

## CROSS-BORDER TARGETED KILLINGS: “LAWFUL BUT AWFUL”?

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Since September 11, the United States has waged two very open wars in Afghanistan and Iraq. These two wars have killed nearly 7,000 U.S. military personnel and left some 50,000 American troops wounded; they have also left an unknown number of Iraqi and Afghan soldiers and civilians dead or wounded.<sup>1</sup> But alongside these two costly and visible wars, the United States has also been waging what amounts to a third war.

This third war is a secret war, waged mostly by drone strikes, though it has also involved a smaller number of special operations raids.<sup>2</sup> I call this third war a secret war, because though its existence is widely known, it remains officially unacknowledged by the government of the United States: In court filings, for instance, the United States continues to state that it will neither confirm nor deny its involvement in drone strikes outside of traditional battlefields.<sup>3</sup>

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1. DEP'T OF DEFENSE, <http://www.defense.gov/news/casualty.pdf> [<http://perma.cc/TE3M-UNT2>] (last visited July 25, 2014); David Pogue, *Iraq, Afghanistan War Wounded Pass 50,000*, HUFFINGTON POST (Oct. 25, 2012, 12:36 PM) [http://www.huffingtonpost.com/2012/10/25/iraq-afghanistan-war-wounded\\_n\\_2017338.html](http://www.huffingtonpost.com/2012/10/25/iraq-afghanistan-war-wounded_n_2017338.html) [<http://perma.cc/3RDZ-ZGRQ>].

2. Throughout these remarks, I use “U.S. drone strikes” as a shorthand way to refer to the expansive U.S. campaign of lethal, cross-border counterterrorist strikes outside of traditional, territorially defined battlefields. To be clear, however, the issue is not “drones” or “drone strikes;” drones are simply another way of delivering ordnance from a distance. The availability of armed unmanned aerial vehicles has enabled an expanded U.S. campaign of cross-border targeted killings, but my concern is with the expanded use of such targeted killings, rather than the specific platforms used to carry them out.

3. See Brief for Appellee, *Am. Civil Liberties Union v. CIA*, 710 F.3d 422 (D.C. Cir. 2013) (No. 11-5320), 2012 WL 1853574; Brief for Defendants-Appellants, *New York Times Co. v. U.S. Dep't of Justice*, 752 F.3d 123 (2d Cir. 2014) (Nos. 13-422(L), 13-445(CON)), 2013 WL 3171502.

We do not know what this secret war has cost us in dollars, and we do not know its cost in human lives, either.<sup>4</sup> Drone strikes are appealing to the United States for the obvious reason that the use of unmanned aerial vehicles creates no short-term risk to the U.S. personnel who operate them. On the ground, however, U.S. drone strikes are estimated to have killed some 3,000 to 4,000 people in at least three countries (Pakistan, Yemen and Somalia) and perhaps as many as half-a-dozen countries (including Mali, the Philippines, and perhaps Nigeria).<sup>5</sup> For the most part, we do not know the identities of those killed by U.S. drone strikes, or the precise reasons they were targeted. We do not even know what percentage of the dead were specifically targeted, as opposed to those who simply became collateral damage in a U.S. strike aimed at someone else.<sup>6</sup>

How should we evaluate this secret conflict, more than a decade after the September 11 attacks? There is a phrase that was coined by my friend and former professor, Harold Hongju Koh, former Dean of Yale Law School, and more recently the State Department's Legal Advisor under President Obama. Harold Koh sometimes uses the term "lawful but awful," though he does not apply that term to the drone war.<sup>7</sup> In fact, Koh has been a staunch defender of the legal right of the administration to wage this particular secret war.<sup>8</sup> For me, however, this secret war fits squarely into in the "arguably lawful but nonetheless fairly awful" category.

I say this for three very distinct reasons, although they all overlap to some extent. First, I think this secret war is deeply offensive to core principles of American democracy, in particular to any

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4. Noah Shachtman, *Not Even the White House Knows the Drones' Body Count*, WIRED (Sept. 29, 2012, 8:00 AM), <http://www.wired.com/2012/09/drone-body-count/> [<http://perma.cc/3WRU-EPWZ>].

5. See COLUMBIA LAW SCHOOL, CENTER FOR CIVILIANS IN CONFLICT, *THE CIVILIAN IMPACT OF DRONES: UNEXAMINED COSTS, UNANSWERED QUESTIONS* 20 (2012); Declan Walsh, *US Extends Drone Strikes to Somalia*, THE GUARDIAN, June 30, 2011, <http://www.theguardian.com/world/2011/jun/30/us-drone-strikes-somalia> [<http://perma.cc/JHP9-468X>].

6. CENTER FOR CIVILIANS IN CONFLICT, *supra* note 5, at 19–20.

7. Harold Hongju Koh, Legal Adviser, U.S. Dep't of State, "The Obama Administration and International Law," Keynote Speech at the Annual Meeting of the American Society of International Law 3 (March 25, 2010), *available at* <http://www.state.gov/documents/organization/179305.pdf> [<http://perma.cc/V94-UA8A>].

8. *Id.* at 14–15.

notion of constitutional checks and balances. Second, I think it undermines core rule of law norms, internationally as well as domestically. And third, I think it is strategically misguided: At best, it is unhelpful; at worst, it is distinctly counterproductive.

#### I. DEMOCRATIC ACCOUNTABILITY

I begin with the issue of domestic law and democratic accountability. Remember, our Constitution gives Congress vital powers relating to the use of military force. To Congress is given the power to declare war and the power to raise, support, and make rules regulating the armed forces and to make rules concerning “captures on land and water.”<sup>9</sup> To Congress is also given the constitutional power to call forth “the militia to execute the laws of the Union, suppress insurrections and repel invasions,”<sup>10</sup> as well as the power to “define and punish . . . offenses against the law of nations.”<sup>11</sup>

If I were a member of Congress right now, I would be hopping mad. This secret war—which began under President Bush, but accelerated dramatically under President Obama—has gotten us very far away from anything Congress contemplated in the 2001 Authorization to Use Military Force (AUMF), passed just a few days after the September 11 attacks.<sup>12</sup>

Go back and look at the language of the AUMF: It states that the President may “[U]se all necessary and appropriate force against those nations, organizations, or persons he determines planned, authorized, committed, or aided the terrorist attacks that occurred on September 11, 2001, or harbored such organizations or persons, in order to prevent any future acts of international terrorism against the United States by such nations, organizations or persons.”<sup>13</sup>

Note that although this language gives the executive branch authorization to use force, it does not authorize the use of force against anyone, anywhere, anytime. Rather, it authorizes the

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9. U.S. CONST. art. I, § 8, cls. 11–12, 14.

10. U.S. CONST. art. I, § 8, cl. 15.

11. U.S. CONST. art. I, § 8, cl. 10.

12. This discussion of the AUMF draws on my 2013 congressional testimony. See *Oversight: The Law of Armed Conflict, the Use of Military Force, and the 2001 Authorization for Use of Military Force: Hearing Before the S. Comm. on Armed Servs.*, 113th Cong. (2013) (statement of Rosa Brooks).

13. Pub. L. No. 107-40, § 2(a), 115 Stat. 224, 224 (codified at 50 U.S.C. § 1541 note).

use of force specifically and solely against those organizations and states that planned, authorized, committed, or aided the September 11 attacks, or who harbored those who did. Furthermore, the AUMF authorizes force for the sole purpose of preventing future terrorism against the United States by such organizations or states—not for the purpose of preventing all future bad acts committed by anyone anywhere.

Even in those terrifying days right after September 11, when the Pentagon and the World Trade Center were still smoldering and rescue personnel were still pulling corpses out of the wreckage, Congress rejected a request from the Bush administration to have a more expansive AUMF. The administration initially asked that Congress authorize the use of force to “deter and preempt any future acts of terrorism or aggression.”<sup>14</sup> But even in that moment of grief, anger, and fear, Congress rightly rejected such an open-ended AUMF, understanding full well that when Congress cedes power to the executive branch, it generally never comes back.<sup>15</sup>

For much of the last dozen years, the 2001 AUMF provided adequate domestic legal authority both for the conflict in Afghanistan and for most U.S. drone strikes outside “hot battlefields,” since most of the individuals targeted in early U.S. strikes were reportedly senior Taliban or Al Qaeda operatives. But this appears to have changed in the last few years.<sup>16</sup>

The threat has metastasized: even as U.S. military action has decimated “Al Qaeda Central” and the network of Taliban leaders most active in 2001, new extremist groups have evolved, some inspired by or affiliated with Al Qaeda and the

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14. See 147 CONG. REC. S9950-51 (daily ed. Oct. 1, 2001) (statement of Sen. Byrd) (providing the text of the administration’s initial proposal); see also *id.* at S9949 (“[T]he use of force authority granted to the president extends only to the perpetrators of the September 11 attack. It was not the intent of Congress to give the president unbridled authority . . . to wage war against terrorism writ large without the advice and consent of Congress. That intent was made clear when Senators modified the text of the resolution proposed by the White House to limit the grant of authority to the September 11 attack.”).

15. Susan Milligan, *Congress gives Bush power to hunt terrorists*, BOSTON GLOBE, Sept. 15, 2001, [http://www.boston.com/news/packages/underattack/globe\\_stories/0915/Congress\\_gives\\_Bush\\_power\\_to\\_hunt\\_terroristsP.shtml](http://www.boston.com/news/packages/underattack/globe_stories/0915/Congress_gives_Bush_power_to_hunt_terroristsP.shtml) [http://perma.cc/E4QC-STBQ].

16. Jonathan S. Landy, *Obama’s drone war kills ‘others,’ not just al Qaida leaders*, McCLATCHY DC, April 9, 2013, <http://www.mcclatchydc.com/2013/04/09/188062/obamas-drone-war-kills-others.html#.UZF-Xncq9QI> [http://perma.cc/NZE2-54UV].

Taliban, others linked merely by a similar extremist ideology and a similar willingness to use violence against civilian targets to achieve their ends.<sup>17</sup> In the last few years, U.S. drone strikes outside of hot battlefields have consequently targeted not only the remnants of “core” Al Qaeda and the Taliban, but also known or suspected members of other organizations—including Somalia’s al Shabaab—as well as various individuals identified by U.S. intelligence only as “militants,” “foreign fighters,” and “unknown extremists.”<sup>18</sup>

For the moment, leave aside the question of whether the expanding range of groups targeted by the United States all pose a threat (or the same degree of threat) to the United States. Maybe all these groups and individuals pose a threat to the United States, and maybe they don’t—but on its face, the 2001 AUMF simply does not appear to cover groups and individuals that were unconnected to the September 11 attacks and are not planning or carrying out future terrorist attacks against the United States.<sup>19</sup>

The Obama administration has countered this argument by asserting that insofar as Congress intended the AUMF to be the functional equivalent of a declaration of war, the AUMF must be read to include the implied law of war-based authority to target groups that are “associates” of Al Qaeda or the Taliban.<sup>20</sup> However, it is far from clear that Congress intended to authorize the use of force *outside* of traditional territorial battlefields against mere “associates” of those responsible for the September 11 attacks, particularly when many of those associated groups did not exist in 2001.<sup>21</sup> It is also not clear how the executive branch defines “associates” of Al Qaeda.<sup>22</sup>

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17. Barack Obama, Remarks by the President at the National Defense University 1–2 (May 23, 2013), *available at* <http://www.whitehouse.gov/the-press-office/2013/05/23/remarks-president-national-defense-university> [<http://perma.cc/M5R3-7FHZ>].

18. Landy, *supra* note 16.

19. See Pub. L. No. 107-40, § 2(a), 115 Stat. 224, 224 (codified at 50 U.S.C. § 1541 note); Jennifer Daskal & Stephen I. Vladeck, *After the AUMF*, 5 HARV. NAT’L SEC. J. 115, 115–16 (2014).

20. Rosa Brooks, *Mission Creep in the War on Terror*, FOREIGN POLICY, March 14, 2013, [http://www.foreignpolicy.com/articles/2013/03/14/mission\\_creep\\_in\\_the\\_war\\_on\\_terror](http://www.foreignpolicy.com/articles/2013/03/14/mission_creep_in_the_war_on_terror) [<http://perma.cc/QA9B-7VL4>].

21. Oona Hathaway et al., *The Power To Detain: Detention of Terrorism Suspects After 9/11*, 38 YALE J. INT’L L. 123, 130–31 (2013).

22. The closest the administration has come is to describe an “associated force” as “(1) an organized, armed group that has entered the fight alongside al Qaeda,

The international law of war unquestionably permits parties to a conflict to target “co-belligerents” of the enemy.<sup>23</sup> On a traditional battlefield—such as within the territorial confines of Afghanistan—it would clearly be permissible for the United States to target individuals and groups that are literally fighting alongside the Taliban or Al Qaeda.<sup>24</sup> It is less clear that this is the case outside “hot battlefields.” In this murkier context, it is far more difficult to determine what would constitute “co-belligerency” with Al Qaeda, and executive branch officials have provided no clear criteria, nor even a simple list of those it regards as “associates” under a co-belligerency theory.<sup>25</sup>

In effect, the administration’s assertion that the AUMF authorizes the use of force against Al Qaeda “associates” even outside of traditional battlefields appears to have become a backdoor way of expanding the AUMF far beyond Congress’s intent. If Congress accepts Obama Administration claims that force can be used against a broad category of persons and organizations determined (based on unknown criteria) to be Al Qaeda “associates,” this effectively turns the AUMF into precisely the kind of open-ended authorization to use force that Congress rejected in 2001.

Call it AUMF mission creep. In recent years, the United States has targeted more and more people with no apparent connection to Al Qaeda, no apparent connection to the September 11 at-

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[and that] (2) is a co-belligerent with al Qaeda in hostilities against the United States or its coalition partners.” Brief for the Appellants at 27–29, *Hedges v. Obama*, 724 F.3d 170 (2d Cir. 2013) (No. 12-3176), 2012 WL 5464206 (C.A.2) (quoting Hon. Jeh Charles Johnson, General Counsel, U.S. Dep’t of Def., “The Conflict Against Al Qaeda and its Affiliates: How Will It End?,” Speech Before the Oxford Union (Nov. 30, 2012), available at <http://www.lawfareblog.com/2012/11/jeh-johnson-speech-at-the-oxford-union/> [<http://perma.cc/2UX5-YU3A>]). However, the quoted passage went on to state: “[T]he AUMF authorized the use of necessary and appropriate force against the organizations and persons connected to the September 11th attacks—al Qaeda and the Taliban—without a geographic limitation,” a broader description that calls into question the spatial limitations implied by “entered the fight alongside al Qaeda.” *Id.*

23. Curtis A. Bradley & Jack L. Goldsmith, *Congressional Authorization and the War on Terrorism*, 118 HARV. L. REV. 2047, 2112–13 (2005).

24. Indeed, the AUMF notwithstanding, the United States would be justified under international self-defense principles in using force against persons or organizations posing an imminent threat to U.S. personnel, subject to the principles of necessity and proportionality.

25. Daskal & Vladeck, *supra* note 19, at 123 (“[T]he Executive Branch has . . . refused to publicly acknowledge what groups qualify as associated forces . . .”).

tacks, and increasingly with no apparent connection to any imminent threat to the United States (using a normal understanding of the term imminent).<sup>26</sup>

Does the shoehorning of all these various groups and individuals into the AUMF make U.S. drone strikes against them clearly “unlawful?” That is a stronger claim than I am prepared to make; the “associated forces” argument has a facial plausibility. But we are assuredly stretching the law here.

For most of our history, Congress has rightly been vigilant against executive usurpation of its constitutional prerogatives.<sup>27</sup> But over the last few years, Congress has sat by idly, allowing the executive branch to stretch the 2001 AUMF beyond all recognition. This is not a partisan issue at all, by the way; this is an issue of political cowardliness on the part of both parties, and frankly, the Democrats have been every bit as bad as the Republicans.

To be clear, saying that many recent U.S. drone strikes do not seem to fit well under the AUMF umbrella is not the same as saying that the President lacks any constitutional authority to use force in the absence of express congressional authorization. I think there is no question that with or without an AUMF, the President clearly has the inherent constitutional power to use force against an imminent threat to the United States, no matter where and from whom it comes.<sup>28</sup> Nonetheless, I think that that is a power that U.S. presidents have, generally speaking, used rarely (and for the most part wisely, with some notable exceptions). Here too, the secret drone war is perhaps best understood as falling into the “lawful but awful” category. The use of force without clear, ongoing congressional authorization

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26. See Michael Isikoff, *Justice Department memo reveals legal case for drone strikes on Americans*, NBC NEWS (Feb. 4, 2013, 5:57 PM), [http://investigations.nbcnews.com/\\_news/2013/02/04/16843014-justice-department-memo-reveals-legal-case-for-drone-strikes-on-americans?lite](http://investigations.nbcnews.com/_news/2013/02/04/16843014-justice-department-memo-reveals-legal-case-for-drone-strikes-on-americans?lite) [http://perma.cc/CC23-RTDG] (citing DOJ white paper stating: “The condition that an operational leader present an ‘imminent’ threat of violent attack against the United States does not require the United States to have clear evidence that a specific attack on U.S. persons and interests will take place in the immediate future”).

27. See, e.g., Michael P. Kelly, *Fixing the War Powers*, 141 MIL. L. REV. 83, 84 (1993) (addressing historical context of decades of discontent over presidential usurpation of war powers that led to War Powers Resolution).

28. David Abramowitz, *The President, The Congress, and Use of Force: Legal and Political Considerations in Authorizing Use of Force Against International Terrorism*, 43 HARV. INT’L L.J. 71, 78 (2002) (“The Constitution is not a suicide pact, and the President has unchallenged authority to prevent an imminent threat to the United States.”).

should be the exception, not the norm. In recent years, however, the executive branch has normalized the use of force against an ever-expanding and ever more nebulous and geographically unbounded threat.<sup>29</sup> This, I think, is dangerous.

Recall that the United States is usually credited with the first modern codification of the rules of armed conflict.<sup>30</sup> In 1863, President Abraham Lincoln signed General Order #100, “Instructions for the Government of Armies of the United States in the Field” — better known as the Lieber Code — outlining the core rules of armed conflict with which he expected the Union Army to comply. In Article 29, the Lieber Code makes a bold declaration: “Peace is [the] normal condition; war is the exception. The ultimate object of all modern war is a renewed state of peace.”<sup>31</sup>

One might argue that the kinds of threat we face now just do not lend themselves to such a neat distinction between war and peace. I would agree. Nonetheless, this is no reason to throw all of our own democratic checks and balances out the window, or to throw rule-of-law principles out the window. On the contrary: If the lines between what we have traditionally understood as “war” and “peace” are blurring, this is all the more reason to insist on the active engagement of Congress in decisions about the use of force.

## II. THE RULE OF LAW

If the secret drone war poses challenges to our domestic system of democratic checks and balances, it poses similar challenges to the international law of armed conflict and to core international rule of law norms.

Here again, the issue is not one of manifest illegality:<sup>32</sup> From an international law perspective, the United States has justified

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29. See, e.g., Johnson, *supra* note 22 (“[T]he AUMF authorized the use of necessary and appropriate force against the organizations and persons connected to the September 11th attacks—al Qaeda and the Taliban—without a geographic limitation.” (emphasis added)); Isikoff, *supra* note 26 (“imminent threat” does not require “clear evidence that a specific attack on U.S. persons and interests will take place in the immediate future”).

30. Ingrid Brunk Wuerth, *Authorizations for the Use of Force, International Law, and the Charming Betsy Canon*, 46 B.C. L. REV. 293, 334 (2005).

31. General Orders No. 100 art. 29 (April 24, 1863), available at [http://avalon.law.yale.edu/19th\\_century/lieber.asp](http://avalon.law.yale.edu/19th_century/lieber.asp) [<http://perma.cc/BB5Q-AS9C>].

32. I have discussed this issue in greater detail elsewhere. See, e.g., Rosa Brooks, *Duck-Rabbits and Drones: Legal Indeterminacy and Targeted Killing*, 25 STAN. L. &



strikes outside of hot battlefields on the theory that since September 11, the United States has been in an armed conflict against Al Qaeda, the Taliban and associated forces. The U.S. reading of the international law of armed conflict strikes me as perfectly plausible (though it is far from the *only* plausible reading of the law of armed conflict). It seems reasonable to view the September 11 attacks as an act of war, given the scale of death and destruction; I cannot see any logical reason to argue that armed conflicts can only exist between states. That makes no particular sense in today's world.

That being said, the U.S. decision to conceptualize U.S. relations with Al Qaeda as an "armed conflict," though plausible, was not inevitable as a legal or policy matter. The United States could have used military force to respond to the September 11 attacks under the international law of self-defense without choosing to declare the exchange of hostilities an "armed conflict."<sup>33</sup> The decision to view this as an armed conflict was a policy choice, not a decision somehow dictated by the law. Indeed, from an historical perspective it was in some ways a rather odd choice: As my Georgetown colleague Laura Donohue has noted, most governments have historically been quite reluctant to place attacks by insurgent groups or terror groups under the rubric of armed conflict, for fear of legitimizing these groups.<sup>34</sup> Why give mass murderers such a soap box to stand upon? Calling Al Qaeda a combatant in war against the United States gave Al Qaeda a certain international prestige, and arguably helped it gain new recruits and funding.<sup>35</sup>

Nonetheless, leaving aside the policy wisdom of calling this an armed conflict, from a strictly legal perspective, it was plausible for the Bush administration to argue that the law of armed conflict should apply to U.S. efforts to combat Al Qaeda. Unfortunately,

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POL'Y REV. 301 (2014); Rosa Brooks, *Drones and the International Rule of Law*, 28 J. ETHICS & INT'L AFF. 83 (2014).

33. See U.N. Charter art. 51; Military and Paramilitary Activities in and Against Nicaragua (Nicar. v. U.S.), 1986 I.C.J.14, ¶ 193 (June 27).

34. See LAURA K. DONOHUE, THE COST OF COUNTERTERRORISM: POWER, POLITICS, AND LIBERTY 7–10 (2008).

35. See Dana Priest & Josh White, *War Helps Recruit Terrorist, Hill Told: Intelligence Officials Talk of Growing Insurgency*, WASH. POST, Feb. 17, 2005, <http://www.washingtonpost.com/wp-dyn/articles/A28876-2005Feb16.html> [<http://perma.cc/7ZZL-FQJP>].

the claim that the law of armed conflict is the applicable legal framework gave rise to far more problems than it resolved.

There is, for instance, no obvious spatial boundary to an armed conflict with Al Qaeda. Since Al Qaeda is not a state, and its members plan, train, and act in numerous different states, it is hard to know the *places* in which the law of armed conflict applies.<sup>36</sup> Presumably, if we accept the notion of an armed conflict with a geographically diffuse non-state actor to begin with, the armed conflict—and thus the law of armed conflict’s permissive rules relating to the use of lethal force—travels with Al Qaeda members (and their “associates”).<sup>37</sup>

This certainly appears to be the U.S. government’s theory: The law of war follows the enemy. Again, this is not an implausible way to interpret that law—but its implications are frightening. If the armed conflict (and thus the law of armed conflict) exists wherever Al Qaeda or an Al Qaeda associate goes, the whole world is potentially a battlefield.

There are also no obvious temporal boundaries to an armed conflict with Al Qaeda and its associates. When a war with Al Qaeda can morph so easily into a war with all its “associates,” many of whom operate within decentralized, non-hierarchical groups, how can the war ever “end?” But as I noted in the context of the AUMF, if we accept a conflict with no apparent spatial or temporal boundaries, we give to our executive branch a virtually open-ended ability to use lethal force, anywhere, any time.<sup>38</sup>

Needless to say, it is also difficult to distinguish between those who can and cannot lawfully be targeted in an armed conflict with Al Qaeda and its associates. What precisely does it mean to be a combatant in such a non-traditional conflict? Are there members, or associates, or affiliates of Al Qaeda who would *not* be considered combatants, and thus must not be targeted under the laws of armed conflict? If so, who are those people? How do we define “civilian” in the context of a conflict with such a pro-

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36. See Jeremy Shapiro, *The Foreign Policy Essay: Your Enemy Has a Name—How the “Al Qaeda” Label is Leading U.S. Policy Astray*, LAWFARE (July 13, 2014, 10:00 AM), <http://www.lawfareblog.com/2014/07/the-foreign-policy-essay-your-enemy-has-a-name-how-the-al-qaeda-label-is-leading-u-s-policy-astray/> [<http://perma.cc/3977-HTL6>].

37. See Rosa Ehrenreich Brooks, *War Everywhere: Rights, National Security Law, and the Law of Armed Conflict in the Age of Terror*, 153 U. PA. L. REV. 675, 745–46 (2004).

38. *Id.* at 745–46.

tean non-state group? What constitutes “hostilities,” and what does it mean for a civilian to participate directly in hostilities?

In an armed conflict with a geographically diffuse, non-hierarchical non-state actor, we have no coherent or principled basis for answering any of these questions. This matters. It has implications for sovereignty, and implications for rights; after all, once we are in an armed conflict framework, many things that we consider illegal and immoral when we are *not* in an armed conflict become things that we consider legal and moral—indeed, even ethically required. When there is no armed conflict, you cannot go out on the street and kill the next person you see simply because you think he is your enemy. When there is an armed conflict, the rules change dramatically.<sup>39</sup> This is the rule-of-law conundrum raised by the U.S. drone war: The character of U.S. drone strikes changes utterly, depending on which set of legal syllogisms you deem most plausible, yet there is no principled basis for picking one set of syllogisms over another.

If you accept that the United States is in an armed conflict with Al Qaeda and its “associates”—and you accept that “associates” is a fairly broad category, encompassing not only those organizations and individuals who have formally sworn allegiance to Al Qaeda but also all those whose activities appear coordinated with Al Qaeda or whose interests appear to align with Al Qaeda—and if you accept that the law of armed conflict travels wherever Al Qaeda and its associates travel—and that many individuals who do not look much like traditional combatants are still combatants for legal purposes—then drone strikes targeting assorted militants in Pakistan, Yemen, or Somalia constitute lawful wartime strikes against legitimate enemy targets.<sup>40</sup>

If you reject any of the steps in that chain of syllogisms, however—if you reject the armed conflict frame to begin with, or the broad understanding of associated forces, or the notion that

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39. See generally Hague Convention IV Respecting the Laws and Customs of War on Land, Oct. 18, 1907, available at <http://www.icrc.org/ihl/INTRO/195> [<http://perma.cc/P482-94XY>]; see also Ryan J. Vogel, *Drone Warfare and the Law of Armed Conflict*, 39 DENV. J. INT'L L. & POL'Y 101, 110 (2010).

40. John Brennan, Assistant to the President for Homeland Sec. and Counterterrorism, *The Ethics and Efficacy of the President's Counterterrorism Strategy*, (April 30, 2012), available at <http://www.wilsoncenter.org/event/the-ethics-and-ethics-us-counterterrorism-strategy> [<http://perma.cc/KZ9M-LSR3>].

the rules of armed conflict apply in any place the enemy goes, for instance—then U.S. drone strikes look like simple murder.<sup>41</sup>

How should we decide which category U.S. drone strikes fit into? Conceptually, this is a hard problem to begin with—and it is rendered still harder by the utter lack of transparency surrounding U.S. strikes. If we (and the rest of the world) do not know how many strikes there have been, how many people have been targeted, the reasons and evidence behind U.S. targeting decisions, where the strikes have occurred, and so on, how can we even *begin* to evaluate the legality, morality, or strategic wisdom of these strikes?

I do not for one moment doubt the good faith of the U.S. government officials making the decisions on drone strikes. But at the end of the day, all that good faith notwithstanding, we now have a state of affairs in which our government—the government of a nation that was founded on the premise that all men are created equal, and endowed by their creator with certain unalienable rights, including the rights to life and liberty—is claiming for itself the unreviewable power to kill any person, anywhere on earth, at any time, based on information that is secret and has been collected and evaluated according to secret criteria by anonymous individuals in a secret procedure.<sup>42</sup>

If you think this is consistent with core rule-of-law norms, I urge you to go back and reread the Declaration of Independence. Go back and take a close look at the legal and ethical tradition that this nation was founded upon. The core notion of the rule of law is that all power must be constrained by law; even the state must be accountable to those it acts upon.<sup>43</sup> If we truly believe in those “unalienable rights”—human rights, we would call them today—the lack of transparency and accountability characterizing U.S. drone strikes should chill us to the bone.

It is of course true, as Michael Paulsen has observed, that an abuse is possible in *any* system of government, and one cannot

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41. See Benjamin Hart, *Jeremy Scahill Says Obama Strikes In Yemen Constitute 'Murder'*, HUFFINGTON POST (June 3, 2012, 12:30 AM), [http://www.huffingtonpost.com/2012/06/02/jeremy-scahill-says-drone-strikes-murders\\_n\\_1565441.html](http://www.huffingtonpost.com/2012/06/02/jeremy-scahill-says-drone-strikes-murders_n_1565441.html) [<http://perma.cc/WTZ3-H5FX>].

42. See Paul D. Miller, *When will the U.S. drone war end?*, WASH. POST, Nov. 17, 2011, [http://www.washingtonpost.com/opinions/when-will-the-us-drone-war-end/2011/11/15/gIQAZ677VN\\_story.html](http://www.washingtonpost.com/opinions/when-will-the-us-drone-war-end/2011/11/15/gIQAZ677VN_story.html) [<http://perma.cc/NX4G-N4EX>].

43. THE DECLARATION OF INDEPENDENCE para. 2 (U.S. 1776).

simply say that just because abuse is *possible*, a particular system of government is wrong.<sup>44</sup> But I would suggest that in some systems, abuse is much more likely than in other systems. Right now, we are in a situation in which the possibility of abuse has gone up dramatically.

### III. STRATEGIC CONSIDERATIONS

I have argued that the U.S. drone war undermines our domestic system of checks and balances, tipping an uncomfortable amount of power to the executive branch. I have also argued that it is difficult to apply the law of armed conflict in a coherent or principled way to terrorist organizations we currently face, and that the lack of transparency and accountability surrounding U.S. drone strikes combines with this fundamental legal uncertainty to undermine core rule-of-law norms. But there is yet another reason to consider the U.S. drone war problematic: It is strategically foolhardy. U.S. drone strikes outside of traditional battlefields may achieve near-term tactical gains, but they also create substantial strategic risk.<sup>45</sup>

Consider, for one thing, the precedent we are setting. I look at my former colleagues in the military, Department of Defense, and the intelligence community, and I think they are good people, acting in good faith. Despite my rule-of-law concerns, I trust them to act carefully and responsibly, doing their best to avoid mistakes and not abuse their power. But there are a lot of other people in the world whom I do not trust at all, and when the U.S. asserts a unilateral right to use force in a secretive and unaccountable way, we must consider that we are essentially handing every repressive and unscrupulous regime a playbook for how to violate sovereignty and get away with murder.

Imagine how we would respond if Vladimir Putin decided to engage in an expanded drone strike campaign against political critics living outside of Russia's borders. U.S. authorities would protest, of course, and insist on the importance of free expression,

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44. See Michael Stokes Paulsen, *The War Power*, 33 HARV. J.L. & PUB. POL'Y 113, 137 (2010).

45. STIMSON CTR., RECOMMENDATIONS AND REPORT OF THE TASK FORCE ON US DRONE POLICY 10 (2014), available at <http://www.stimson.org/books-reports/recommendations-and-report-of-the-stimson-task-force-on-us-drone-policy/> [<http://perma.cc/GLE6-4NNJ>].

due process, and human rights. But Putin would presumably respond by taking a leaf from our book: He would refuse to confirm or deny any Russian strikes, while insisting that any Russian strikes that might or might not have occurred complied with all applicable law, and that any targeted persons were terrorists posing an imminent threat to Russian national security. The United States would demand evidence of this—but once again, Putin could simply echo the United States: It's classified. Sorry.

And what could we say? Let's not kid ourselves: Do not imagine that the legal arguments that the United States is now making will not come back and bite us in the future. In fact, Putin has promised as much, in a context that is slightly different, but not entirely unrelated. Back when the United States recognized the unilateral declaration of independence made by Kosovo, Putin was unhappy; he argued that U.S. decision to disregard what Russia saw as Serbia's right to sovereignty threatened to "blow apart the whole system of international relations," and he warned that those states that had opted to recognize Kosovar independence should understand that their decision "is a two-sided stick, and the second end will come back and hit them in the face."<sup>46</sup> That particular two-sided stick has already been deployed by the Russians in the context of Ukraine and Crimea<sup>47</sup>—and we should expect something similar with regard to U.S. legal arguments justifying on targeted killings.

We need to ask ourselves this: Do we want to live in a world in which every state considers itself to have a legal right to kill people in other states, secretly and with no public disclosure or due process, based on its own unilateral assertions of national security prerogatives? Is it consistent with U.S. interests to usher in such a world? This is fundamentally a policy question, not a legal question.

The legal precedents we are currently setting risk undermining the fragile norms of sovereignty and human rights that help

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46. *Putin calls Kosovo independence 'terrible precedent'*, THE SYDNEY MORNING HERALD, Feb. 23, 2008, <http://www.smh.com.au/news/world/putin-calls-kosovo-independence-terrible-precedent/2008/02/23/1203467431503.html> [http://perma.cc/QC2A-TR3D].

47. Vladimir Putin, President, Address to joint session of Russian parliament (Mar. 18, 2014) in Julia Percha, *Transcript: Putin says Russia will protect the rights of Russians abroad*, WASH. POST, Mar. 18, 2014, [http://www.washingtonpost.com/world/transcript-putin-says-russia-will-protect-the-rights-of-russians-abroad/2014/03/18/432a1e60-ae99-11e3-a49e-76adc9210f19\\_story.html](http://www.washingtonpost.com/world/transcript-putin-says-russia-will-protect-the-rights-of-russians-abroad/2014/03/18/432a1e60-ae99-11e3-a49e-76adc9210f19_story.html) [http://perma.cc/EDJ7-UJ4V].

keep our world stable. But even beyond this, there is ample reason to doubt the strategic wisdom of U.S. targeted killings.<sup>48</sup> Recall former Defense Secretary Donald Rumsfeld's famous question during the Iraq war: Are we creating new terrorists faster than we can kill them?<sup>49</sup> This is the profound strategic question we need to ask about the U.S. targeted killing program today. For every U.S. drone strike that kills a terrorist, are we inspiring two new terrorist recruits? Are we alienating populations and governments whose support and cooperation we may need? Are our tactical successes leading to enduring strategic gains in our efforts to battle violent extremist groups, or are they actually undermining our longer-term security goals?

It is difficult to answer these questions definitively, but I think that growing evidence suggests that the expansive U.S. targeted killing program may simply be making our problems worse. Numerous senior military and intelligence officials have raised these same questions.<sup>50</sup> Can we really hope to kill our way out of a complex geo-political problem, one bad guy at a time? Today, Al Qaeda Central is no longer the threat it once was—but it has been replaced by new groups and new enemies, some amorphous, some increasingly centralized and lethal.<sup>51</sup> As I write, an Al Qaeda offshoot so violent it was disowned by Al Qaeda itself has taken over large swathes of territory inside the borders of both Syria and Iraq, proclaiming an Islamic Caliphate; meanwhile, a resurgent Taliban is retaking territory in Afghanistan's

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48. STIMSON CTR., *supra* note 45, at 9.

49. Dave Moniz & Tom Squitier, *After grim Rumsfeld memo, White House supports him*, USA TODAY, Oct. 22, 2003, [http://usatoday30.usatoday.com/news/washington/2003-10-22-defense-memo-usat\\_x.htm](http://usatoday30.usatoday.com/news/washington/2003-10-22-defense-memo-usat_x.htm) [<http://perma.cc/KQA7-42PS>].

50. See STIMSON CTR., *supra* note 45, at 5, 10–11; David Alexander, *Retired general cautions against overuse of "hated" drones*, REUTERS, Jan. 7, 2013, <http://www.reuters.com/article/2013/01/07/us-usa-afghanistan-mcchrystal-idUSBRE90608020130107> [<http://perma.cc/Y8V7-5U6K>]; Mark Mazzetti, *Use of Drones for Killings Risks a War Without End, Panel Concludes in Report*, N.Y. TIMES, June 26, 2014, [http://www.nytimes.com/2014/06/26/world/use-of-drones-for-killings-risks-a-war-without-end-panel-concludes-in-report.html?\\_r=1](http://www.nytimes.com/2014/06/26/world/use-of-drones-for-killings-risks-a-war-without-end-panel-concludes-in-report.html?_r=1) [<http://perma.cc/D5US-4XK4>].

51. U.S. DEP'T OF STATE, COUNTRY REPORTS ON TERRORISM 2013 EXECUTIVE SUMMARY 5 (2014), available at <http://www.state.gov/documents/organization/225050.pdf> [<http://perma.cc/MTD2-T75M>]; Jamie Crawford & Elise Labott, *Al Qaeda affiliate groups gaining strength, terror report says*, CNN, Apr. 30, 2014, <http://www.cnn.com/2014/04/30/world/global-terror-report/> [<http://perma.cc/52RZ-8SEU>].

Helmand Province.<sup>52</sup> It is too soon to say if these efforts will be rolled back once again—but if nothing else, the evolving and expanding threat posed by these groups suggests that U.S. drone strikes are not achieving their strategic goals.

That is why “lawful but awful” strikes me as a fairly apt description of the expansive U.S. targeted killing program we have seen in recent years. Strategically, the U.S. targeted killing program is somewhere between unhelpful and downright self-destructive—and while it is not manifestly illegal, neither is it consistent with core rule-of-law values or democratic principles.

When a series of plausible legal propositions leads us to a situation in which we are so profoundly undermining core rule-of-law norms, it is time to admit that our legal framework is wholly inadequate. It is not doing the work we want it to do: It is not helping us draw some coherent lines to prevent the use of lethal force by states from becoming entirely unconstrained.

We can do better. We could have a good deal more transparency and accountability than we currently have. This may be hard, but it is certainly far from impossible. There is a false choice that gets set up, where those disinclined to change anything suggest that the choice is either unbounded state power or complete U.S. impotence in the face of even the gravest threats. I think that is plainly silly, and we need to reject such notions out of hand.

Remember, the laws of armed conflict—and indeed our own Constitution and laws—were not handed down by a divine power. Humans created the legal frameworks we now live with, and humans can change them. We do not need to simply accept a situation in which law no longer has any real ability to restrain state power. If we need a different legal framework that does a better job of imposing some meaningful constraints, while simultaneously reflecting the need for flexibility in the face of non-traditional threats, surely we are, collectively, smart enough to come up with something that does a better job than our current

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52. Nathan Hodge & Habib Khan Totakhil, *Afghan Troops Struggle to Retake Parts of Key Province from Taliban*, WALL ST. J., July 6, 2014, <http://online.wsj.com/articles/afghan-troops-struggle-to-retake-parts-of-key-province-from-taliban-1404670052> [<http://perma.cc/J2K4-YRQV>]; Sylvia Westall, *After Iraq gains, Qaeda offshoot claims Islamic “caliphate”*, REUTERS, June 29, 2014, <http://www.reuters.com/article/2014/06/29/us-syria-crisis-iraq-idUSKBN0F40SL20140629> [<http://perma.cc/F7KL-7ZG9>].



legal framework. And do not fall for claims that if you take away the AUMF, the executive branch would lack the power to protect the nation. That is also silly. In a true emergency, the President clearly has the constitutional power and the international law right to act.<sup>53</sup> The trick is this: How do we prevent the exception from swallowing up the norm altogether?

Let me end with a plea to keep current security threats in perspective. The United States and its residents have faced threat and danger many times in the past. The English pilgrims who settled in Massachusetts faced shipwreck, disease, and starvation in their quest for religious freedom; half were dead by the end of the first winter, but those who remained persevered.<sup>54</sup> American pioneers crossed the Rocky Mountains, traveling into the unknown in search of a better life; many did not make it.<sup>55</sup> In the middle of the Nineteenth Century, the Civil War killed more than 600,000 Americans.<sup>56</sup> Less than a century later, World War II killed more than 400,000 Americans.<sup>57</sup> If you adjust for population size, these were horrific death tolls—and yet, even in the face of these existential threats, we did not decide that we needed to give the executive branch wholesale authorization to use force against anyone, anywhere, anytime, permanently, without spatial or temporal limitations.

Today, terrorism is a real threat. Al Qaeda is scary, and so are its offshoots, affiliates, associates, and the emerging extremist groups it has inspired. But as I said, we need to keep the current threat in perspective. Yes, we should be vigilant, particularly to ensure that terrorist groups (or irresponsible states) do not gain access to weapons of mass destruction. But we should also keep

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53. HAROLD C. RELYEA, CRS REPORT FOR CONGRESS, NATIONAL EMERGENCY POWERS 4 (2001), available at <http://fpc.state.gov/documents/organization/6216.pdf> [<http://perma.cc/9FTR-QX7P>].

54. William Bradford, OF PLYMOUTH PLANTATION (1656), reprinted in *Surviving the First Winter of the Plymouth Colony, 1620-1621*, NATIONAL HUMANITIES CENTER RESOURCE TOOLBOX, <http://nationalhumanitiescenter.org/pds/amerbegin/settlement/text1/BradfordPlymouthPlantation.pdf> [<http://perma.cc/6DB8-ZW92>] (last visited Aug. 10, 2014).

55. See ROBERT V. HINE & JOHN MACH FARAGHER, *THE AMERICAN WEST: A NEW INTERPRETIVE HISTORY* 185 (2000).

56. RUSSELL F. WEIGLEY, *A GREAT CIVIL WAR: A MILITARY AND POLITICAL HISTORY, 1861-1865*, at xv (2000).

57. ANNE LELAND & MARI-JANA OBOROCEANU, CONG. RESEARCH SERV., RL32492, *AMERICAN WAR AND MILITARY OPERATIONS CASUALTIES: LISTS AND STATISTICS 2* (2010).

in mind there has been no year except 2001 in which terrorism has killed more American citizens than lightning strikes.<sup>58</sup> In fact, you are twelve times more likely to suffocate accidentally in your own bed than you are to be killed by terrorism.<sup>59</sup>

This is not a reason to ignore or dismiss the threat of terrorism—but when a threat is distant and likely to be the exception, not the norm, let's not start handing over our freedoms wholesale. The executive has emergency powers that can be used if and when a specific and grave terrorist threat arises. But in the meantime, is the threat of terrorism really so grave that we are willing to toss 200-plus years of American values out the window?

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58. *Tots More Dangerous than Terrorists*, WASHINGTONSBLOG (June 12, 2013), <http://www.washingtonsblog.com/2013/06/youre-more-likely-to-be-killed-by-a-toddler-than-a-terrorist.html> [<http://perma.cc/V2T4-T3VQ>].

59. *Id.*