimes.com/2013/02/07/us/politics/obama-orders-release-of-drone-memos-to-lawmakers.html?pagewanted=all&_r=0 (accessed December 12, 2014).

[69]Although earlier speeches, such as that of Harold Koh to the American Society of International Law in 2010, acknowledged targeted killing, they did not purport to explain its legal rationale; instead, they simply stated that such actions were legal. Attorney General Eric Holder did outline the legal basis for U.S. lethal action broadly in a speech at Northwestern University Law School, but this was to a specialized and somewhat narrow audience.

targeted killings by UAVs.[70] The question of whether and when such operations are lawful – especially the targeting of U.S. citizens under American constitutional law – has only been grudgingly and partly addressed. The U.S. government has not fully and persuasively presented neither the international nor the domestic legal basis for such operations.

Legal issues surrounding targeted killing differ from those of counterinsurgency, whose operations pose no major issues about legality, except perhaps in terms of the rationale for intervention in the first place. By contrast, targeted killing raises troubling questions of legality. These issues may only affect the definition of civil-military roles tangentially. But doubts about both U.S. domes- tic and international legality create problems for international allies, for American national leadership, for the public whose support is necessary, and for the men and women in the chain of command who both mandate and perform operations.

President Obama did address some of these mounting legal concerns in his 2013 National Defense University speech. He outlined the legal justification for targeted killing by stating:

> *America's actions are legal. We were attacked on 9/11. Within a week, Congress overwhelmingly authorized the use of force. Under domestic law, and international law, the United States is at war with al Qaeda, the Taliban, and their associated forces. We are at war with an organization that right now would kill as many Americans as they could if we did not stop them first. So this is a just war – a war waged proportionally, in last resort, and in self-defense.*[71]

Legally, that statement would establish that the laws of armed conflict provide the justification for actions taken. Under international law, as under American domestic law, a set of rules governs when resort to force is permitted and permissible behavior on the battle- field. However, President Obama made another comment in the same address. He stated that "we must define our effort not as a boundless 'global war on terror,' but rather as a series of persistent, targeted efforts to dismantle specific networks of violent extremists that threaten America."[72] That characterization contradicts the notion that there is a war on terror. Moreover, on other occasions, the Obama administration made clear that it was abandoning the concept of a "Global War on Terror."

Kinetic action in a situation that is less than war calls forth a different set of international legal rules. By downplaying the notion that by conducting these strikes the United States was engaging in "war" outside of Afghanistan and Iraq, the administration may have eased some diplomatic and domestic political concerns, but it may have made the legal issues more difficult. And, issues of domestic legality in such situations also might differ from those in wartime situations.

The Justice Department, in its Office of Legal Counsel memorandum (the Barron memorandum), whose redacted release was mandated by the Federal Court of Appeals for the Second Circuit on April 21, 2014,[73] took the position that the United States is in a global,

[70]The appointment of Professor David Barron to the U.S. Court of Appeals was held up until a Department of Justice memorandum on the legality of drones that had been written by him was released. NY Times v. US, Ct. of Appeals, 2d Cir, slip op, June 23, 2014. See Noah Bierman, "Barron Likely to Be Confirmed to Appeals Court," *Boston Globe*, May 20, 2014, http://www.bostonglobe.com/news/politics/2014/05/20/david-barron-author-controversial-drone -memo-looks-likely-for-confirmation-appeals-court-democrats-say/sC0PW4fmoaN9qgaWWxHUTL/story.html (accessed December 12, 2014); Rand Paul, "Show Us the Drone Memos," *The New York Times*, May 11, 2014, http://www.nytimes.com/2014/05/12/opinion/show-us-the-drone-memos.html?_r=0 (accessed December 12, 2014).

[71]President Barack Obama (address, National Defense University, Washington, DC, May 23, 2013), http://www.whitehouse.gov/the-press-office/2013/05/23/remarks-president-national-defense-university (accessed December 12, 2014).

[72]Ibid.

[73]Anwar Al-Aulaqi: FOIA Request – OLC Memo, https://www.aclu.org/national-security/anwar-al-aulaqi-

non-international armed conflict with non–state actors.[74] As I explain later in this chapter, that opinion maintains that such a situation permits the United States to strike the enemy wherever it might present a threat. Over time, and in a different administration, further doctrinal analysis may change or refine the American position. Nor does the American legal position seem to be shared even by some of our close allies. European allies are currently developing their own interpretations. Scholarly legal commentary, possible U.S. legislation, EU decisions or directives, U.S. Supreme Court opinions, and opinions by the International Court of Justice are likely to refine or alter the legal positions taken by the Barron memorandum. Although doctrinal refinements tend to remain the business of the legal and scholarly community, if an issue arises that triggers moral outrage, the government is obliged to provide enough legal clarity to be comprehensible to a wider community.

President Obama couched further justification in moral and practical terms, arguing:

> *Where foreign governments cannot or will not effectively stop terrorism in their territory, the primary alternative to targeted lethal action would be the use of conventional military options. As I've already said, even small special operations carry enormous risks. Conventional airpower or missiles are far less precise than drones, and are likely to cause more civilian casual- ties and more local outrage.*[75]

Would a clearer legal framework make a difference to allies, to publics in the United States and around the world, and to those who perform operations? A democratic society demands reasonable legal justification – certainly in the long run.

A flowing legal scholarship has burgeoned on the legality of targeted killing, and it is not the purpose of this chapter to either repeat or argue with that body of discourse. It is sufficient for my purposes to demonstrate that the relevant legal commentary reveals serious issues of ambiguity and interpretation. In the area of targeted killing, it is not clear whether either new international agreements or, for the United States, changes in legislative authorization or further oversight could resolve some of the dilemmas that targeted killing poses. It is complex and difficult to be able to characterize the widespread threat of terrorism and insurgencies persuasively under international law. The plausibility of legal justification remains a problem. But it should not be necessary for the public to have access to legal memoranda only when they are leaked or produced by court order. The U.S. failure to even offer a plausible legal position to a broad domestic and international audience in terms that can be widely understood has diminished domestic and international confidence. Even worse, presidential insistence since 2001 that another large-scale terrorist attack must be avoided at all costs – a "not on my watch" mentality – has distorted both policy actions and legal justification.

3.1 Justification Under International Law

3.1.1 When is a Strike Permissible?

Apart from permissible military action in a war zone, the basic justification for drone attacks when a nation is not at war is self-defense, based on Article 51 of the UN Charter, its historic antecedents in customary international law, and principles of necessity, proportionality and state responsibility. Article 51 reads: "Nothing in the present Charter shall impair the

foia-request-olc-memo (accessed December 12, 2014).

[74]But see the argument in Mary Ellen O'Connell, "The Choice of Law against Terrorism," *Journal of National Security Law and Policy* 4 (2010): 343–368.

[75]President Barack Obama (address, National Defense University).

inherent right of individual or collective self defense if an armed attack occurs."[76] If that requirement were to be taken literally, it would require a physical attack before a response could be made. Therefore, some interpretations of customary law also permit acts of self-defense if there is imminence of an attack.[77] Daniel Bethlehem, former Legal Adviser of the United Kingdom Foreign & Commonwealth Office, explains the British view, paralleling at least part of the American government's position, which has not been fully and publicly articulated. He quotes Lord Peter Goldsmith:

> *It is argued by some that the language of Article 51 provides for a right of self-defence only in response to an actual armed attack. However, it has been the consistent position of successive United Kingdom Governments over many years that the right of self-defence under international law includes the right to use force where an armed attack is imminent. It is clear that the language of Article 51 was not intended to create a new right of self-defense. Article 51 recognizes the inherent right of self-defence that states enjoy under international law. That can be traced back to the "Caroline" incident in 1837 ... It is not a new invention. The Charter did not therefore affect the scope of the right of self-defence existing at that time in customary international law, which included the right to use force in anticipation of an imminent armed attack. The Government's position is supported by the records of the international conference at which the UN charter was drawn up and by state practice since 1945. It is therefore the Government's view that international law permits the use of force in self-defense against an imminent attack* but does not authorize the use of force to mount a pre-emptive strike against a threat that is more remote.[78]

The United States has relied heavily on the justification of imminence in attempting to justify drone strikes against individuals and small groups far from actual armed conflict

[76]United Nations, Charter of the United Nations, 1 UNTS XVI (October 24, 1945), ch. 7, art. 51, http://www.refworld.org/docid/3ae6b3930.html (accessed December 12, 2014).

[77]See Oscar Schachter, "The Right of States to Use Armed Force," *Michigan Law Review* 82 (1984): 1634–1635; Jeh Johnson, "A Drone Court: Some Pros and Cons" (keynote address, Center on National Security, Fordham Law School, March 18, 2013), http://www.lawfareblog.com/2013/03/jeh-johnson-speech-on -a-drone-court-some-pros-and-cons/ (accessed December 12, 2014); Eric Holder (speech, Northwestern University School of Law, March 5, 2012), http://www.jus- tice.gov/iso/opa/ag/speeches/2012/ag-speech-1203051.html (accessed December 12, 2014); United Nations, *Report of the Special Rapporteur on Extrajudicial, Summary or Arbitrary Executions Philip Alston*, UN Human Rights Council Report, UN Doc. A/HRC/14/24/Add. 6, May 28, 2010, 45 n. 92, 73, http://www2.ohchr.org/english/bodies/hrcouncil/docs/14session/A.HRC.14.24.Add6.pdf (accessed December 12, 2014): "Under a more permissive view that more accurately reflects State practice and the weight of scholarship, self-defense also includes the right to use force against a real and imminent threat when 'the necessity of that self-defense is instant, overwhelming, and leaving no choice of means, and no moment of deliberation.'" Harold Hongju Koh, "The Obama Administration and International Law" (speech, Annual Meeting of the American Society of International Law, Washington, DC, March 25, 2010), http://www .state.gov/s/l/releases/remarks/139119.htm (accessed December 12, 2014).

[78]Lord Peter Goldsmith, quoted in Daniel Bethlehem, "Self-Defense against an Imminent or Actual Armed Attack by Nonstate Actors," *American Journal of International Law* 106 (2012): 771. A complete and careful analysis of the U.S. position was developed in June 2014 by the Committee on International Law of the New York City Bar Association in *The Legality under International Law of Targeted Killings by Drones Launched by The United States*, especially 64–69, 84–100, http://www2.nycbar.org/pdf/report/uploads/20072625-TheLegalityofTargetedInternationalKillingsbyUS-LaunchedDrones.pdf (accessed April 25, 2015). Some legal scholars specializing in the law on resort to force, however, do not share the view that the plain terms of Article 51 may be ignored. In addition, they point out that complying with the principles of necessity, proportionality, and state responsibility in self-defense depends on evidence of the actual armed attack that is occurring. See, e.g., Mary Ellen O'Connell, "Dangerous Departures from the Law of Self-Defense," *American Journal of International Law* 107 (2013): 380–386 (response to Daniel Bethlehem, citing Olivier Corten, Yoram Dinstein, and Christine Gray).

hostilities.[79] That justification seems to be in accordance with the president's statements that we are engaged in specific targeted efforts to dismantle networks of threatening terrorists, and underscores the ambiguity of the gray area.[80] But whether a particular threat is imminent or remote must be justified on a factual basis. And whether the targeted killing of an individual or small group, disassociated with the state where they are present, can be justified under UN Charter Article 51 is an argument that has caused ongoing controversy.[81] The American military response to 9/11 – "Operation Enduring Freedom" in October 2001, attacking the Taliban in Afghanistan – complied with Article 51 and its clause of that "measures taken by Members in exercising this right of self-defense shall be immediately reported to the Security Council...."[82] But the United States has not complied with that requirement in most of its UAV strikes thereafter. And although mostly discussed among scholars, some argue that a threat need only be imminent at the time force is initiated and that once the Article 51 right to self-defense has been triggered, continued use of force does not require a regular re-assessment of imminence.[83]

However, the U.S. Justice Department, in the Barron memorandum, based its argument primarily on the position that the United States was on a wartime footing, stating:

> *[W]e conclude that DoD would carry out its operation [the one that killed al-Awlaki] as part of the non-international armed conflict between the United States and al-Qaida, and thus, on those facts, the operation would comply with international law so long as DoD would conduct it in accord with the applicable laws of war that govern targeting in such a conflict.*[84]

In so doing, under international law, the memorandum had to over- come the interpretation of the Geneva Convention Common Article 3 that such non-international armed conflicts only meant civil wars. To do so, the memorandum then relied on the Supreme Court case of *Hamdan v. Rumsfeld*[85] to justify the position that Common Article 3 covered the conflict between a state and a non-state actor such as Al Qaeda. The facts and issues in Hamdan

[79]John Brennan, "Strengthening Our Security by Adhering to Our Values and Laws" (speech, Harvard Law School, Cambridge, MA, September 16, 2011), http:// www.whitehouse.gov/the-press-office/2011/09/16/remarks-john-o-brennan-stren gthening-our-security-adhering-our-values-an (accessed December 12, 2014); John Brennan, "The Ethics and Efficacy of the President's Counterterrorism Strategy" (speech, Woodrow Wilson International Center for Scholars, Washington, DC, April 30, 2012), http://www.wilsoncenter.org/event/the-efficacy-and-ethics-us-counterterrorism-strategy (accessed December 12, 2014).

[80]Another issue is whether small attacks linked together can amount to the status of an "armed attack" ("accumulation doctrine"). See a discussion contending the persuasiveness of this argument in New York City Bar Association, *Legality under International Law of Targeted Killings*, 78–79.

[81]See the extended discussion about the principles suggested by Daniel Bethlehem, "Self-Defense against an Imminent or Actual Armed Attack by Nonstate Actors," *American Journal of International Law* 106 (2012): 769–777, and Mary Ellen O'Connell, "Dangerous Departures from the Law of Self-Defense," *American Journal of International Law* 107 (2013): 380–386, including Daniel Bethlehem's response to comments and criticisms about his principles.

[82]United Nations, Charter of the United Nations, ch. VII, art. 51, "Action with Respect to Threats to the Peace, Breaches, and Acts of Aggression," http://www .un.org/en/documents/charter/chapter7.shtml (accessed December 12, 2014).

[83]Kenneth Anderson, "The U.S. Government Position on Imminence and Active Self-Defense," *Lawfare* (blog), February 7, 2013, http://www.lawfareblog .com/2013/02/the-us-government-position-on-imminence-and-active-self -defense/ (accessed December 12, 2014). See also Department of Justice White Paper, 7–8 and Robert Chesney, "Postwar," *Harvard National Security Law Journal* 5 (2014): 305-333.

[84]David J. Barron to Eric H. Holder, July 16, 2010, "Applicability of Federal Criminal Laws and the Constitution to Contemplated Lethal Operations against Shaykh Anwar al-Aulaqi," U.S. Department of Justice, Office of Legal Counsel, Office of the Assistant Attorney General, 23–24, https://www.aclu .org/sites/default/files/field_document/2014-06-23_barron-memorandum.pdf (accessed April 14, 2015).

[85]Hamdan v. Rumsfeld, 548 U. S. 557 (2006); Hamdi v. Rumsfeld, 542 U. S. 507 (2004); and Boumediene v. Bush, 553 U. S. 723 (2008).

were entirely different from those in the al-Awlaki case. The Hamdan Court used the determination that the United States was in a non-international armed conflict with al Qaeda as a building block to reach the major issue in the case – the legality of the Military Commissions Act for detention in Guantanamo. Still addressing international law, the "Barron memorandum" then had to justify the fact that the conflict could legally be extended beyond the immediate battlefield of Afghanistan in order for the rule to cover a drone strike in Yemen. The same argument was made as that in the leaked Justice Department White Paper of 2013, arguing that the unconventionally fluid nature of terrorist organizations that operate beyond national borders require broad geographic reach to protect and defend the homeland. Both memoranda also rely on the negative: No authority restricts such an interpretation. The issue of invading sovereignty is addressed here separately, as is targeting an American citizen.

3.1.2 Who May Be Targeted?

Under international rules, it is far from clear that a legally justifiable response to the 2001 al-Qaeda armed attack can be stretched to include indefinite use of force not only against al-Qaeda but also against the Afghan Taliban, the Pakistani Taliban, other Pakistani terrorist organizations such as Lashkar-e-Taiba; al-Qaeda in the Arabian Peninsula, al-Shaba'ab in Somalia, and other terrorist groups – particularly ISIS, which al-Qaeda repudiated that have come into existence years after 2001.[86] Far greater public disclosure of the underlying facts would be required to provide the necessary confidence that the requisite linkages exist in place and time.

Under both the interpretation that states have a right of self-defense against attacks by non-state actors and the interpretation that the United States and its allies are in an ongoing armed conflict with non–state actors,[87] issues remain about *which* non–state actors may be legitimately targeted. The decision in each case requires an interpretation of whether such a strike meets the standards of imminence of attack by those persons, whether a strike meets the requirements of state responsibility, and whether the killing is proportionate to the threat. Even more rigid standards are imposed by international human rights law than by the laws of armed conflict.[88] But serious questions of both fact and law remain regarding whether international law plausibly permits the United States to meld a collection of Islamic terrorist organizations into one single, worldwide actor that can be attacked in many different and seemingly unrelated sovereign states indefinitely.[89]

Such connections may indeed exist, as is the case in Yemen and generally for al-Qaeda in the Arabian Peninsula (AQAP). But these connections may be merely verbal assertions by domestically oriented terrorist groups. Such incidents as the al-Shaba'ab attack on the Westgate Mall in Nairobi in September 2013 and its massacre of nearly 150 university students in Kenya in April 2015 do suggest more than an in-country intent.[90] Even so, the evidence

[86]Department of Justice White Paper, I, 3; see also Craig Martin, "Going Medieval: Targeted Killing, Self Defense, and the Jus ad Bellum Regime," in *Targeted Killings: Law and Morality in an Asymmetrical World*, ed. Claire Finkelstein et al (Oxford: Oxford University Press, 2012), 223.

[87]See, for example, United Nations Security Council resolution 1368, UN Doc. S/RES/1368, September 12, 2001, http://www.un.org/News/Press/docs/2001/ SC7143.doc.htm (accessed December 12, 2014); United Nations Security Council resolution 1373, UN Doc. S/RES/1373, September 28, 2001; Hamdan v. Rumsfeld, 548 U. S. 557 (2006); Hamdi v. Rumsfeld, 542 U. S. 507 (2004); and Boumediene v. Bush, 553 U. S. 723 (2008).

[88]New York City Bar Association, *Legality under International Law of Targeted Killings.*

[89]Ibid.

[90]Jeffrey Gettleman, Isma'il Kushkush, and Rukmini Callimachi, "Somali Militants Kill 147 at Kenyan University," *The New York Times*, April 2, 2015, http://www .nytimes.com/2015/04/03/world/africa/garissa-

officially provided to the public that the myriad terrorist groups now in the crosshairs of U.S. drones in fact all stem from an original (legally sanctioned) al-Qaeda source has not been factually developed, at least not publicly, convincing though it may be in classified accounts.[91] To be persuasive, the argument for the legality of targeting such entities must be based on a continuing specific threat posed by terrorist organizations that have a relationship to the original al-Qaeda – and it must be made public. Professor Jack Goldsmith, who is otherwise supportive of targeted killings, states: "If the organizations are 'inflated' enough to be targeted with military force, why cannot they be mentioned publicly? [There is] a countervailing very important interest in the public knowing whom the government is fighting against in its name."[92]

Another requirement of the laws of armed conflict is that no alternative to the use of force is available for targeting a particular individual or group. This case of "necessity" was effectively made to the UN Security Council after 9/11 the when the Taliban government was harboring al- Qaeda. UN Security Council resolutions in 2001 were supportive and strong in their demand for state efforts to evict such terrorist groups.[93]

In later strikes in other nations, including the raid that killed Osama bin Laden in Abbotobad, the justification of "necessity" has been bolstered by the argument that a host nation is "unwilling or unable" to deal with terrorists within its borders – a complex doctrine that is developed later in this chapter.[94]

Although the criteria for specific targeting decisions must remain classified, it is questionable whether such cases as a group of unidentified young men gathering in a suspicious location represents "imminence" sufficient to justify a targeted attack known as a "signature strike." Thus both jus ad bellum, which means in the parlance of the laws of war "the justification for attack," and jus in bello, or "acceptable conduct in war," discussed later in this chapter, demand standards of necessity and proportionality, although the meaning may differ in these two different contexts.[95]

university-college-shooting-in-kenya.html?_r=0 (accessed April 14, 2015).

[91]Rachel Briggs, "The Changing Face of al Qaeda" (discussion paper, Institute for Strategic Dialogue, 2012); "Who Runs al-Qaeda?," *The Economist*, August 8, 2013, http://www.economist.com/blogs/economist-explains/2013/08/economist-explains-5 (accessed December 12, 2014); Ben Hubbard, "The Franchising of Al Qaeda," *The New York Times*, January 25, 2014, http://www.nytimes.com/2014/01/26/sunday-review/the-franchising-of-al-qaeda.html?_r=0 (accessed December 12, 2014). The connections between al-Qaeda and al-Qaeda in the Arabian Peninsula (AQAP) seem well established. See New York City Bar Association, *Legality under International Law of Targeted Killings*, 30–47 and associated footnotes.

[92]Cora Currier, "Who Are We at War With? That's Classified," *ProPublica*, July 26, 2013, http://www.propublica.org/article/who-are-we-at-war-with-thats-classified (accessed December 12, 2014). See also Jennifer Daskal and Stephen I. Vladeck, "After the AUMF," *Harvard National Security Journal* 5 (2014): 122–123, http://harvardnsj.org/wp-content/uploads/2014/01/Daskal-Vladeck-Final1.pdf (accessed April 14, 2015).

[93]See United Nations Security Council resolutions 1368 and 1373. Together, these resolutions express both acknowledgment of appropriate reliance on chapter VII of the Charter and the gravity of the terrorist attack by the requirements imposed on all member states, inter alia, to prevent the movement of terrorists across borders, to evict terrorists from their borders, and to cooperate to prevent financing of terrorist activities; http://www.un.org/press/en/2001/SC7143.doc.htm (accessed April 18, 2015) and http://www.un.org/en/sc/ctc/specialmeetings/2012/docs/United%20Nations%20Security%20Council%20Resolution%201373%20%28200 (accessed April 18, 2015).

[94]Barron memorandum, 24–26.

[95]Gabor Rona and Raha Wala, "No Thank You to a Radical Rewrite of the *Jus ad Bellum*," *American Journal of International Law* 107, no. 2 (April 2013): 386.

3.1.3 When Are Attacks Permissible?: Sovereignty Issues in Defining the War Zone

To the extent that the drone strikes may be a legally permissible form of kinetic action to eliminate an imminent threat or to prevent a spreading amorphous terrorist campaign, the question remains whether such strikes are permissible anywhere, any time.[96] Any attacks on the sovereign soil of another country with which we are not at war ordinarily require the consent of its government. The United States received such permission from Yemen before its government collapsed, as well as from the tenuous government in Somalia.[97] The United States previously inferred Pakistan's "tacit consent," but Pakistan's vocal disapproval of drone strikes following the 2011 Osama bin Laden raid makes it harder to assume that consent was not revoked, unless, of course, secret arrangements have been made and the outrage was for domestic Pakistani public consumption.[98] While justification for violating sovereignty might turn on a factual demonstration of imminence of attack on the U.S. homeland, its embassies, or bases, it is hard to argue that any and all suspected terrorists may be freely targeted throughout the world.[99]

The United States contends it may strike in a sovereign state's territory without consent if it is determined that "the host nation is unwilling or unable to suppress the threat posed by the individual target."[100] While the international community recognized and sup- ported the American invasion of Afghanistan, an analysis of UN Security Council resolutions on Afghanistan, the Taliban, and al- Qaeda from before and during the war reveals that the UN Security Council did not address the issue that the military campaign against al-Qaeda might extend beyond the borders of Afghanistan.[101] As mentioned, both the "Barron memorandum" and the earlier Department of Justice White Paper point to the unconventionally

[96]U.S. domestic law prohibits assassinations by any "person employed by or acting on behalf of the United States Government." Executive Order 123333, 87 Stat. 555, pt. 2, para. 11. See also Michael N. Schmitt, "State Sponsored Assassination in International and Domestic Law," *Yale Journal of International Law* 17 (1992): 609–686. Schmitt notes that the prohibition would not apply to a war- time situation. Finally, Harold Koh, in his address to the American Society of International Law, brushed the use of the assassination prohibition to prevent targeted killing by stating that "under domestic law, the use of lawful weapons systems – consistent with the applicable laws of war – for precision targeting of specific high-level belligerent leaders when acting in self-defense or during an armed conflict is not unlawful, and hence does not constitute 'assassination.'" Koh therefore lays out effectively four reasons why the Executive Order does not apply: the targeting program uses: (1) lawful weapons (2) to precisely target (3) a high-level belligerent (4) in a situation where the United States is acting *either* in self-defense or in war. See Koh, "The Obama Administration and International Law."

[97]Karen DeYoung, "U.S. Recognizes Somalia, Citing Success of a Campaign against Militants," *The Washington Post*, January 17, 2013, http://articles.washington- post.com/2013-01-17/world/36410076_1_somalia-somali-clan-leader-mohamud (accessed December 12, 2014).

[98]Adam Entous, Siobham Gorman, and Evan Perez, "U.S. Unease over Drone Strikes," *The Wall Street Journal*, December 26, 2012, http://www.wsj.com/articles/SB10000872396390444100404577641520858011452 (accessed April 18, 2015). See also Karen DeYoung. "Pakistani Ambassador to U.S. Calls CIA Drone Strikes a 'Clear Violation,' " *The Washington Post*, February 5, 2013, http://articles.washingtonpost.com/2013-02-05/world/36756792_1_afghan-taliban-cia-dr one-strikes-afghan-militants (accessed December 12, 2014).

[99]Jordan Paust, "Self-Defense Targetings of Non-State Actors and Permissibility of U.S. Use of Drones in Pakistan," *Journal of Transnational Law and Policy* 19, no. 2 (2009): 237–280; See" Mary Ellen O'Connell, "The Questions Brennan Can't Dodge," *The New York Times*, February 6, 2013, http://www.nytimes.com/2013/02/07/opinion/the-questions-brennan-cant-dodge.html (accessed April 14, 2015). "[D]rone attacks have been carried out in Yemen, Somalia and Pakistan and may soon begin in Libya, Mali and Nigeria. None of these countries have attacked America, so no right of self-defense can be invoked under the United Nations Charter."

[100]Department of Justice White Paper, 1–2.

[101]Mumtaz Baloch, a Pakistani diplomat, explores these issues in an unpublished paper: "Implications of the Use of Drones on State Sovereignty" (thesis, Fletcher School of Law and Diplomacy, Tufts University, 2013), 19.

fluid nature of terrorist organizations as grounds for acting to protect the United States, without geographic constraints:

> *Particularly in a non-international armed conflict, where terrorist organizations may move their operations from one country to another, the determination of whether a particular operation would be part of an ongoing armed conflict would require consideration of the particular facts and circumstances in each case, including the fact that transnational non-state organizations such as al Qaeda may have no single site serving as their base of operations.*[102]

The White Paper admits, but is not deterred by, the lack of legal authority.[103] This "unwilling or unable" standard also seems to argue the negative. It makes the case that if no international agreement nor any judicial precedent delineates geographic limits to reach transnational non-state actors, no sovereignty limits are imposed – so long as the host country's own efforts to curb the non-state enemy are judged insufficient.[104] That standard does seem to fill a gap in the law of self-defense. Ashley Deeks and others find support in the laws of neutrality, and prior use of the concept.[105] The doctrine was developed to permit one belligerent to respond to a co-belligerent's use of a neutral country when that neutral fails to meet its obligation to repel such use of its territory.[106] Professor Jack Goldsmith concurs:

> *This standard is not settled in international law, but it is sufficiently grounded in law and practice that no American president charged with keeping the country safe could refuse to exercise international self-defense rights when presented with a concrete security threat in this situation. The "unwilling or unable" standard was almost certainly the one the United States relied on in the Osama bin Laden raid inside Pakistan.*[107]

Yet as Deeks points out, "unwilling or unable" still lacks clear legal content or a well-balanced test to provide it with legitimacy. It is "incompletely theorized."[108] She therefore offers some common-sense tests that might help create greater legitimacy. In summary, they include: (1) consent or cooperation from the territorial state to an intervention; (2) the seriousness of the threat to the victim state; (3) a request that the territorial state act in a timely manner; (4) an articulate, reasonable assessment of the territorial state's capability; (5) proportionate means used by the victim state; and (6) prior inter- actions between the victim state and the territorial state.

However, nations have not attempted to develop such extensive factual justification for the doctrine in situations where it has been relied on. Moreover, other scholars argue that the current U.S. approach does not represent state practice.[109] Even in Deeks' case study of a raid by Colombia into Peru to prevent lethal attacks in its homeland, the OAS found the

[102] Department of Justice White Paper, 4.

[103] "The Department has not found any authority for the proposition that when one of the parties to an armed conflict plans and executes operations from a base in a new nation, an operation to engage the enemy in that location cannot be part of the original armed conflict, and thus subject to the laws of war governing that conflict, unless the hostilities become sufficiently intense and protracted in the new location. That does not appear to be the rule of the historical practice." Department of Justice White Paper, 4.

[104] Sikander Ahmed Shah, *International Law and Drone Strikes in Pakistan: The Legal and Socio-Political Aspects* (London: Routledge, 2014), 73–95.

[105] Ashley Deeks, "Unwilling or Unable: Towards a Normative Framework for Extra-Terrritorial Self Defense," *Virginia Law Review* 52 (2012): 483.

[106] Ibid, 499-500.

[107] Jack Goldsmith, "Fire When Ready," *Foreign Policy*, March 19, 2012, (accessed December 12, 2014).

[108] Deeks, "Unwilling or Unable," 505.

[109] Michael J. Glennon, "Law, Power, and Principles," *American Journal of International Law* 107, no. 2 (April 2013): 378; Mary Ellen O'Connell, "Dangerous Departures," *American Journal of International Law* 107, no. 2 (April 2013): 380.

cross-border attack unjustified.[110] To the extent that the "unwilling or unable" doctrine is needed and relied on, wider acceptance can only be gained with some public acknowledgment that a careful factual analysis of the sort proposed by Deeks has been made.

The legal and policy issues of drone strikes in the Northwest Federally Administered Tribal Areas (FATA) and the Northwest Frontier Province of Pakistan, on the Haqqani leadership, and even the killing of Osama bin Laden so close to the Pakistani military academy are not simple. Pakistan is not, strictly speaking, a war zone, yet it appears that it has allowed its territory to be available to terrorists and insurgents to plan and carry out attacks against Afghan and ISAF troops, or failed to take adequate preventive measures. There was a strong, if unspoken, perception in parts of the U.S. government that Pakistan was colluding with the Taliban and even al-Qaeda. That sentiment was made explicit by Admiral Mike Mullen in his testimony before the Senate Armed Services committee on September 22, 2011, when he said: "In choosing to use violent extremism as an instrument of policy, the government of Pakistan and most especially the Pakistani army and ISI jeopardizes not only the prospect of our strategic partnership, but Pakistan's opportunity to be a respected nation with legitimate regional influence."[111]

The legal justification may be on somewhat firmer footing in Pakistan than in other nations. ISAF troops have been engaged in legitimate military action in neighboring Afghanistan, where they have been under constant attack emanating from Pakistan. But the issue of "hot pursuit" is a maritime legal concept that is not often relied on in this context, even though respect for sovereignty has been breached with as thin a rationale.[112] After troop withdrawal, the only justification may be imminence of attack on the few troops remaining, or by request of the government of Pakistan.

Pakistan may be a "frenemy," but it is a sovereign nation and a declared ally to which the United States continues to provide liberal amounts of financial and military assistance.[113] The politics of the relationship have been as wicked as the legal issues. America has been dependent on Pakistan for supply routes for troop support in Afghanistan, and Pakistan's displeasure has been expressed by choking off those routes. After ISAF departs, the future of Afghanistan's government will be deeply affected by its neighbor's behavior and its potential for disruption.[114]

The 2014 bombing of ISIS-held territory in Syria, another country whose consent was not secured, was tersely justified by Samantha Power as a response to a request from Iraq to deal with the "serious threats of continuing attacks from ISIL coming out of safe havens in Syria."

[110]Deeks, "Unwilling or Unable," 539–540, especially n. 198.

[111]Michael Mullen (statement on Afghanistan and Iraq to the Senate Armed Services Committee, September 22, 2011), http://www.cfr.org/afghanistan/ mullens-testimony-afghanistan-iraq-before-senate-armed-services-committee-september-2011/p26021 (accessed December 12, 2014).

[112]See Lionel Beehner, *Can States Invoke Hot Pursuit to Hunt Rebels?*, Council on Foreign Relations Backgrounder, June 7, 2007, http://www.cfr.org/iraq/ can-states-invoke-hot-pursuit-hunt-rebels/p13440 (accessed December 12, 2014). The doctrine is used mostly in maritime cases, enshrined in Article 111 of the 1982 UN Convention on the Law of the Sea. It is questionable as a matter of international law for the pursuit of insurgents into Pakistan.

[113]Hassan Abbas, "Pakistan 2020: A Vision for Building a Better Future" (report, Pakistan 2020 Study Group, Asia Society, May 2011), 51, http://asiasociety.org/files/pdf/as_pakistan%202020_study_group_rpt.pdf (accessed December 12, 2014).

[114]Justified concerns about nuclear proliferation and inadequate stewardship of its nuclear arsenal also require a healthier ongoing relationship than now exists. It is hard to say whether a policy of restraint or military boldness will prevail. Dexter Filkins, "We Don't Know Which Side the Pakistanis Are On," *Frontline*, May 2011, http://www.pbs.org/wgbh/pages/frontline/afghanistan-pakistan/secret-war/dexter-filkins-we-dont-know-what-side-the-pakistanis-are-on/ (accessed December 12, 2014).

Power's letter to Secretary General of the United Nations Ban Ki-Moon relied on two legal doctrines. First, she argued that Syria is "unwilling and unable" to "prevent the use of its territory for those attacks."[115] Second, the Article 51 inherent right includes both collective as well as individual self-defense.[116]

Unfortunately, no full public legal analysis was given at the time to support that claim. In *Nicaragua v. the United States of America*, the International Court of Justice (ICJ) rejected the argument of collective self-defense when the United States applied it on behalf of El Salvador to justify the U.S. attacks on Nicaragua.[117] The argument of collective self-defense for Iraq may be somewhat more plausible on the facts, but such an argument was not developed at the time.[118]

President Obama, in his NDU address, stated: "To do nothing in the face of terrorist networks would invite far more civilian casualties – not just in our cities at home and our facilities abroad, but also in the very places like Sana'a and Kabul and Mogadishu where terrorists seek a foothold." He continued:

> *[I]t is false to assert that putting more boots on the ground is less likely to result in civilian deaths or less likely to create enemies in the Muslim world. The results would be more U.S. deaths, more Black Hawks down, more confrontations with local populations, and an inevitable mission creep in support of such raids that could easily escalate into new wars.*[119]

Thus, on the basis of total resulting harm to civilians, Obama justified military action, but especially action of a specific type – targeted killings. This policy argument may have merit – it is a cautious case made for immediate self-protection, but it provides no further legal justification. Moreover, this exercise of the President's obligation to keep a nation safe may only achieve a short-term benefit. Assuring near-term safety – "not on my watch" – may only be purchased at the price of long-term safety – at significant opportunity cost. Two significant risks exist. First, as mentioned, there is a risk of "blowback." It can be argued that widespread targeted killing in nations that pose no immediate threat outside their own immediate territories, such as Yemen, may produce new generations of terrorists who are more dangerous than those killed, and who may, as ISIS has, widen their threats and actions. Second, the risk of armed drone proliferation presents a future risk to American and its allies. Unarmed drones are already a safety hazard.[120] Technology will not remain in one corner of the globe.

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[115]It is ironic that Assad offered to cooperate with the United States and thus was presumably "willing," but the United States did not want any Syrian government control over targeting, given Assad's grim agenda of targeting all opposition.

[116]Samantha Power to Ban Ki-Moon, September 23, 2014, http://www.cbsnews.com/htdocs/pdf/00_2014/09-2014/USlettertoSecretaryGeneral092314.pdf (accessed October 31, 2014).

[117]*Case Concerning Military and Paramilitary Activities in and Against Nicaragua* (Judgement) [1986] International Court of Justice Report 14. See Kathleen Hennessey and Christie Parsons, "Obama Faces Hurdles at UN Security Council," *The Los Angeles Times*, September 22, 2014, http://www.latimes.com/world/middleeast/la-fg-obama-isis-20140923-story.html (accessed December 12, 2014).

[118]Ibid. The fact that ISIS attacks have largely originated in Syria, even though supported by Iraqi Sunnis, and the Iraqi government plea for cross-border action seem to present a stronger case than the meager support that Nicaragua was giving the Salvadorean rebels. A strong U.S. argument developing that factual distinction would have been useful.

[119]President Barack Obama (address, National Defense University).

[120]Nick Wingfield, "Now, Anyone Can Buy a Drone. Heaven Help Us," *The New York Times*, November 26, 2014, http://www.nytimes.com/2014/11/27/ technology/personaltech/as-drones-swoop-above-skies-thrill-seeking-stunts-elicit-safety-concerns.html (accessed April 17, 2015). See also Benjamin Wittes and Gabriella Blum, *The Future of Violence: Robots and Germs, Hackers and Drones – Confronting a New Age of Threat* (New York: Basic Books, 2015).

Terrorism may indeed be ubiquitous and pose ongoing threats to the United States, but if there were unaddressed terrorist activities in NATO countries, such as Germany or Turkey, a U.S. drone strike without authorization would not occur, nor any act other than an attempt to extradite and thereafter to prosecute, even when responses are slow to materialize.

Furthermore, even America's staunchest allies have rejected the U.S. position on the ability to strike foreign sovereign territory with- out consent. The European Union passed a resolution on February 27, 2014, stating that "drone strikes outside a declared war by a State on the territory of another State without the consent of the latter or of the UN Security Council constitute a violation of international law and of the territorial integrity and sovereignty of that country."[121] The resolution contained an even broader condemnation of extra- judicial killings. Concerned about the findings in the Emmerson Report, a further resolution condemning extrajudicial killings and calling for transparency and accountability by the EU nations that cooperated in such programs was tabled in December 2014.

3.1.4 *Jus in Bello*: What is Permissible in War?

U.S. officials also insist that drone strikes are consistent with principles of legal use of force under international law once the hurdle of entering into conflict has been passed. No adequate definition or criteria have been fully developed for the same principles of necessity, distinction, and proportionality that are demanded for actions once in war.[122] Nor has American policy that distinguishes combatants from noncombatants – or "distinction" – been made clear by government lawyers although direct participants may certainly be targeted. The international legal principle of distinction, as enshrined in Article 48 of Additional Protocol I of 1977 to the Geneva Convention, requires that parties to a conflict distinguish between combatants and civilians and target only military objectives.[123] Civilians who are directly participating in hostilities may be targeted when engaged directly in hostilities. The term "unlawful combatant" has been used in domestic law in the United States, but the concept is not enshrined in the Geneva Conventions.[124] Nor is there plausible justification for "signature strikes" that target groups of unidentified young men. The practice of signature strikes reflects a questionable interpretation of the principle of distinction.[125] Micah Zenko states:

> *President Obama extended and expanded this practice into Yemen which "in effect*

[121] European Parliament resolution on the use of armed drones, 2014/2567, RSP, February 25, 2014.

[122] Department of Justice White Paper, 8. See also the Barron memorandum.

[123] "Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts (Protocol I), 8 June 1977," International Committee of the Red Cross, https://www.icrc.org/applic/ihl/ihl.nsf /7c4d08d9b287a42141256739003e636b/f6c8b9fee14a77fdc125641e0052b079 (accessed April 17, 2015). See also Additional Protocol II, Article 13.

[124] Because there is there is no definition of a "combatant" in non-international armed conflict (NIAC), the ICRC has proposed a "continuous combatant function" to serve as a proxy for defining a combatant in a NIAC to fill this gap in international law. Nils Melzer, "Interpretive Guidance on the Notion of Direct Participation in Hostilities Under International Humanitarian Law," International Committee of the Red Cross, May 2009, https://www.icrc.org/eng/assets/files/other/icrc-002-0990.pdf (accessed April 18, 2015). See also Jakob Kellenberger, "Current Challenges Faced by the International Committee of the Red Cross and International Humanitarian Law" (speech, New York City, March 5, 2008), International Committee on the Red Cross, https://www.icrc.org/eng/resources/ documents/misc/ihl-challenges-050308.htm (accessed April 18, 2015); "Direct Participation in Hostilities: Questions and Answers," International Committee of the Red Cross, June 2, 2009, https://www.icrc.org/eng/resources/documents/faq/direct-participation-ihl-faq-020609.htm (accessed April 18, 2015).

[125] Jo Becker and Scott Shane, "Secret 'Kill List' Proves a Test of Obama's Principles and Will," *The New York Times*, May 29, 2012, http://www.nytimes.com/2012/05/29/ world/obamas-leadership-in-war-on-al-qaeda.html?pagewanted=all&_r=0 (accessed December 12, 2014).

> *counts all military age males in a strike zone as combatants unless there is explicit intelligence posthumously proving them innocent." Human rights advocates, international law experts and current and former U.S. officials dispute whether this methodology meets the principle of distinction for the use of force.*[126]

As Micah Zenko also observed, public statements defining who is a legitimate target have varied with the authorized speaker – from (1) high-level al-Qaeda leaders who are planning attacks, to (2) high-level individuals, to (3) individuals who are part of al-Qaeda or its associated forces, to (4) simply anyone threatening the United States.[127] Even though the Additional Protocol permits the targeting of civilians who are direct participants in a conflict, such variance in definition also suggests a laxity in the standards of proportionality.[128]

Of the 3,200–4,600 deaths by UAVs in 2013,[129] most have occurred in Pakistan, but a fair number were executed in Yemen, with a smaller number in Somalia. Syria and Iraq are now added to the list, although bombing by conventional aircraft has dominated in the fight against ISIS.[130] The Emmerson Report to the Human Rights Council investigated a number of specific strikes, many by UAVs. It documented the many civilian casualties, some in cases where alleged terrorists have also been killed, but also cases of wrong identification.[131] Accounts alleging that civilian rescuers and funeral attendees have been targeted in second-round strikes[132] might be less puzzling if the United States would reveal how it establishes strike targets. Greater transparency in the its efforts to avoid collateral damage to civilians and their property would clarify whether the United States is meeting the requirement of proportionality in its conduct of UAV strikes.[133] We would expect a "kill list" to be classified, but why should the criteria for targeting not be made public? It is hardly plausible that all of the signature strikes removed terrorists who were actually poised to strike at America or Europe. These unanswered questions remain troubling and give rise to the view expressed

[126]Micah Zenko, *Reforming U.S. Drone Policies* (New York: Council on Foreign Relations Special Report no. 65 (2013): 12, http://www.cfr.org/wars-and-warfare/ reforming-us-drone-strike-policies/p29736 (accessed April 20, 2015). The International Committee of the Red Cross (ICRC) standards require a "continuous combat function" in order to justify targeting those who are not members of the armed forces. ICRC Guidance 1007. Sudarsan Raghavan, "When U.S. Drones Kill Civilians, Yemen's Government Tries to Conceal It," *The Washington Post*, December 24, 2012, http://www.washingtonpost.com/world/middle_east/when-us-drones-kill-civilians-yemens-government-tries-to-conceal-it/2012/12/24/bd4d7ac2-486d-11e2-8af9-9b50cb4605a7_story.html (accessed December 12, 2014); "Tracking America's Drone War," *The Washington Post*, http://apps.washingtonpost.com/foreign/drones/ (accessed December 12, 2014).

[127]Micah Zenko, discussion, Council on Foreign Relations Meeting, Cambridge, MA, October 22, 2012.

[128]Nils Melzer, "Interpretive Guidance on the Notion of Direct Participation in Hostilities Under International Humanitarian Law," International Committee of the Red Cross, May 2009, https://www.icrc.org/eng/assets/files/other/icrc-002-0990.pdf (accessed April 18, 2015).

[129]Ibid; See also "Get the Data: Drone Wars," The Bureau of Investigative Journalism, http://www.thebureauinvestigates.com/category/projects/drones/drones-graphs/ (accessed April 18, 2015); "International Security Data Site," New America Foundation, http://securitydata.newamerica.net/ (accessed April 18, 2015).

[130]Jack Serle, "Why Drones are not Enough in Iraq and Syria," The Bureau of Investigative Journalism, September 11, 2014, http://www.thebureauinvestigates.com/2014/09/11/why-drones-are-not-enough-in-iraq-and-syria/ (accessed April 18, 2015).

[131]Ben Emmerson, "Report of the Special Rapporteur on the Promotion and Protection of Human Rights and Fundamental Freedoms While Countering Terrorism," Office of the High Commissioner for Human Rights, http://daccess-dds-ny.un.org/doc/UNDOC/GEN/G14/119/49/PDF/G1411949.pdf?OpenElement (accessed April 18, 2015).

[132]Chris Woods and Christina Lamb, "CIA Tactics in Pakistan Include Targeting Rescuers and Funerals," The Bureau of Investigative Journalism, February 4, 2012, http://www.thebureauinvestigates.com/2012/02/04/obama-terror-drones-cia-tactics-in -pakistan-include-targeting-rescuers-and-funerals/ (accessed December 12, 2014).

[133]Protocol Additional to the Geneva Conventions of 1949, June 8 1977, Article 48, 51(b)(5), https://www.icrc.org/applic/ihl/ihl.nsf/Article.xsp?action=openDocument&documentId=8A9E7E14C63C7F30C12563CD0051DC5C (accessed April 18, 2015).

by opponents of targeted killing that it is easier to kill than to capture, much less prosecute, an alleged terrorist.

3.1.5 Domestic American Legal Issues

As a matter of U.S. law, targeted killings have been specifically justified under the Authorization for Use of Military Force (AUMF), a joint resolution passed immediately after 9/11 that authorizes the President to use "all necessary and appropriate force" against those "nations, organizations, or persons he determines planned, authorized, committed, or aided the terrorist attacks that occurred on September 11, 2001, or harbored such organizations or persons."[134] Underlying that joint resolution is the constitutional Commander-in-Chief powers of the President under Article II, Section 2 of the U.S. Constitution. The War Powers Resolution of 1973 was the Congressional effort to assert its joint constitutional authority by requiring presidential notification of entry into conflict, with a sixty-day period after which Congress must justify the use of force, or the administration would be required to withdraw.[135] That act has often been ignored by successive administrations, and attempts to increase its effectiveness have failed.[136] It is notable that President Obama did notify Congress of the initiation of bombing ISIL in Iraq on August 17, 2014, under both his constitutional authority and that of the War Powers Resolution. Congress, interestingly, did not respond after the sixty-day period expired. U.S. attacks continued.

Although the AUMF has been considered sufficient to justify the Osama bin Laden raid, its authorization to include terrorist cells in Somalia, terrorists with little relationship to the original al-Qaeda organization beyond the name, and those created long after 9/11, has been questioned.[137] If indeed the facts support a linkage among these disparate groups, then as a matter of domestic law, the AUMF might arguably be sufficient. But reliance becomes increasingly attenuated over time, especially when Iraq has flared up with terrorists whom al-Qaeda disavows. So long as the underlying factual and legal cases remain classified, it can be argued, as Professor Jack Goldsmith does, that "executive-branch decisions since 2001 have led the nation to a new type of war against new enemies on a new battlefield without focused national debate, deliberate congressional approval or real judicial review."[138] The President recognized the legal shortcomings of relying on the AUMF in his May 23, 2013, address, when he urged Congress to "refine and ultimately repeal, the AUMF's mandate."[139] In the hands of a fractious Congress, however, "refining" may not turn out to be the narrowing, careful authorization process the President envisioned.

Apart from the question of whether the president has the right to conduct these strikes at all, under the Constitution and the AUMF, one of the most contentious legal issues domestically has been whether there is a denial of due process in targeting American citizens such as al-Awlaki. The Justice Department's White Paper, the President's May 2013 speech, and the Barron memorandum all developed the justification for that case and for several other

[134]Authorization for Use of Military Force, Pub. L. No. 107–40, § 2(a), 115 Stat. 224, 224 (2001), http://www.gpo.gov/fdsys/pkg/PLAW-107publ40/pdf/PLAW-107publ40.pdf (accessed December 12, 2014).
[135]War Powers Resolution, 50 U. S. Code 1548–1553.
[136]Michael J. Glennon. "The War Powers Resolution, Once Again," (February, 10 2009), *American Journal of International Law*, January 2009. Available at SSRN: http://ssrn.com/abstract=1340622.
[137]Robert Chesney, "A New Drone Strike in Somalia: Is the 2001 AUMF Needed?," *Lawfare* (blog), September 2, 2014, http://www.lawfareblog.com/2014/0 9/a-new-drone-strike-in-somalia-is-the-2001-aumf-needed/ (accessed October 3, 2014).
[138]Jack Goldsmith, "U.S. Needs a Rulebook for Secret Warfare," *The Washington Post*, February 5, 2013, http://articles.washingtonpost.com/2013-02-05/opinions/ 36757699_1_government-lawyers-secret-warfare-al-qaeda (accessed December 12, 2014).
[139]President Barack Obama (speech, National Defense University).

strikes by describing them as actual imminent threats that had a basis in past incitement of violence, including a plot to explode an airliner over American soil. The legal opinions tried to demonstrate that there was no feasible alternative.

With respect to constitutional rights, then Attorney General Eric Holder argued that "due process does not necessarily mean judicial process" in a wartime situation. The wartime analogies relied on by the Justice Department may fit the situation in Afghanistan and Iraq, where American troops have been under attack daily. The Justice Department memoranda relied on Supreme Court balancing tests, weighing private rights against governmental interests[140] to explain why it was infeasible to capture and provide constitutional due process rights to an American citizen who was serving as an enemy combatant.

The Department of Justice relied in part on *Ex Parte Quirin*, in which German soldiers, including an American citizen, were tried by military commission as unlawful combatants in the midst of a declared war. Those Nazi soldiers had surreptitiously landed on American beaches, abandoned their uniforms, and were captured carrying explosive devices. It is a stretch for the government to rely on that case and other similar cases to justify presidential power to target an American citizen in a location that was not directly related to the Iraq or Afghan wars. Yet although the facts in these cases are so different from al-Awlaki's situation, a legal rationale has been constructed from them. The argument is made that, first, the capture and trial of al-Awlaki was not possible, and second, the action taken to kill him was proportionate to the imminence of the threat to the United States.

The evidence against al-Awlaki was not without basis. He was an international voice threatening the United States; he allegedly recruited and helped train Umar Farouk Abdulmutallab, the "underwear bomber" who attempted to down a U.S. plane on Christmas 2009. He helped oversee the plot to detonate explosive devices on two U.S.-bound cargo planes in 2010. Alberto Gonsalez, former Attorney General to President George W. Bush, concluded in his carefully analyzed article: "[C]onsidering the totality of the circumstances, the President's actions with respect to Al-Aulaqi were lawful."[141] Yet even so, he was not comfortable with the arguments that the government had made. He recommended something closer to due process than an unconstrained presidential determination to protect future American citizens who might be placed on the kill list. He had several suggestions. They included a congressional definition of what constitutes an enemy combatant; a requirement that the president inform Congress of each citizen designated as an enemy combatant; and even a requirement that a neutral body pass on the President's deliberation to target such individuals.[142] These recommendations suggest that if many more citizens are to be targeted, some changes in procedures should be instituted to afford greater protection to them.

In relying on war cases, the legal analogy assumes that a war- time situation existed such that normal judicial processes are not feasible. The case might be more persuasive under the *Quirin* rationale if the argument that America is in a war with al-Qaeda and its networks, including AQAP, is also persuasive. That argument depends on carefully developed facts that there is a real war against related groups of terrorists in areas beyond Afghanistan and Iraq to justify targeting a U.S. citizen.[143] The demonstration of factual linkages to al-Qaeda must

[140]Hamdi; Mathews v. Eldridge 424 U.S. 319 (1976). The facts and rationale in applying the balancing test to a case involving a claim for denial of due process in hearing about disability benefits under Social Security seem quite unrelated to the circumstances of killing al-Awlaki.

[141]Alberto Gonzales, "Drones: The Power to Kill," *George Washington University Law Review* 82, no. 1 (2014): 28.

[142]Ibid, 49–58.

[143]See Cass Sunstein and Jack Goldsmith, "Military Tribunals and Legal Culture: What a Difference Sixty Years Makes" (working paper, University of Chicago Public Law and Political Theory, 2002) http://www.law.uchcago.edu/Lawecon/ index.html (accessed December 12, 2014). See also Har-

be sufficiently persuasive to the relevant publics to gain national and international support. These linkages have become progressively attenuated with time. The Barron memorandum states:

> *Moreover, DoD would conduct the operation in Yemen, where, according to the facts related to us, AQAP has a significant and organized presence, and from which AQAP is conducting terrorist training in an organized manner and has executed and is planning to execute attacks against the United States. Finally, the targeted individual himself, on behalf of that force, is continuously planning attacks from that Yemeni base of operations against the United States, as the conflict with al-Qaida continues.*[144]

This statement does not clear up the confusion created by alternative and contradictory presidential statements in 2013, which has made it difficult for the public to understand the legal basis for such acts. Perhaps it would have been easier to retain the phrase "the global war on terror" for coherence – however thin an argument it was to designate a series of conflicts or threats from disparate locations as a "war." But to continue the description as war might raise even greater constitutional questions if pursued without further congressional authorization.

3.1.6 War or Criminal Law Model?

The issue of how terrorism is framed further complicates the legal underpinnings for targeted killings in both international and domes- tic law. The legal analysis of terrorist acts can turn on whether the case is framed as a response to crime or to a war threat, in the formulation of Professors Gabriella Blum and Philip Heymann.[145] If the provocation is construed as a crime, as has been the practice with alleged terrorists in the United States and Europe, then the response is constrained by the due process requirements of peacetime law enforcement. Where terrorism is treated as a crime, the remedy is an effort to extradite the suspect, followed by trial in the United States and, if the suspect is found guilty, punishment. The United States abided by this model in pursuing a number of high-profile terrorists, such as Abu Hamza al-Masri, a radical cleric who was extradited from England to stand trial in New York in 2012, or Sulaiman Abu Ghaith, son-in-law of Osama bin Laden, who was arrested in Jordan in March 2013, extradited, tried by jury in New York, and convicted on March 26, 2014.[146]

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vey Silverglate, "Obama Crosses the Rubicon: The Killing of Anwar al-Awlaki," *Forbes*, October 6, 2011, http://www.forbes.com/sites/harveysilverglate/2011/10/06/ obama-crosses-the-rubicon-the-killing-of-anwar-al-awlaki/ (accessed December 12, 2014). Other issues were raised by the Department of Justice memorandum, such as whether the targeting killing of al-Awlaki violated the law against the murder of an American citizen abroad and whether the public authority exemption applies under that statute (18 U. S. Code 1119). Although they are important, as is the issue of whether the law applies to the CIA as well as the military, those issues are not within the scope of the more limited discussion in this book.

[144]The White Paper unsurprisingly uses very similar language to that in the Barron memorandum: "The United States retains its authority to use force against al Qaeda and associated forces outside the area of active hostilities when it targets a senior operational leader of the enemy force who is actively engaged in planning operations to kill Americans. The United States is currently in a non-international armed conflict with al Qaeda and its associated forces ... Any U.S. operation would be part of this non-international armed conflict, even if it were to take place away from the zone of active hostilities." See Barron memorandum, 27. See also Gonzales "Drones."

[145]Gabriella Blum and Philip Heymann, "Law and Policy of Targeted Killing," *Harvard National Security Journal* 1 (June 27, 2010): 145, http://harvardnsj .org/2010/06/law-and-policy-of-targeted-killing/ (accessed December 12, 2014).

[146]Benjamin Weiser, "Jurors Convict Abu Ghaith, Bin Laden Son-in-Law, in Terror Case," *The New York Times*, March 26, 2014, http://www.nytimes .com/2014/03/27/nyregion/bin-ladens-son-in-law-is-convicted-

Yet, for targeted killing to be acceptable as a rational, efficient, effective and legal response that protects more civilian lives in targeted areas and more American military lives than the alternatives of invasion or covert action, terrorism must be construed not as a crime, but rather as war. As Blum and Heymann point out, the United States seems to embrace both models (and some derivatives) simultaneously: terrorists caught within the United States or allied territories are likely to be tried as criminals, while similar suspected terrorists – even if they are U.S. citizens – who happen to be located in areas outside states of established alliances are likely to be treated as combatants or as imminent threats to U.S. security. They are ghost enemies in the amorphous war on terror who are afforded neither the rights of citizens nor the protections given to traditional combatants.

The Obama administration has utilized a criminal law model where feasible, and made efforts to close the Guantanamo prison facilities and incarcerate prisoners on the mainland.[147] The decision to fly a Russian alleged terrorist detained in Afghanistan to the United States for trial in October 2014 was an important move to widen the criminal law model.[148] But the United States has also relied on self-defense and war rationales without hanging its hat on either authority.[149] Clarification could be made about why both approaches might be helpful, and under which circumstances one approach is more apt than another – and why. The current blurring of paradigms, as stated before, gives rise to the accusation that it is easier to kill than to jail suspected terrorists – not a conclusion that reflects well on the American respect for the law.[150]

3.1.7 Secrecy versus Transparency

Secrecy compounds whatever legal weakness may be inherent in targeting activities. The public is left to rely heavily on journalistic leaks, and correspondingly, journalists become bolder in asserting what they consider to be an obligation to the public.[151] National security

in-terror-trial.html (accessed December 12, 2014). For the Abu Hamza case, see Pervaiz Shallwani, Devlin Barrett, and Evan Perez, "After Long Wait, U.S. Presses Terror Cases against Five," *The Wall Street Journal*, October 6, 2012, http://online .wsj.com/article/SB10000872396390444223104578040482856321890.html (accessed December 12, 2014). For the Abu Ghaith case, see Marc Santora and William K. Rashbaum, "Bin Laden Relative Pleads Not Guilty in Terrorism Case," *The New York Times*, March 8, 2013, http://www.nytimes.com/2013/03/09/nyregion/sulaiman-abu-ghaith-bin-ladens-son-in-law-charged-in-new-york.html (accessed December 12, 2014).

[147]Erin B. Corcoran,"Obama's Failed Attempt to Close Gitmo: Why Executive Orders Can't Bring about Systemic Change," *University of New Hampshire Law Review* 9 (2010–2011): 207. David J. R. Frakt, "Prisoners of Congress: The Constitutional and Political Clash over Detainees and the Closure of Guantanamo," University of Pittsburgh Law Review 74, no. 2 (2012): 181-262.

[148]"'Russian Taliban' Appears in US Court on Terror Charges," *BBC*, http://www .bbc.com/news/world-us-canada-29910022 (accessed December 12, 2014).

[149]Department of Justice White Paper, 3–4.

[150]See Laurie Blank, "Targeted Strikes: The Consequences of Blurring the Armed Conflict and Self-Defense Justifications" *William Mitchell Law Review* 38 no. 5 (2012): 1697. In criticizing the U.S. justification, the author argues: "[U]sing both the armed conflict and self-defense justifications for targeted strikes, whether in Pakistan, Yemen, Somalia, or elsewhere, may be an easy way to communicate to the public that the state is using force to eliminate 'bad guys.' It certainly adds a great deal of flexibility to policy-making and decision-making, which is highly valuable from the perspective of political leaders. The costs of allowing the lines between legal regimes and paradigms to be blurred, however, are far too great."

[151]Jack Goldsmith, *Power and Constraint* (New York: W. W. Norton, 2012), 51–82. But active, investigative journalists, such as James Risen of The New York Times, face criminal charges when they refuse to divulge sources, and the pressure on the media to suppress stories is heavy. See Norman Soloman and Marcy Wheeler, "The Government War Against Reporter James Risen," *The Nation*, October 27, 2014, http://www.thenation.com/article/181919/government-war-against-reporter -james-risen (accessed April 17, 2015) and Mark Berman, "The Supreme Court Won't Intervene In the James Risen Case. What's Next?" *The Washington Post*, June 2, 2014, http://www.washingtonpost.com/news/post-nation/wp/2014/06/02/the-supreme-court-wont-intervene-in-the-james-risen-case-whats-next/ (accessed April 17, 2015).

suffers even as the public gains important information. The fact that official secrecy was maintained about the al-Awlaki strike for three months after the disclosure of the Department of Justice White Paper increased the contentiousness of that targeted killing. The legal issue had been submitted to the Department of Justice, which, as the White Paper revealed, had supplied legal justification, but classification had prevented informed public debate.[152] Available information about targeted killing in general has only increased slightly, and then sporadically. For example, government debate about whether to target Abdullah al-Shami, an American citizen in Pakistan and a known terrorist, was somehow made known to journalists.[153] But support for the present program does not simply lie with the executive branch. As a recent expose in *The New York Times* reveals – naming names,

> *It was two years ago that Mr. Obama gave a speech pledging to pull the targeted killing program from the shadows, and White House officials said they wanted to shift the bulk of drone operations from the C.I.A. to the Pentagon, with the stated intent of making the program somewhat more transparent. But the intelligence committees have resisted the plan, in part because Mr. D'Andrea and other top agency officials have convinced lawmakers that the C.I.A. strikes are more precise than those conducted by the Pentagon's Joint Special Operations Command.*[154]

Mary Ellen O'Connell remarks that "secret law" is an oxymoron: "The rule of law is the basis of our democracy and the foundation of international relations. Facts like operational details may properly be kept confidential, but not the law itself." Withholding information about a legal rationale is like classifying the weather report. The public faces a veritable "fog of law" when legal justification is kept classified for a long period of time and not made transparent.[155]

3.1.8 More Oversight?

Serious concerns about legality has given rise to a call for increased oversight. A number of proposals for special oversight, including a FISA-type court (FISC), have been offered. Such a court might be reassuring to the public, but it would be troublesome as a matter of security policy and constitutional law for any court to opine on or decide the legality of specific attacks in advance. A deliberative judicial process would only be effective in a post hoc opinion on the legality of a particular strike, or group of strikes. Highly classified and technical information would have to be subject to scrutiny. As Director of Georgetown University's National Security Program and former Justice Department official, Carrie Cordero argues:

> *[I]f the FISC is used as the model, the Executive Branch must be prepared to explain, in detail, its capabilities, technologies, innovations and compliance vulnerabilities. The intersection of the technological "how" and Court authorization is all the more difficult as technology changes. Just one example to highlight a potential scenario: what if the hypothetical new court becomes interested in collateral*

[152] Department of Justice White Paper.

[153] Mark Mazzetti and Eric Schmitt, "U.S. Militant, Hidden, Spurs Drone Debate," *The New York Times*, February 28, 2014, http://www.nytimes.com/2014/02/28/ world/asia/us-militant-hidden-spurs-drone-debate.html?emc=eta1&_r=0 (accessed April 17, 2015).

[154] http://www.nytimes.com/2015/04/26/us/politics/deep-support-in-washington-for-cias-drone-missions.html?smprod=nytcore-iphone&smid=nytcore-iphone-share&_r=1 (accessed April 26, 2015).

[155] Michael J. Glennon, *The Fog of Law* (Stanford: Stanford University Press, 2010). The Israelis also have issues of disclosure and explanation about the legality of UAV usage. See Amir Oren, "Israeli Military Hiding Targeted Killing Investigative Panel," *Haaretz*, May 31, 2014, http://www.haaretz.com/news/ diplomacy-defense/1.596339#.VF5LQfS-IAM.email (accessed November 10, 2014).

> *deaths? Would a court inquire as to the precision of missile and drone technology to prevent anyone but the identified target from being killed? Is the Defense Department and Intelligence Community prepared to fully inform the court about its equipment, techniques, technologies, designs, prototypes, margin of error and casualty counts? On the other hand, should Congress try to craft a new court that more substantially cabins the authority of the court to request additional information than in the FISA context, it is hard to imagine that federal judges would be comfortable and willing to operate in that more constrained environment.*[156]

Furthermore, the record of nearly 99 percent approval of pro- posed government actions by the FISC into question whether such a step would in fact increase effective oversight.[157]

While there are technical, functional, and even structural issues with current oversight mechanisms, the problem with both judicial and congressional oversight may be more a function of unwavering support of the program. Could that be changed by forceful presentation of opposing views?[158] An advocate's voice will only be instituted when there is public demand.

The Privacy and Civil Liberties Oversight Board (PCLOB) as an independent, bipartisan executive agency might provide an alter- native route for selective oversight of such issues as targeted killing. Although small and potentially divided along party lines, it has demonstrated its capability and depth in investigation with its initial "Report on the Telephone Records Program Under Section 215 of the U.S. Patriot Act and on the Operations of the Foreign Intelligence Surveillance Court,"[159] which was reinforced by later reports.[160] The PCLOB, with its access to classified materials, as well as its power to hold public hearings, could be a better instrument for airing and analyzing the issues raised here. However, as terrorism metastasizes throughout the world, concerns for effective security will continue to dampen the efforts to provide for more scrupulous oversight. The demand for both greater transparency and oversight waits until public opinion is mobilized. At that point, there are many alternative routes to be explored.[161]

4 Opportunities for Stepping Forward

Although the United States seems unlikely to abandon targeted killing in the near future, the focus ought now to be on developing and implementing standards, limits, and safeguards. In addition to the issues of blowback and the potential loss of technological edge already discussed, the United States has lost legitimacy and stature even among its allies. Legal

[156]"Carrie Codero on FISA Court Lessons for a Drone Court," *Lawfare* (blog), February 18, 2013, http://www.lawfareblog.com/2013/02/carrie-cordero-on-fisa-court-lessons-for-a-drone-court/ (accessed December 12, 2014).

[157]Andrew Weissman "The Foreign Intelligence Security Court: Is Reform Needed," *Just Security*, June 12, 2014, http://justsecurity.org/11540/guest-post-foreign-intelligence-surveillance-court-reform-needed/ (accessed April 26, 2015).

[158]Ibid.

[159]Privacy and Civil Liberties Oversight Board, *Report on the Telephone Records Program Conducted under Section 215 of the USA PATRIOT Act and on the Operations of the Foreign Intelligence Surveillance Court*, January 23, 2014, https:// www.pclob.gov/library/215-Report_on_the_Telephone_Records_Program.pdf (accessed on April 18, 2015).

[160]Privacy and Civil Liberties Oversight Board, *Report on the Surveillance Program Operated Pursuant to Section 702 of the Foreign Intelligence Surveillance Act*, July 2, 2014, http://www.pclob.gov/Library/702-Report-2.pdf (accessed December 12, 2014).

[161]For example, there multiple treaty and case law routes for raising the right to life, as Brian Kelly suggests. See, e.g., the Case of Al-Skeini and Others v. The United Kingdom, http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-105606 #"itemid":["001-105606"]

justification, as the late Thomas Franck has written, is a key to legitimacy.[162] There can be little public confidence in the current policy of targeted killing until the legal justification for it is put on firmer ground and strikes are limited to instances in which a sound factual basis for targeting individuals is made to the public. Legal justification, just as the joke about Wagner's music, is better than it sounds. But that justification has not been presented clearly to the public, nor has it been offered in a timely fashion.

Professor Jack Goldsmith relies in part on "accountability journalism," FOIA requests, and litigation to expose conditions that will prompt the public to demand action and Congress to act in response. But he is also ambivalent about the exposure of classified information harmful to national security.[163] And while U.S. Supreme Court rulings during the George W. Bush administration curbed some of the worst prisoner abuses, laid the groundwork for habeas corpus,[164] and spurred improved procedures for trial under the Military Commissions Act of 2009,[165] Guantanamo was not closed, indefinite incarceration has continued, and actual freedom for prisoners has been rare. The broad continuity of policy between the Bush and Obama administrations is notable. Michael Glennon's evidence that a permanent stratum of unaccountable "Trumanites" actually make policy; that a "double government" exists in the United States casts considerable doubt about the effectiveness of the accountability mechanisms suggested by Professor Goldsmith.[166]

It is important now to think ahead about forms of international norms and standards that nations might be willing to live by before we are faced with a crisscrossing of targeted attacks from rogue states and non-state actors who have been able to develop advanced technology. Moreover, the technology may go in a direction of autonomous and miniaturized UAVs presenting even greater problems than the current human-guided ones.[167]

The most desirable outcome for the use of present and future UAVs would be international regulation of drone warfare, as has been achieved slowly with many aspects of war-fighting, such as land mines[168] or cluster bombs.[169] The United States is unlikely to initiate such an international regime, given the fact that it is the principal developer and user of UAVs. But circumstances may force the nation to greater openness to international regulation. Even though a binding legal agreement is not feasible politically in the midst of proliferating terrorism, it might not be far-fetched for responsible states to strive for an initial agreement that assures that they will act in ways that specifically uphold the Laws of Armed Conflict, and the UN Charter in the employment of drones.

An imaginative proposal has been made by Professors Allan Buchanan and Robert O. Keo-

[162]Thomas Franck, "Legitimacy in the International System," *American Journal of International Law* 82, no. 4 (October 1988): 705.

[163]Jack Goldsmith, *Power and Constraint* (New York: W. W. Norton, 2012), 205–243.

[164]Hamdi v. Rumsfeld 542 U.S. 507 (2004); Rasul v. Bush 542 U.S. 466 (2004); Hamdan v. Rumsfeld 548 U.S. 557 (2006); Boumedienne v. Bush 553 U.S. 723 (2008).

[165]See also Jennifer K. Elsea, "The Military Commissions Act of 2009: (MCA 2009): Overview and Legal Issues," Congressional Research Service, August 4, 2014, https://fas.org/sgp/crs/natsec/R41163.pdf (accessed April 22, 2015); Mark Martins, "A Conversation with General Mark Martins, Chief Prosecutor of Military Commissions" (Harvard Law School lecture by Brigadier General Mark Martins, Cambridge, MA, April 14, 2015).

[166]Michael J. Glennon, *National Security and Double Government* (Oxford: Oxford University Press, 2014).

[167]Benjamin Wittes and Gabriella Blum, *The Future of Violence: Robots and Germs, Hackers and Drones: Confronting a New Age of Threat* (New York: Basic Books, 2015).

[168]"Convention on the Prohibition of the Use, Stockpiling, Production and Transfer of Anti-Personnel Mines and their Destruction," United Nations, September 18, 1997, https://www.icrc.org/ihl/INTRO/580 (accessed April 20, 2015).

[169]"Dublin Diplomatic Conference on Cluster Munitions," Dublin, Ireland, May 30, 2008, https://treaties.un.org/pages/ViewDetails.aspx?src=TREATY&mtdsg_ no=XXVI-6&chapter=26&lang=en (accessed April 20, 2015).

hane.[170] They would create a non-legally binding Drone Accountability Regime. Their conception is an informal pledge by nations to adopt internal standards and mechanisms to curb abuses of drone warfare. Their model agreement would rely on states to legislate international common standards. Their model is the Missile Technology Control Regime. Such a pledge is a step beyond internationally agreed codes of conduct. Their proposed non-binding regime is detailed: it includes an assembly of states to assure transparency and an ombudsperson to settle disputes. It would only provide state enforcement mechanisms to uphold the broad standards of acceptable behavior. Yet the regime would offer the opportunity for civil society to mobilize and pressure the state to implement the agreed standards.[171] A similar model of a non- binding agreement or pledge is the successful Proliferation Security Initiative, which sets forth broad standards without imposing a regulatory regime.[172] Although these approaches admittedly do not provide for deep regulation, they can represent the beginning steps of a norm-building process.

A 2014 Stimson report, chaired by retired U.S. Army General John Abizaid and Rosa Brooks, offered strong and clear recommendations for the future U.S. use of lethal UAV technologies.[173] Their methodology, analysis, and eight recommendations carry the weight of a committee distinguished group of former legal, military, and policy officials as well as technical experts. They demand both cost and technological research and analysis. All of the Stimson Report recommendations, including those related to export control, research, and development, and assuring safety through FAA civil aircraft regulation, are worthy of study and support.

The recommendations offered in this book draw from both reports and focus on the most critical issues. They are narrower in scope than those in the Stimson Report, but also are directed toward international action, just as in Buchanan and Keohane's scheme. Many new recommendations will emerge in the years ahead until changes are made. At the very least, the United States might be wise to accept some of the criticism made about its use of lethal UAVs, and move now toward setting internal standards, while demonstrating openness to international agreements.

1. U.S. civil-military roles in UAV warfare should be clarified and made public. Since

[170] Allen Buchanan and Robert O. Keohane, "Toward a Drone Accountability Regime" *Ethics and International Affairs* 29 (Spring 2015), 15–27, http://www .ethicsandinternationalaffairs.org/2015/toward-drone-accountability-regime/ based on their article: "International Institutional Regulation of Lethal Drones" (Unpublished Paper, October 5, 2014).

[171] See Beth Simmons, *Mobilization for Human Rights: International Law In Domestic Politics* (New York: Cambridge University Press, 2009).

[172] "Proliferation Security Initiative, 10th Anniversary: Joint Statement on Enhancing Interdiction Capabilities and Practices," United States Department of State, http:// www.state.gov/t/isn/jtstmts/211498.htm (accessed April 18, 2015).

[173] John P. Abizaid and Rosa Brooks, Recommendations and Report on the Task Force on US Drone Policy, The Stimson Center, June 2014, http://www.stimson .org/images/uploads/research-pdfs/task_force_report_FINAL_WEB_062414.pdf (accessed October 2, 2014). Their recommendations are:
- Conduct a rigorous strategic review and cost-benefit analysis of the role of lethal UAVs.
- Improve transparency in targeted UAV strikes.
- Transfer general responsibility for carrying out lethal UAV strikes from the CIA to the military.
- Develop more robust oversight and accountability mechanisms for targeted strikes outside of traditional battlefields.
- Foster the development of appropriate international norms for the use of lethal force outside traditional battlefields.
- Assess UAV-related technological developments and likely future trends, and develop an interagency research and development strategy.
- Review and reform UAV-related export control rules and FAA rules.
- The FAA should accelerate its efforts to meet the requirements of the 2012 FAA Reauthorization Bill.

repetitive and near-routine bombing continues to occur, it is best to make the transition to military operational control without further delay, as President Obama indicated he intended to do.

2. Concerted efforts should be made to gain law enforcement cooperation from nations where terrorist leaders can be found so they are tried, not targeted. The United States should redouble its efforts to bring terrorists who are U.S. citizens through judicial process.

3. The practice of signature strikes should be ended. The choice of targets should be limited to terrorist leaders who pose a known and imminent threat to the United States and its allies. Stringent standards of imminence should be used. Strikes should be carried out only after positive identification of the targets.[174]

4. Transparency should be increased. Although secrecy may be needed in advance of action, it is not necessary afterwards. Public disclosure about who was targeted and the justification for it would offer civil society and the public the opportunity to raise questions. To the extent that international and domestic publics know what safeguards are in place and what processes have led to the choices made, greater support for policies may be forthcoming.

5. The United States and its allies should display the greatest possible respect for sovereignty. Before a decision is made that national security trumps the sovereign rights of another nation, the kind of intensive civil-military dialogue recommended in Chapter 3 should be institutionalized. Such discourse could be systematized by the various means suggested – by Executive Order, by legislation when feasible, and by such practices as those developed in SOUTHCOM/AFRICOM.[175]

6. If the United States or its allies face imminent attack from ungoverned territories, conditions of the kind proposed by Ashley Deeks should be imposed before reliance on a doctrine of "unable or unwilling." These conditions would help limit intrusions into the sovereignty of a state and offer needed justification when that sovereignty is bypassed.

7. The U.S. government should clarify and further articulate how ongoing threats should be treated (whether they should be considered acts of war or something lesser), continue to aggressively pursue Congressional support for a new authority to update the AUMF, and seek the support needed under the War Powers Resolution.

8. A more effective form of supervision should be fashioned to review whether past targeting decisions have met the criteria that have been established. Suggestions for improvement over present Congressional oversight may be forthcoming with the public mobilization that greater transparency might effect. These might include an enhanced PCLOB, as discussed in Chapter 8.

These steps would help allay public and international concern about kinetic actions that many see as lacking sufficient legal or even ethical grounding. Each administration owes to the public its reassurance that the constraints of both international and domestic law are carefully observed. There are no legal doctrines so obscure that they defy explanation in plain language. The first step would parallel a proposal offered in Chapter 13, whose focus

[174]If such a standard were implemented under internationally agreed interpretations of Article 51 of the UN Charter and the Laws of Armed Conflict, concerns about reciprocity and mimicking behavior might be lessened.

[175]This is not to say that some such discussions do not now take place, but some results, such as signature strikes in Pakistan, Yemen, and Somalia, suggest either a lack of full discussion or hasty decision making.

is on cyber attacks: developing a formal code of conduct, which might be a prelude to actual international agreements. Codes of conduct and other confidence building measures, as mild as they are, can be an important step forward in counterterrorism activity.

Although America cannot claim to be the "shining city on the hill," American policy still tends to set a standard for the rest of the world. Clarity and transparency are necessary so that people in the United States and the world know that the use of drones complies with legal and humanitarian standards, and that these weapons are used only with the restraint that will encourage other nations to act accordingly.