

ESSAY

Postwar

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Abstract

Does it really matter, from a legal perspective, whether the U.S. government continues to maintain that it is in an armed conflict with al Qaeda? Critics of the status quo regarding the use of lethal force and military detention tend to assume that it matters a great deal and that shifting to a postwar framework will result in significant practical change. Supporters of the status quo tend to share that assumption and oppose abandoning the armed-conflict model for that reason. But both camps are mistaken about this common premise. For better or worse, shifting from the armed-conflict model to a postwar framework would have far less of a practical impact than both assume.

First, consider lethal force. The Obama Administration has made clear that lethal force would remain on the table even under a postwar model, and more specifically that it would remain an option against “continuous” terrorist threats. This in itself is not surprising; the U.S. government took a similar position for decades preceding 9/11. What is surprising is the capaciousness of the continuous-threat framework and the extent to which it turns out to be consistent with the government’s existing approach to targeting even while the United States remains within the armed-conflict model. The capaciousness is not new. It was built into the continuous-threat model all along, in fact, as a review of key events in the 1980s and 1990s reveals. But the flexibility of the continuous-threat model was thoroughly obscured in the pre-9/11 period thanks to certain non-legal constraints,

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including, especially, the limited technology then available to carry out airstrikes in denied areas and the paucity of actionable intelligence. A variety of technological and institutional changes over the past dozen years—particularly the emergence of armed drones and the expansion of Central Intelligence Agency (“CIA”) and Joint Special Operations Command (“JSOC”) capabilities—have sharply eroded those constraints, altering what it would mean in practice to operate under the continuous-threat model once more. This helps explain why the government, though still maintaining the relevance of the armed-conflict model as a formal matter, has in fact already returned to the continuous-threat model as a matter of policy for operations outside of Afghanistan. There was relatively little cost to doing so in terms of operational flexibility, and by the same token there would be surprisingly little loss of operational flexibility should the underlying armed-conflict framework be abandoned.

The situation with respect to military detention is different, but only marginally so. The demise of the armed-conflict model will certainly matter for the dwindling legacy population at Guantánamo (and, perhaps, for a handful of legacy detainees in Afghanistan). It will not matter nearly so much for potential future detainees, however, for the simple reason that the United States long ago abandoned the business of taking on new detainees outside of Afghanistan. There are several reasons for the demise of long-term military detention as a policy option, including the fact that it has become unattractive compared to alternatives such as prosecution, the use of lethal force, and encouraging detention in the hands of other countries. The theoretical loss of legal authority to detain in the postwar period will have comparatively little real consequence in light of this larger dynamic.

None of this is an argument for or against declaring an end to the conflict with al Qaeda. The debate over that issue is badly distorted, however, by the shared and mistaken assumption that status quo targeting and detention policies depend on the armed-conflict model. Moving to postwar would not generate the sea change that advocates seek and opponents fear.

I. An Evening at the Oxford Union

The Oxford Union is a lovely place to give a speech. It has seen its share of major public figures over the years, with everyone from Margaret Thatcher to Michael Jackson dropping by to weigh in on the issues of the

day. It certainly suited the occasion when Jeh Johnson, then General Counsel of the U.S. Defense Department, appeared on a cold evening in late November 2012 to discuss “the conflict against al Qaeda and its affiliates,” as the bland title in the Union’s promotional tweets and posts had put it.¹

Johnson was not the first U.S. government lawyer to stand before a skeptical audience to defend the position that an armed conflict exists between the United States and al Qaeda. During the Bush Administration, State Department Legal Adviser John Bellinger had done precisely that in a speech delivered just down the road at Oxford University, and his Obama Administration successor, Harold Koh, had given a surprisingly robust defense of the proposition before a packed gathering of the American Society of International Law in 2010.² Several other Obama Administration officials had followed Koh with similar speeches, moreover, and Johnson himself had already given a few such talks.³ But tonight would be novel in an important respect. Johnson was not merely going to mount another rote

¹ See, e.g., Seung Yoon Lee, *Jeh Johnson: “The Conflict Against Al Qaeda and Its Affiliates” @ the Oxford Union*, FACEBOOK.COM (Nov. 26, 2012), <https://www.facebook.com/events/262801320509981/>.

² See John B. Bellinger, Legal Advisor to the U.S. Dep’t of State, Address at Oxford University: Prisoners in War: Contemporary Challenges to the Geneva Conventions (Dec. 10, 2007), available at <http://2001-2009.state.gov/s/l/2007/112723.htm>, [<http://perma.cc/GY2M-QU4W>]; Harold Koh, Legal Advisor to the U.S. Dep’t of State, Address at the Am. Soc’y of Int’l Law: The Obama Administration and International Law (Mar. 25, 2010), available at <http://www.lawfareblog.com/wp-content/uploads/2013/01/Speech-by-Harold-Hongju-Koh-State-Department-Legal-Adviser-at-the-Annual-Meeting-of-the-American-Society-of-International-Law-Mar-25-2010.pdf>.

³ See, e.g., John Brennan, Assistant to the President for Homeland Security & Counterterrorism, Address at Harvard Law School: Strengthening Our Security by Adhering to Our Values and Laws (Sept. 16, 2011), available at <http://www.whitehouse.gov/the-press-office/2011/09/16/remarks-john-o-brennan-strengthening-our-security-adhering-our-values-an>, [<http://www.perma.cc/0iWhQXcxMQi>]; John Brennan, Assistant to the President for Homeland Security & Counterterrorism, Address at the Woodrow Wilson Int’l Center for Scholars: The Ethics and Efficacy of the President’s Counterterrorism Strategy (Apr. 30, 2012), available at <http://www.wilsoncenter.org/event/the-ethics-and-ethics-us-counterterrorism-strategy>, [<http://perma.cc/UXJ7-5SZ6>]; Eric Holder, Attorney Gen., Dep’t of Justice, Address at Northwestern University School of Law (Mar. 5, 2012), available at <http://www.justice.gov/iso/opa/ag/speeches/2012/ag-speech-1203051.html>, [<http://perma.cc/QH37-XZJN/>]; Stephen Preston, Gen. Counsel, Cent. Intelligence Agency, Address at Harvard Law School: CIA and the Rule of Law (Apr. 10, 2012), available at <http://www.lawfareblog.com/2012/04/remarks-of-cia-general-counsel-stephen-preston-at-harvard-law-school/>, [<http://perma.cc/G7FF-DFCA>]; Jeh Charles Johnson, Gen. Counsel, Dep’t of Def., Address at Yale Law School: National Security Law, Lawyers, and Lawyering in the Obama Administration (Feb. 22, 2012), available at <http://www.lawfareblog.com/2012/02/jeh-johnson-speech-at-yale-law-school/>,

defense of the armed-conflict model. He also intended to foreshadow its demise and the corresponding prospect of a postwar era.

This was a risky move from a political perspective.⁴ It was an article of faith in some quarters that the U.S. government prior to 9/11 had responded to terrorism through a feckless combination of indictments, extradition requests, and *Miranda* warnings. From this perspective, 9/11 was a wakeup call that belatedly stirred America to adopt a more appropriate model—specifically, the armed-conflict model—thereby paving the way for the use of military detention without criminal charge, “enhanced interrogation techniques,” rendition, prosecution by military commission, and, of course, lethal force. And in those same quarters, it was equally assumed that the country in recent years had grown sleepy once again and was now at grave risk of reverting to a dangerous “pre-9/11 mindset.” For an Obama Administration official to speak publicly of the possibility of an end to the armed conflict with al Qaeda would be to invite criticism of precisely this kind, without even satisfying those who instead wished to see an immediate end to militarized approaches to counterterrorism.

So much easier to let sleeping dogs lie, then. Yet it was past time for a U.S. government official to acknowledge that the possibility of moving on to a “postwar” phase was more than merely theoretical. In the face of economic, political, and diplomatic pressure (or perhaps the better word is exhaustion), the United States was drawing down rapidly in Afghanistan.

[<http://perma.cc/66UD-HDR5>]. For a comprehensive treatment of these speeches, see BENJAMIN WITTES & KENNETH ANDERSON, *SPEAKING THE LAW* 1–16 (2013).

⁴ Jeh Johnson was an excellent choice to take this risk. A Morehouse man and graduate of Columbia Law School, he was widely-respected for his acumen and sober judgment. More importantly in this context, Johnson could not readily be depicted as a sheep in wolf’s clothing working from within the Administration to shut down the armed-conflict approach to counterterrorism. Over the past several years, a steady stream of media accounts had shed light on the internal legal debates that periodically emerged within the Obama Administration in connection with counterterrorism policy, particularly with respect to the use of military detention and lethal force. *See generally, e.g.*, DANIEL KLAIDMAN, *KILL OR CAPTURE: THE WAR ON TERROR AND THE SOUL OF THE OBAMA PRESIDENCY* (2012). These stories tended to depict Johnson as cautious yet more likely than certain other Administration lawyers—particularly Koh—to support the legality of using the military option. At any rate, no one could say he was holding down the left flank among the members of President Obama’s national security law team. Of course, it also did not hurt that Johnson already planned to retire from public service in the near future and hence did not have to worry quite so much about the personal political consequences his speech otherwise might have entailed.

And while there was talk of leaving some forces in that country to assist with training and possibly to conduct episodic counterterrorism missions, much as once had been said about the post-drawdown role of the United States in Iraq, the days of sustained combat operations in Afghanistan plainly were numbered by the fall of 2012. At the same time, the original post-9/11 enemy—al Qaeda—was undergoing its own transformation. Faced with unrelenting pressure from the United States and its allies, and driven by the logic of its own organizational structure and strategic preferences, al Qaeda for years had been fragmenting, with its core gradually ceding center stage to a profusion of co-branded affiliates with varied objectives and considerable operational independence.⁵

Taken together, these trends were making it ever less clear precisely where and with whom the United States was engaged in armed conflict. Just how the United States might move on to a postwar phase—and what might follow from this in terms of the policy and legal architectures of counterterrorism—were thus increasingly pressing questions. Johnson’s speech would be an important first step in suggesting answers.

After the usual opening pleasantries, Johnson took to the podium. He began in conventional fashion, defending the now-familiar proposition that the U.S. government remains engaged in an armed conflict with al Qaeda and its “associated forces.”⁶ Toward the end of the speech, however, he came around at last to the topic of war’s end.

No one seriously expects al Qaeda to participate in a peace treaty or surrender ceremony, Johnson acknowledged; its implacable ideological commitments would seem to foreclose that path.⁷ Nor is it realistic to expect the conflict phase to end based on the literal destruction of the enemy⁸—what the Romans called *debellatio*—in light of al Qaeda’s lack of a physical center of gravity, its fuzzy organizational and individual boundaries, and the

⁵ See Robert Chesney, *Beyond the Battlefield, Beyond al Qaeda: The Destabilizing Legal Architecture of Counterterrorism*, 112 MICH. L. REV. 163 (2013).

⁶ Jeh Charles Johnson, Gen. Counsel to the Pentagon, Speech at Oxford Union: The Conflict Against Al Qaeda and Its Affiliates: How Will It End? (Nov. 30, 2012), available at <http://www.lawfareblog.com/2012/11/jeh-johnson-speech-at-the-oxford-union/>, [<http://perma.cc/B4RX-U2BM>].

⁷ *Id.*

⁸ *Id.*

ease with which new persons and groups in any event could emerge to take up its name and cause. But there was another possibility, Johnson suggested.

The United States *had* enjoyed considerable success in its struggle with al Qaeda during the post-9/11 period. Eventually, Johnson asserted, there would come a “tipping point” beyond which al Qaeda and its affiliates might still remain in existence, yet would no longer have the practical capacity “to attempt or launch a strategic attack against the United States.”⁹ When that time arrived, the need to suppress al Qaeda’s remnants might still remain, yet it would no longer be appropriate to drape counterterrorism efforts in the mantle of armed conflict. “At that point,” Johnson explained, “we must be able to say to ourselves that our efforts should no longer be considered an ‘armed conflict’ against al Qaeda and its associated forces.”¹⁰ Instead, the governing rubric would be that of “a counterterrorism effort against *individuals*” who happened to be the “scattered remnants of al Qaeda,” or who were members of other, unaffiliated groups.¹¹ In such cases, “the law enforcement and intelligence resources of our government [would be] principally responsible, in cooperation with the international community.”¹²

This sounded very much like the law-enforcement-oriented scenario long feared by some on the right and long sought by some on the left. That is, it sounded like a vision of demilitarized counterterrorism, a literal return to what is widely understood to be the pre-9/11 paradigm. It is conventional wisdom among both supporters and critics of post-9/11 arrangements, after all, that the resort to military force for counterterrorism purposes depends as a legal matter on the continuation of the armed-conflict model. And had Johnson stopped there, his speech certainly would have been consistent with that keystone assumption. But he did not stop there. Immediately after describing the primacy of law enforcement and intelligence methods in a postwar phase, Johnson issued a brief but important caveat; even after the

⁹ *Id.* The phrase “strategic attack” is marvelously indeterminate. Which attacks, or series of attacks, would qualify for this label necessarily is a subjective matter, not the sort of thing one could or should expect to be determined judicially rather than politically.

¹⁰ *Id.*

¹¹ *Id.* (emphasis added).

¹² *Id.*

armed conflict with al Qaeda ended, “our military assets [should remain] available in reserve to address continuing and imminent terrorist threats.”¹³

What to make of this? Johnson plainly thought that something important turned on whether the tipping point had been reached. “‘War’ must be regarded as a finite, extraordinary and unnatural state of affairs,” he had intoned, adding that “we must not accept the current conflict, and all that it entails, as the ‘new normal.’”¹⁴ The obvious implication is that the postwar world would differ sharply from the status quo. Certainly that is the working assumption of many if not most participants in the current debate. But would things really be so different? Not so much as critics of the status quo assume and supporters of the status quo fear.

II. The Military Detention Option Is Largely Defunct Already

The question is more complicated than it seems. Plainly, it has a legal dimension. But a number of non-legal factors come into play as well, including domestic political considerations, the international diplomatic context, and even what we might call the balance of equities among institutions within the Executive Branch. Each of those also might be impacted in a significant way by adopting a postwar posture, and this Essay has much to say about that below. We begin, however, with the question of how moving to a postwar model would alter the prevailing legal architecture with respect to the most important manifestations of the armed-conflict model: the powers to kill and to detain.

A. The Armed-Conflict Model Matters for the Dwindling Group of Legacy Detainees

Consider detention first. Throughout the post-9/11 period, the legal architecture undergirding the U.S. government’s use of military detention has depended on a series of claims: that a state of armed conflict exists, that

¹³ *Id.* In a subsequent interview, Johnson reaffirmed that this residual authority did not depend on whether there existed an armed conflict with al Qaeda. “Even after an ‘armed conflict,’” Johnson said, “the president always has the constitutional authority to protect the nation and important national interests, by responding to individual terrorist threats, militarily or otherwise.” Jacob Gershman, *Law Blog Fireside: Jeh Johnson on War, Zero Dark Thirty, and Paul Weiss*, WALL ST. J. (Jan. 22, 2013), <http://blogs.wsj.com/law/2013/01/22/law-blog-fireside-jeh-johnson-on-terror-zero-dark-thirty-and-paul-weiss/>.

¹⁴ Johnson, Speech at Oxford Union, *supra* note 6.

the law of armed conflict (“LOAC”) therefore applies, and that LOAC rules permit detention without criminal charge for the duration of the conflict when it comes to at least some persons associated with the enemy. Each step in that chain of reasoning has been met with fierce objections from various quarters, but nonetheless this analysis has supported the government’s use of military detention for the past dozen years. And yet, despite the resilience of the government’s detention framework, it is not perpetually sustainable.

By definition, the authority the government has asserted will collapse once the underlying armed conflict ends. Moving to a postwar model thus unavoidably entails an end to the authority to continue to hold the last remaining military detainees in U.S. custody. Currently, that would mean the 164 remaining detainees at Guantánamo¹⁵ and the several dozen detainees still in U.S. custody in Parwan, Afghanistan.¹⁶ Of course, the U.S. government could plausibly continue to hold these individuals in military detention for a limited additional period upon the end of the armed-conflict stage, while unwinding their situations in a safe and orderly fashion.¹⁷ But such wind-up authority would be temporary at best.¹⁸ The government eventually would have no choice but to prosecute the detainees—an option

¹⁵ See Karen DeYoung, *Afghan war’s approaching end throws legal status of Guantánamo detainees into doubt*, WASH. POST (Oct. 18, 2013), http://www.washingtonpost.com/world/national-security/afghan-wars-approaching-end-throws-legal-status-of-guantanamo-detainees-into-doubt/2013/10/18/758be516-2d0a-11e3-97a3-ff2758228523_story.html, [<http://perma.cc/R6PT-NBTP>].

¹⁶ The United States continues to maintain custody of several dozen non-Afghan detainees at Parwan, notwithstanding a much-ballyhooed process through which detention operations otherwise (that is, in cases involving Afghan detainees) have been handed over to the government of Afghanistan. U.S. officials have declared their interest in ending this detention operation as well, but though the looming withdrawal of U.S. forces suggests this may be inevitable, it is not yet clear how the situation will be resolved. See Kevin Sieff, *In Afghanistan, a Second Guantánamo*, WASH. POST (Aug. 8, 2013), http://www.washingtonpost.com/world/in-afghanistan-a-second-guantanamo/2013/08/04/e33e8658-f53e-11e2-81fa-8e83b3864c36_story.html?hpid=z1, [<http://www.perma.cc/0uqw8sAbadG/>].

¹⁷ *In re Guantánamo Bay Detainee Litig.*, 581 F. Supp. 2d 33, 38 (D.D.C. 2008).

¹⁸ *Id.* (noting that “wind up” authority “ceases once (1) detention becomes effectively indefinite; (2) there is a reasonable certainty that the petitioner will not return to the battlefield to fight against the United States; and (3) an alternative legal justification has not been provided for continued detention”).

that lately seems viable for ever-fewer detainees¹⁹—transfer them to the custody of another country, or simply release them outright. Habeas review that already exists for Guantánamo detainees—and that most likely would soon be brought to bear for detainees in Afghanistan—would serve to enforce this outcome.²⁰

As to the small and dwindling population of military detainees remaining at Guantánamo and in Afghanistan, then, moving to the postwar era would have genuine legal consequences. Those consequences would surely be magnified in the public's eye, moreover, thanks to the media spotlight that shines perpetually on all things Guantánamo. The unwinding of detention there surely would be portrayed as an unmistakable sign of a sea change. Yet the legacy cases are only part of the story. When we turn our attention to what the postwar model would mean for *potential* detainees going forward, the extent to which such a change would actually matter is much less obvious.

B. The Decline of Detention

As an initial matter, consider that the Obama Administration has made clear since 2009 that it will not bring new detainees to Guantánamo, that Congress simultaneously has made clear its opposition to hosting detainees in the United States, that new detainees may not be brought into Afghanistan for holding in facilities there, and that there are no other long-

¹⁹ Cf. *The Lawfare Podcast Episode #23: Brig. Gen. Mark Martins on His Decision to Drop Standalone Conspiracy Charges Against 9/11 Defendants*, LAWFARE BLOG (Jan. 10, 2013), <http://www.lawfareblog.com/2013/01/the-lawfare-podcast-episode-23-brig-gen-mark-martins-on-his-decision-to-drop-standalone-conspiracy-charges-against-911-defendants/>, [<http://www.perma.cc/0eaUoyGkgwc/>] (describing implications of the D.C. Circuit's decision in *Hamdan v. United States*, which rejected an attempt to prosecute detainee on "material support" grounds for conduct pre-dating 2006).

²⁰ The existence of habeas jurisdiction at Guantánamo would ensure some role for the courts in policing the unwinding of detention authority there, though the D.C. Circuit's mixed experience with the release of Uighur detainees at Guantánamo provides reason to manage one's expectations as to how hard courts would push in circumstances involving diplomatic obstacles to release. See, e.g., *Kiyemba v. Obama*, 555 F.3d 1022, 1031 (D.C. Cir. 2009) (refusing to direct the government to release into the United States a detainee who had prevailed in habeas but had not yet been released). Habeas does not similarly extend to Parwan detainees at this time, but that very likely would change in the event that the government were to perpetuate its custody of non-Afghan detainees there substantially past the point in time when the armed-conflict phase of the conflict might be declared over. Cf. *Maqaleh v. Gates*, 605 F.3d 84, 98–99 (D.C. Cir. 2010) (declining habeas jurisdiction while holding out the prospect of a different result in the event of different circumstances).

term detention facilities available.²¹ So long as these conditions hold, the existence or absence of detention authority based on the law of armed conflict is entirely academic for persons not already in custody. Of course, perhaps something could change. A future administration might feel differently about Guantánamo, for example. But might there be larger factors, applicable across administrations, suggesting that new long-term detainees nonetheless would be few and far between? In fact, there are several.

Let us begin by noting that the bulk of Guantánamo's growth occurred between 2002 and 2004, peaking in 2004 at approximately 660 detainees.²² After that, it began shrinking, reaching 164 detainees as of the end of August 2013.²³ True, some additional detainees did arrive between 2005 and early 2008, but the pace declined over time and ground to a halt early in the last year of the Bush Administration; the last individual brought there, Muhammed Rahim al-Afghani, arrived in March 2008.²⁴

This slowdown was inevitable for various reasons. Most obviously, there just were not as many people who might be detained in the first place once a few years had gone by after 9/11. The circumstances of the immediate post-9/11 period were unique from this perspective. Both al Qaeda and the Taliban were concentrated in Afghanistan in the fall of 2001 and operated relatively openly there. The U.S. invasion of Afghanistan drove both groups from the field, providing opportunities for large numbers of captures both within Afghanistan and in Pakistan (including, alas, captures of persons who were not actually linked to either group). It was never likely that the pace of captures that occurred under those circumstances could be perpetuated beyond a year or two; only the

²¹ This dilemma was summarized by Admiral William McRaven during his testimony before the Senate Armed Services Committee in June 2011. See *Nominations Before the Senate Armed Servs. Comm.*, 112th Cong. 359 (2011) (statement of VADM William H. McRaven, USN, to be Admiral and Commander, U.S. Special Operations Command), available at https://www.fas.org/irp/congress/2011_hr/sasc-nom.pdf.

²² *By the Numbers*, MIAMI HERALD (Aug. 12, 2013), <http://www.miamiherald.com/2013/08/12/322461/by-the-numbers.html>, [<http://www.perma.cc/0okDCpJHUcz>].

²³ News Release, U.S. Dep't of Def., Detainee Transfer Announced (Aug. 29, 2013), <http://www.defense.gov/releases/release.aspx?releaseid=16235>, [<http://www.perma.cc/0U4Jn6ERqbk/>].

²⁴ Ben Fox, *Mohammed Rahim al-Afghani, Guantánamo Bay Prisoner, Sends Quirky Letters*, HUFF. POST (Dec. 31, 2012), http://www.huffingtonpost.com/2012/12/31/mohammed-rahim-al-afghani_n_2389243.html, [<http://www.perma.cc/0sGNPTDd8TA/>].

emergence of new conflict zones with large-footprint combat deployments could result in comparable occasions for detention on a high-volume basis, as events in Afghanistan and Iraq would illustrate. The erosion of al Qaeda's leadership core and the geographic shift of its center of gravity (from an overt, concentrated grouping in Afghanistan to a dispersed, gone-to-ground network with elements in areas such as Pakistan, Yemen, and Somalia) meant that the flow of new detainees to Guantánamo was bound to drop off sharply even if no other factors emerged to push against using the facility.

Of course, other such factors *did* emerge. The political and diplomatic costs of using Guantánamo increased over time, to the point that President George W. Bush himself frequently referred to the desirability of shuttering the facility by the end of his time in office, and 2008 Republican presidential candidate John McCain likewise endorsed closure. Simultaneously, the pressure to rely on U.S.-administered military detention dropped off to some extent for several reasons. In part this had to do with the fact that the interrogation programs facilitated by that detention had become known to the public and extraordinarily controversial. And in part it had to do with the increasing attractiveness of alternative dispositions that could provide incapacitation with less legal, political, and diplomatic friction. First, the domestic criminal justice system in the United States expanded both its substantive reach and its procedural flexibility in terrorism-related cases, and the Justice Department's mounting record of success in a long line of terrorism-related cases helped establish the reliability of that approach.²⁵ Second, there has long been the option of taking advantage of the willingness of another country to take custody of a particular individual, either with or without U.S. assistance in capturing the person, and that approach has continued in more recent years.²⁶ At any rate, as U.S.-administered detention grew more controversial, it likewise grew more appealing to have some other country do the honors whenever this

²⁵ See generally RICHARD B. ZABEL & JAMES J. BENJAMIN, JR., IN PURSUIT OF JUSTICE: PROSECUTING TERRORISM CASES IN FEDERAL COURT (2008), available at <http://www.humanrightsfirst.org/wp-content/uploads/pdf/080521-USLS-pursuit-justice.pdf>.

²⁶ See, e.g., Eli Lake, *Somalia's Prisons: The War on Terror's Latest Front*, THE DAILY BEAST (June 27, 2012), <http://www.thedailybeast.com/articles/2012/06/27/somalia-s-prisons-the-war-on-terror-s-latest-front.html>, [<http://www.perma.cc/0Lkr3F4ioXK/>] (reporting more than a dozen persons transferred into Somali custody by U.S. forces since 2009). Of course, there may be a very fuzzy line between circumstances in which another country is affirmatively interested in taking custody of such a person and circumstances in which another country instead is induced to take such a step.

might be a reliable option, sufficiently likely to address U.S. security concerns. Third, some have suggested that the expanding practical capacity to carry out lethal strikes via drone has also played a role in disincentivizing detention,²⁷ though in fairness it remains to be demonstrated that drone strikes have been used with any frequency in circumstances where a capture operation truly was a reasonable alternative (and the Obama Administration has vigorously denied doing so).²⁸

There was more. The wave of habeas litigation generated by detention at Guantánamo grew increasingly complex over the years, becoming a *cause célèbre* at the center of intense media scrutiny. Things then boiled over in the summer of 2008 with the Supreme Court's *Boumediene* ruling, which established at last that the detainees could litigate their claims on both legal and evidentiary grounds.²⁹ This launched years' worth of intensive litigation across dozens of cases—litigation that continues to this day—with the government responding to discovery requests, haggling over the disclosure of classified information, and, ultimately, having to prove the factual basis for particular detentions in federal court.³⁰ Whether this process ultimately tilts substantially in the government's favor has generated much debate; some critics take the view that, in the end, it is an exceedingly—excessively—deferential system.³¹ The fact remains, however, that nothing in the history of warfare compares to it in terms of its procedural and logistical demands. On that dimension, it necessarily makes detention at Guantánamo less appealing to the government, though one might argue that the legitimacy that such judicial

²⁷ See, e.g., Editorial Board, *Wishful Thinking on the War on Terror*, WASH. POST (Aug. 5, 2013), http://www.washingtonpost.com/opinions/wishful-thinking-on-the-war-on-terror/2013/08/05/3485e982-fde3-11e2-9711-3708310f6f4d_story.html, [<http://www.perma.cc/0fAMk4dm3RR/>] (speculating that President Obama's opposition to holding prisoners in long-term custody may have contributed to an increase in the use of lethal force in recent years).

²⁸ Brennan, Address at Harvard Law School, *supra* note 3.

²⁹ *Boumediene v. Bush*, 553 U.S. 723, 788, 790 (2008).

³⁰ See, e.g., Benjamin Wittes et al., *The Emerging Law of Detention 2.0: The Guantánamo Habeas Cases as Lawmaking* (Apr. 2012), http://www.brookings.edu/~media/research/files/reports/2011/5/guantanamo%20wittes/05_guantanamo_wittes.pdf, [<http://www.perma.cc/0LYECcXsXTP/>].

³¹ See, e.g., Clive Stafford Smith, *Federal Courts Reject Virtually All Habeas Petitions from Gitmo: Study*, THE DAILY BEAST (May 13, 2012), <http://www.thedailybeast.com/articles/2012/05/13/federal-courts-reject-virtually-all-habeas-petitions-from-gitmo-study.html>, [<http://www.perma.cc/0QmX1SYmrk9/>].

review can confer is well worth the candle in circumstances such as this in which there is a manifest and persistent risk of false positives.³² Meanwhile, Congress eventually did its part to reduce Guantánamo's appeal to the Executive Branch, albeit unintentionally, when it decided to impose draconian constraints on the discretion of the Commander-in-Chief to release or transfer detainees who are taken there.³³

The picture is made still more complicated by the increasing marginalization of the core al Qaeda network in favor of regional "affiliates" and independent-but-like-minded groups and individuals. This shift matters in part because the government's detention model rests on the claimed existence of an armed conflict with al Qaeda, and the shift makes it harder to determine whether particular individuals are part of that conflict in a relevant sense in the first place. And it matters in part because the government's detention model also rests, from a domestic separation of powers perspective, on the applicability of the 2001 Authorization for Use of Military Force and the National Defense Authorization Act for Fiscal Year 2012, which likewise are harder to connect to a given individual's circumstances in light of these larger changes. Even if we assume that there are persons whom the government would want to hold and could actually capture, in a growing set of circumstances it is hardly obvious that detention authority exists even now.

The upshot of all this is clear. The long-term military detention option has largely ceased to matter in actual practice other than in connection with the small legacy populations at Guantánamo and Parwan.³⁴ Shifting to a postwar legal architecture would indeed matter a great deal for those legacy cases, but it would hardly matter at all when it comes to the potential detention of those not already in custody.

³² See generally JACK GOLDSMITH, *POWER AND CONSTRAINT: THE ACCOUNTABLE PRESIDENCY AFTER 9/11*, Chapter 6 (2012).

³³ Cf. Michael John Garcia et al., *Closing the Guantánamo Detention Center: Legal Issues*, Congressional Research Service (May 30, 2013), at 9–25, <https://www.fas.org/spp/crs/natsec/R40139.pdf>, [<http://www.perma.cc/0okTxbXuUF/>].

³⁴ This Essay certainly does not mean to suggest that there will never be new occasions for the use of military detention. Sooner or later, the United States will have a significant new boots-on-the-ground combat deployment overseas, and detention no doubt will be part of it as in all past wars. Cf. BENJAMIN WITTES, *DETENTION AND DENIAL: THE CASE FOR CANDOR AFTER GUANTANAMO* 103–10 (2011) (pointing out that it would be foolish to assume we will never again be in such a position, and that we will in that case almost certainly have to—and should—resort to military detention on a substantial scale).

III. Lethal Force, Continuous Threats, and the Surprising Pre-9/11 Framework

Would shifting to a postwar framework impact the status quo regarding the use of lethal force more so than it does detention? Surprisingly, no.

That *some* amount of targeting authority would remain even under the postwar rubric is not in doubt. Jeh Johnson said as much, after all, when he indicated that military options would remain available in the postwar period for “continuing and imminent threats.”³⁵ But that is not the interesting question. The interesting question is whether postwar targeting authority would be narrower than the scope of authority currently asserted by the government even under the armed-conflict model, such that drone strikes—and other exercises of lethal force—in the postwar world would have to be eliminated or at least curtailed substantially as compared to the status quo.

A. Policy Constraints on Attacks Outside the Hot Battlefield

It is tempting to assume that the answer must be yes, that the postwar model surely would be a narrower affair—a *much* narrower affair—than the status quo when it comes to lethal force. On close inspection, however, that proves not to be the case. Why? For two seemingly contradictory reasons. First, the government for reasons of policy *already* embraces an approach that is more restrictive than the armed-conflict model arguably would require. Second, the legal framework the government most likely would apply in the absence of the armed-conflict model is considerably less restrictive than one might expect. Indeed, it is the same framework that applies already as a matter of policy.

To explain this, it helps to begin by clarifying the U.S. government’s baseline position on what legal boundaries follow for the use of lethal force—that is, for targeting—under the armed-conflict model. Setting aside important issues such as proportionality (that is, the prohibition on attacks that will have an impact on civilians or civilian objects exceeding what is necessary to achieve the concrete and direct military objective of the attack)

³⁵ See Johnson, Speech at Oxford Union, *supra* note 6.

and questions involving the sovereignty rights of a state in which an attack occurs, the U.S. government's position is straightforward. It maintains that it is in an armed conflict with al Qaeda, the Afghan Taliban, and certain "associated forces"; that LOAC governs its uses of force against those groups irrespective of the location of an attack; and that the members of these organizations as a result may lawfully be targeted based simply on their membership status, as opposed to only targeting them while they are directly participating in hostilities or having to attempt to capture such persons alive.³⁶

This analysis has no shortage of critics, to be sure, but the important point here is that this has been the position of the U.S. government over the past dozen years, and it is an approach that leaves the government with considerable targeting flexibility. Or at least it would, if the government's policy was to exploit those legal boundaries to the maximum extent. But that is not current U.S. government policy outside of Afghanistan, nor has it been for some time.

Simply put, the U.S. government years ago decided not to use the full scope of its LOAC-based targeting authority outside of "hot battlefields" such as Afghanistan. That is, it decided not to make full use of the status-based targeting authority in places like Yemen and Somalia, even while maintaining that LOAC did indeed govern those strikes.

John Brennan made this clear in a speech at Harvard Law School in the fall of 2011, more than a year before Johnson's Oxford Union address.³⁷ Brennan at that time was the White House's top counterterrorism official, and he was at Harvard to deliver a robust defense of the Administration's

³⁶ On the legality of targeting based on membership, see Koh, Address to the Annual Meeting of the Am. Soc'y of Int'l Law, *supra* note 3 (defending the targeted killing of al Qaeda leaders by noting that "individuals who are part of such an armed group are belligerents and, therefore, lawful targets under international law"). On targeting law more generally, see WILLIAM H. BOOTHBY, *THE LAW OF TARGETING* (2012). Ryan Goodman recently published a provocative challenge to the claim that LOAC permits the use of force as a first resort, giving rise to an extended debate on the subject. Compare Ryan Goodman, *The Power to Kill or Capture Enemy Combatants*, 24 *EUROPEAN JOURNAL OF INTERNATIONAL LAW* 819 (2013), with Geoffrey Corn et al., *Corn, Blank, Jenks, and Jensen Respond to Goodman on Capture-Instead-of-Kill*, *LAWFARE BLOG* (Feb. 25, 2013), <http://www.lawfareblog.com/2013/02/corn-blank-jenks-and-jensen-respond-to-goodman-on-capture-instead-of-kill/>, [<http://www.perma.cc/0ofX2MrwGZh/>].

³⁷ See Brennan, Address at Harvard Law School, *supra* note 3.

policies. When he turned to the topic of lethal force, he opened by reminding the audience that the government did not view its “authority to use military force against [al Qaeda] as being restricted solely to ‘hot battlefields’ like Afghanistan,” but rather saw the conflict as extending to those locations where al Qaeda might be found.³⁸ That said, Brennan observed that there nonetheless was much less of a gap between the government and its critics than many assume.³⁹ Outside of Afghanistan and Iraq, he asserted, the U.S. government chose as a matter of policy not to embrace the full scope of its claimed authority under LOAC (which allows for targeting of *all* members of al Qaeda and its associated forces). Instead, the government chose to focus on “those individuals who are a threat to the United States” and “whose removal would cause a significant—even if only temporary—disruption of the plans and capabilities of [al Qaeda] and its associated forces.”⁴⁰

There is no question that this policy, for better or worse, amounted to a constraint above and beyond the limits of the LOAC model (as the U.S. government understood those limits, at any rate). And, at first blush, it seemed a very significant constraint indeed. It was an “imminent threat” test, after all, and to a layperson the use of the word “imminent” might have strict connotations, conjuring images of police snipers at a hostage scene holding their fire until it becomes clear that the perpetrator is about to harm the hostages. That would certainly be a far cry from the LOAC model described above. There was, however, a catch.

B. Imminence Does Not Mean Imminence

The key, Brennan explained, was “how you define ‘imminence.’”⁴¹ Contrary to that word’s connotations of temporal exigency, Brennan asserted that there is “increasing recognition in the international community that a more flexible understanding of ‘imminence’ may be appropriate when dealing with terrorist groups, in part because threats posed by non-state actors do not present themselves in the ways that evidenced imminence in more traditional conflicts.”⁴² Al Qaeda was a case in point, he went on to

³⁸ *Id.*

³⁹ *Id.*

⁴⁰ *Id.*

⁴¹ *Id.*

⁴² *Id.*

say.⁴³ It “does not follow a traditional command structure, wear uniforms, carry its arms openly, or mass its troops at the borders of the nations it attacks,” and yet “it possesses demonstrated capability to strike with little notice and cause significant civilian or military casualties.”⁴⁴ These qualities, Brennan asserted, make it impractical and decidedly unwise to interpret “imminence” in strict temporal terms when applying that test to al Qaeda.⁴⁵ We would not know when that moment of exigency arrived, in most instances, and it made little sense to wait for it insofar as the organization had already attacked once and was bent on doing so again. America’s allies, Brennan added, were coming to the same conclusion: “Over time, an increasing number of our international counterterrorism partners have begun to recognize that the traditional conception of what constitutes an ‘imminent’ attack should be broadened in light of modern-day capabilities, techniques, and technological innovations of terrorist organizations.”⁴⁶

If Brennan’s speech left any doubt as to whether the Obama Administration construed the *imminent*-threat standard as, in substance, merely a *continuous*-threat standard, that doubt should have been dispelled a few months later when Attorney General Eric Holder made the same point in a speech at Northwestern University.⁴⁷ A U.S. drone strike had recently killed a U.S. citizen in Yemen, a member of al Qaeda in the Arabian Peninsula named Anwar al-Awlaki, and had generated heated debate about the manner in which the U.S. Constitution applies in such circumstances. Holder contended that the Constitution permits the government to kill a citizen purposefully, and without prior judicial involvement, at least when certain factors are present.⁴⁸ One such factor, he argued, was the existence of an “imminent threat of violent attack against the United States.”⁴⁹ To be sure, this was a different context than the one Brennan had addressed; Brennan spoke of a constraint embraced by the government on policy grounds in cases involving non-Americans abroad, whereas Holder spoke of

⁴³ *Id.*

⁴⁴ *Id.*

⁴⁵ *Id.*

⁴⁶ *Id.*

⁴⁷ Holder, Address at Northwestern University School of Law, *supra* note 3.

⁴⁸ *Id.*

⁴⁹ *Id.*

what the Constitution required for attacks on Americans.⁵⁰ But the specific issue was much the same: What does “imminence” mean in the context of using force for counterterrorism purposes?

Not surprisingly, Holder closely tracked Brennan’s analysis, rejecting a strict-imminence test in favor of a continuing-threat understanding. And he did so for much the same reasons. In the context of terrorism, Holder contended, imminence must turn on “considerations of the relevant window of opportunity to act, the possible harm that missing the window would cause to civilians, and the likelihood of heading off future attacks against the United States.”⁵¹ Moreover, the same view would later appear in a white paper produced by the Justice Department concerning al-Awlaki-type situations, a document that underscored the position that some groups should be thought of as continuously in the act of planning attacks, thus making an attack always imminent.⁵²

The U.S. government’s embrace of the continuous-threat standard for attacks outside the hot battlefield of Afghanistan was further underscored in May 2013, when President Obama gave an address at the National Defense University.⁵³ The speech was billed as the culmination of a multi-year effort to tailor and clarify the legal and policy frameworks through which the U.S. government should approach counterterrorism. In many respects it echoed what Johnson had said at the Oxford Union, both defending the proposition that the United States currently remains in an armed conflict with al Qaeda but also warning against allowing the war to continue indefinitely.⁵⁴ And like the Brennan speech, Obama’s address emphasized just how constrained U.S. targeting practices actually are while

⁵⁰ *Id.*; see Brennan, Address at Harvard Law School, *supra* note 3.

⁵¹ Holder, Address at Northwestern University School of Law, *supra* note 3.

⁵² Dep’t 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, *available at* http://www.lawfareblog.com/wp-content/uploads/2013/02/020413_DOJ_White_Paper.pdf.

⁵³ Barack Obama, President of the U.S., Address at the Nat’l Def. Univ. (May 23, 2013), *available at* <http://www.whitehouse.gov/the-press-office/2013/05/23/remarks-president-national-defense-university>, [<http://www.perma.cc/0avLJ2bvP47/>].

⁵⁴ *See id.*; Johnson, Speech at Oxford Union, *supra* note 6.

the government is still operating under the armed-conflict rubric.⁵⁵ Outside of Afghanistan,⁵⁶ President Obama explained, drone strikes would occur only when capture is not an option, when no other authority can address the threat, and when the persons to be attacked “pose a continuing and imminent threat to the American people.”⁵⁷

This was at least as restrictive as the policy constraint Brennan had first acknowledged back in 2011, and by the same token it was also a clear departure from what the LOAC framework ostensibly would allow.⁵⁸ At the same time, however, it did not follow that drone strikes would suddenly become rare under this approach. Drone strikes continued to occur and

⁵⁵ With respect to detention, as one might expect, President Obama highlighted that we long since have ended detention operations in Iraq, that we are in the midst of ending them in Afghanistan, and that we ought to end them as soon as possible at Guantánamo as well (though he did not foreclose persevering with detention of legacy detainees at some *other* location). Compare Obama, *supra* note 53, with Brennan, Address at Harvard Law School, *supra* note 3.

⁵⁶ Even within the hot battlefield of Afghanistan, in fact, U.S. policy had come to limit targeting to situations involving either “high value al Qaeda targets” or other forces “massing to support attacks on coalition forces.” This could be a version of the so-called signature strike approach, in which the individual identity of the targets is unknown but circumstances make sufficiently clear that it is an enemy armed group involved in the conflict.

⁵⁷ See Obama, *supra* note 53. The same day as the National Defense University speech, President Obama issued a Presidential Policy Directive (“PPD”) implementing these standards. Fact Sheet: U.S. Policy Standards and Procedures for the Use of Force in Counterterrorism Operations Outside the United States and Areas of Active Hostilities, WHITEHOUSE.GOV (May 23, 2013), <http://www.whitehouse.gov/the-press-office/2013/05/23/fact-sheet-us-policy-standards-and-procedures-use-force-counterterrorism>, [<http://www.perma.cc/09faq5tiTp8/>]. According to the declassified “fact sheet” released by the White House, the new PPD governed the use of force “outside the United States and areas of active hostilities.” *Id.* Consistent with the president’s speech, the PPD states that lethal force cannot be used outside the hot battlefield unless (1) the strike will “prevent or stop attacks against U.S. persons” in the sense that the target “poses a *continuing, imminent* threat,” (2) “capture is not feasible,” (3) and “no other reasonable alternatives exist to address the threat effectively.” *Id.* (emphasis added). The PPD adds that lethal force may not be used against a “non-combatant,” which at first blush sounds like a prohibition on using lethal force outside the context of armed conflict altogether. *Id.* But the PPD defines “non-combatant” in a footnote that puts things in a different light. *Id.* As one would expect, the PPD defines the phrase “non-combatant” to exclude both actual combatants in armed conflict and civilians who directly participate in hostilities during armed conflict. *Id.* In addition to those armed-conflict scenarios, however, the PPD definition also goes on to exclude “an individual who is targetable in the exercise of national self-defense.” *Id.* The net result is that the existence of a state of armed conflict already has become irrelevant to the question of targeting authority for all scenarios arising outside of Afghanistan.

⁵⁸ See Brennan, Address at Harvard Law School, *supra* note 3.

spark controversy after Brennan's speech, and as we soon found out, they would continue under President Obama's reformulation as well. Indeed, during a two-week span in late July and early August 2013, the United States apparently carried out at least nine airstrikes in Yemen while operating under the continuous-threat standard, resulting in some thirty-eight deaths.⁵⁹

Critics of the status quo—those coming from the left and the libertarian right, at least—might respond to this analysis by arguing that they reject not only the armed-conflict model but also the “continuous-threat” conception of imminence. That is, they might argue for rejecting both the armed-conflict model *and* the continuing-threat standard, in favor of an approach that permits the use of force solely when harm is strictly imminent in a temporal sense. This is an approach often described—by supporters and critics alike—as the pre-9/11 model, reflecting the widespread assumption that this standard was the norm before the Bush Administration embraced the armed-conflict approach. But it was *not* the norm then, and it is not likely what Jeh Johnson and President Obama refer to when they speak of a postwar period today.

C. The Continuous-Threat Model in the Pre-9/11 Era

Though this fact is not widely appreciated, counterterrorism in the pre-9/11 period was very much influenced by the continuous-threat standard.⁶⁰ The issue arose explicitly at least as early as 1984. Hezbollah had carried out a series of bombings and kidnappings targeting Americans in Lebanon, most notably the infamous Marine Barracks bombing. When then-National Security Council staff member Oliver North proposed that the CIA should train and field a small group of foreign operatives to kill Hezbollah's leadership in response, it set off a fierce debate.⁶¹ Would this

⁵⁹ Associated Press, *Suspected US drone strike kills 2 al-Qaida militants in Yemen in stepped-up bombing campaign*, FOXNEWS.COM (Aug. 10, 2013), <http://www.foxnews.com/world/2013/08/10/suspected-us-drone-strike-kills-2-al-qaida-militants-in-yemen-in-stepped-up/>, [<http://www.perma.cc/0aLYmpUzCFV/>].

⁶⁰ No one has played a more important role in emphasizing the pre-9/11 roots of this model, under the label of national self-defense, than Professor Kenneth Anderson. *See, e.g.*, Kenneth Anderson, *Targeted Killing in U.S. Counterterrorism Strategy and Law*, in *LEGISLATING THE WAR ON TERROR: AN AGENDA FOR REFORM*, 346, 355 (Benjamin Wittes ed., 2009).

⁶¹ *See* BOB WOODWARD, *VEIL: THE SECRET WARS OF THE CIA, 1981–1987*, at 361 (1987).

amount to “assassination” of the kind that was exposed and denounced during the tumultuous years of the 1970s—that is, the use of lethal force simply to advance foreign policy interests? Or would it instead amount to national self-defense, using lethal force for the same reasons as in wartime but in a manner falling below the threshold of conflict due to its limited scope and to the non-state nature of the opponent?

The debate resulted in an opinion from the CIA General Counsel, the thrust of which was to categorize the proposed operation as national defense rather than assassination, on the theory that the organization in question had already attacked Americans and was capable of and willing to do so again.⁶² Backed by this continuous-threat understanding of its self-defense authority, the Reagan Administration accepted the plan, authorizing it to proceed as a covert action program.⁶³ Ultimately, this particular operation fizzled, seemingly because the proxy force involved made a poor impression on special operations forces sent to observe them, and the plug was pulled as a result.⁶⁴ A 1986 successor to this underlying presidential authority stayed on the books, available should future occasions present a similar continuous-threat scenario involving terrorism.⁶⁵ Reagan Administration officials went on to differ sharply and publicly over whether, as a matter of policy, overt military force ought to be used. Secretary of State George Shultz was hawkish on the point, giving speeches explicitly endorsing the self-defense rationale; Secretary of Defense Casper Weinberger pushed back, having concluded after Vietnam that military force ought not to be used on an isolated or limited basis.⁶⁶ Faced with a terrorist attack sponsored by Libya, however, the Reagan Administration was

⁶² See *id.* at 361–62.

⁶³ See *id.* at 393; DAVID C. WILLS, *THE FIRST WAR ON TERRORISM: COUNTER-TERRORISM POLICY DURING THE REAGAN ADMINISTRATION* 84 (2003); TIMOTHY NAFTALI, *BLIND SPOT: THE SECRET HISTORY OF AMERICAN COUNTERTERRORISM* 148 (2005).

⁶⁴ See NAFTALI, *supra* note 63, at 151–52.

⁶⁵ See STEVE COLL, *GHOST WARS: THE SECRET HISTORY OF THE CIA, AFGHANISTAN, AND BIN LADEN, FROM THE SOVIET INVASION TO SEPTEMBER 10, 2001*, at 140–41 (2004).

⁶⁶ See, e.g., Interview: Robert C. McFarlane, PBS FRONTLINE, <http://www.pbs.org/wgbh/pages/frontline/shows/target/interviews/mcfarlane.html>, [<http://www.perma.cc/09eigU9cwLp/>]; GEORGE P. SHULTZ, *TURMOIL AND TRIUMPH: MY YEARS AS SECRETARY OF STATE* (1993).

ultimately willing to carry out a limited but substantial set of overt airstrikes as a continuing-self-defense response.⁶⁷

A decade later, the Clinton Administration found itself wrestling with the same legal and policy questions as the significance of the threat posed by the emergent al Qaeda network grew clearer. Its decisions reinforced the Reagan model in which continuing terrorist threats could be met with lethal force, quite apart from any claim of an armed conflict.

Prior to 1998, U.S. officials were not prepared to use lethal force against al Qaeda. This changed, however, after the attacks on the American embassies in Kenya and Tanzania. Following Reagan's Libya example, the Clinton Administration launched airstrikes on al Qaeda targets in Afghanistan and Sudan, which included an attempt to kill the entire senior leadership of al Qaeda in one fell swoop.⁶⁸ The results were meager. Thanks to the significant time-delay between the decision to launch and the moment of impact—many hours in the case of sea-launched cruise missiles operating at a long distance from the target—the attempted strike in Afghanistan achieved only limited success, and the strike in Sudan ultimately proved exceptionally controversial as it became apparent that the targeted building might not have been involved in manufacturing materials for chemical weapons after all. The fact remained, however, that the Administration had deployed lethal force against a demonstrated and continuing terrorist threat, without making any claim that its right to do so stemmed from the emergence of a state of armed conflict. It was not merely a fleeting claim of authority, either. Though the U.S. government did not carry out another overt attack on al Qaeda in the years that followed, it was not for lack of legal authority or policy commitment to doing so; the problem, rather, was exclusively a matter of practical and political incapacity.⁶⁹

⁶⁷ See, e.g., Bernard Weinraub, *U.S. Jets Hit 'Terrorist Centers' in Libya; Reagan Warns of New Attacks If Needed*, N.Y. TIMES (Apr. 15, 1986), <http://www.nytimes.com/1986/04/15/politics/15REAG.html?pagewanted=all>, [<http://www.perma.cc/0WhqFzccJvP/>].

⁶⁸ See FINAL REPORT OF THE NATIONAL COMMISSION ON TERRORIST ATTACKS UPON THE UNITED STATES, at 116–17 (2004), available at <http://govinfo.library.unt.edu/911/report/911Report.pdf>.

⁶⁹ See e.g., *id.* at 130–31.

During this period, the United States largely lacked real-time, sustained intelligence regarding conditions on the ground in Afghanistan. Even if such intelligence were available, the only viable option for conducting an attack involved sea-launched cruise missiles that, as noted above, involved multi-hour windows between launch orders and impact. Moreover, there were significant political hurdles in the form of both diplomatic pressure—fueled particularly by the possibility that the Sudan strike had been a mistake—and domestic pressure—fueled by accusations that the Clinton Administration was using force abroad in “wag the dog” fashion to distract the public from the Lewinsky scandal at home.⁷⁰ Legal authority, in contrast, was not perceived to be an obstacle. At least from the fall of 1998 onward, in fact, the government’s formal legal position was that it had the authority to attack al Qaeda if the right opportunity were to arise, without regard to whether there was a state of armed conflict and without need to await the moment when a new attack might be imminent in temporal terms. On multiple occasions, senior officials came extremely close to ordering new attacks, in fact, though they never were convinced that the opportunity was right to take the final step in light of recurring doubts about the reliability of the intelligence—which generally involved second-hand reporting from Afghan agents—and the time delays involved with the cruise missile option.⁷¹

Critically, the existence of these practical and political constraints tended to obscure the fact that the government was claiming authority to attack al Qaeda based on the demonstrated and continuing threat that it posed, quite apart from any claim that another attack was strictly imminent, let alone a claim that there was now an ongoing state of armed conflict. Those constraints do not exist today, when the government’s capacity to generate actionable intelligence is considerably greater. More importantly, it

⁷⁰ See *id.* at 117–18.

⁷¹ See *id.* at 130–31. The Clinton Administration simultaneously became more aggressive with respect to the *covert* use of lethal force, making use of the still-active 1986 Reagan Administration finding. Or at least it did so at times. As the 9/11 Commission Report famously recounted, the Clinton Administration produced a series of decisions on the use of proxy forces to try to capture, if not kill, bin Laden. At least one of these fairly clearly embraced the use of lethal force on continuing-threat grounds. Ultimately, however, the shifting and not-altogether-clear statements of authority in this sequence of approvals muddied the water considerably. Combined with doubts about the capacities of these proxy forces—again, shades of the early 1980s experience—the covert action track ultimately fizzled. See *id.* at 126–33; Coll, *supra* note 65, at 491–93.

now has the capacity to carry out airstrikes very soon after the decision is made to attack. The emergence, evolution, and proliferation of armed drones is central to both of these developments. Armed drones were pushed into development and production prior to 9/11 precisely in order to address these twin limitations on the ability to attack al Qaeda in Afghanistan, and they have certainly gone on to serve that function there and in many other locations as well. Of course, the rapid expansion of CIA and military intelligence-gathering capacities of other kinds, particularly with respect to human intelligence, also has mattered a great deal, as has the corresponding institutionalization of procedures and personnel dedicated to rapidly integrating the inflow of intelligence with operational planning—a process pioneered in Iraq by special operations forces and visible as well in the CIA’s development of its own manhunting-and-targeting systems.⁷²

D. What Sort of Legal Claim Is the “Continuous-Threat” Model Anyway?

It is worth pausing at this stage to address a pressing question: What sort of legal claim does invocation of the continuous-threat model reflect? The whole point of surveying its use in the 1980s and 1990s is that the U.S. government did not claim that those uses of force were part and parcel of an armed conflict. And thus the continuous-threat model is not a creature of the law of armed conflict. But if not that, then what is it in legal terms?

It has a clear character in terms of domestic U.S. law perspective. On this view, the continuous-threat model describes a position one might take in relation to the constitutional law debates surrounding the separation of war powers between Congress and the Executive Branch. Specifically, it is a claim about the President’s authority to direct the use of military force as an exercise of national self-defense even in the absence of explicit congressional authorization. Put another way, the continuous-threat model is a way of articulating the proposition that the Executive Branch has inherent authority to use force against a terrorist organization that has attacked before and is capable and willing to do so again, even absent evidence of a particular, looming plot to be stopped.

⁷² See, e.g., MARK MAZZETTI, *THE WAY OF THE KNIFE* (2013); DAVID E. SANGER, *CONFRONT AND CONCEAL: OBAMA’S SECRET WARS AND SURPRISING USE OF AMERICAN POWER* (2012); STANLEY MCCHRISTAL, *MY SHARE OF THE TASK: A MEMOIR* (2013).

So far, so good. But this does not address the international law issues raised by the use of force abroad. How should we understand the continuous-threat model from that perspective?

There are two ways in which international law might be implicated by invocation of the continuous-threat model. One pertains to the sovereignty interests of the state in whose territory force is used, and the other concerns the rights of the targeted individuals themselves.

Under the sovereignty heading, the continuous-threat model can be understood as an invocation of the right to use force in self-defense under Article 51 of the UN Charter, subject to considerations of necessity and proportionality. This argument might run in either of two directions. One version would hold that a terrorist attack triggered Article 51 and that the resulting right to use force remains in effect over time insofar as the perpetrating organization intends to strike again. Another version partakes of the controversial notion of preemptive self-defense, pursuant to which a terrorist attack might not be strictly imminent in temporal terms yet is sufficiently certain and serious so as to justify a preemptive attack nonetheless. Either line of argument would raise a host of complicated issues, but the important point for now is that the continuous-threat model on this view functions simply to explain why the attacking state is not in violation of the UN Charter and does not address the question of whether a particular attack violates rights that the targeted *individual* may have under one international law regime or another.

What regimes might matter? Under an armed-conflict model, of course, one would look first to the law of armed conflict to resolve this issue. But the point of the current discussion is to understand how to think about the continuous-threat model when a state uses force *outside* the context of armed conflict, as arguably was the case for some if not all of the pre-9/11 examples recounted above. In that case, there is a threshold question as to whether another body of international law applies, or if instead international law is silent aside from the Article 51 constraints mentioned above.

For many observers, the obvious response is that international human rights law would apply in such a circumstance. It is far from clear that the U.S. government took that view in the pre-9/11 period, however, as

opposed to embracing the position that human rights law obligations extend only to territories formally subject to U.S. jurisdiction and control. If that was indeed the U.S. position at that time, it would seem to follow that the U.S. government did not recognize *any* international law constraints on the continuous-threat model, aside from the elements of necessity and proportionality woven into the Article 51 self-defense framework, outside of the armed-conflict context.

If, on the other hand, human rights law *does* govern in such non-armed-conflict circumstances, the question then arises as to whether the continuous-threat model can be squared with that regime. This draws our attention back to John Brennan in his speech at Harvard Law School, as he suggested that there was increasing willingness on the part of allies to recognize that the “imminence” requirement woven into the human rights law framework can encompass the continuous-threat concept.⁷³ Needless to say, there are many who would not agree with that assessment. That said, what matters here is that the continuous-threat model could thus be understood as a human rights law claim—albeit a highly-controversial one—in addition to being a claim about domestic separation of powers law and UN Charter sovereignty-protection norms.

E. Returning to the Pre-9/11 Era: We Are Already There

Whatever its legal nature, the important point is that the continuous-threat model is not an Obama Administration novelty, not a post-9/11 development, and not nearly as constraining as one might expect. It was woven into the fabric of the pre-9/11 counterterrorism policy, but its potential scope was obscured in those years by a number of non-legal constraints. Those constraints have since been substantially eroded by technological and institutional developments, and this erosion, in turn, has quietly paved the way for the government in recent years to embrace, as a matter of policy, a set of targeting constraints over-and-above the limits inherent in the armed-conflict model. In effect, this has superimposed the continuous-threat model on top of the armed-conflict model. If and when the supporting structure of the armed-conflict model is removed,⁷⁴ the

⁷³ See Brennan, Address at Harvard Law School, *supra* note 3.

⁷⁴ Declaring an end to the armed-conflict model vis-à-vis al Qaeda is one path through which the U.S. government might end up relying upon the continuous-threat model once more. It is not the only path, however. Even while the armed-conflict model remains in

continuous-threat model will remain, and, from that perspective, it makes little sense to speak of a potential return to the pre-9/11 framework. In practical terms, we are already there.

IV. The Limited Impact of Non-Legal Constraints Under a Postwar Framework

Let us assume for the sake of argument that the foregoing analysis is correct, and that the *legal* consequences of abandoning the armed-conflict model will have little practical effect given the policy constraints already adopted and the native breadth of the continuous-threat model. Is it possible that the move to postwar might nonetheless produce a significant departure from status quo targeting practices thanks to the impact of such a switch on other, *non-legal* mechanisms of constraint?

Possibly so. To be sure, moving to a postwar framework will not directly cause the technological constraints on the projection of force to resume their previous degree of constraining effect, nor will it necessarily inhibit the production of actionable intelligence (although the looming withdrawal of all or even most U.S. ground forces from Afghanistan—which might or might not precipitate a decision by the government to embrace a postwar framework—may well inhibit such collection). But there are other non-legal constraints to consider.

Three stand out as particularly important and likely to be impacted by a formal shift to a postwar model. First, consider the domestic political climate. This does not mean partisan politics as such, though this can matter, too. Rather, “domestic politics” simply refers to the influence of American public opinion on the calculations of legislators and Executive Branch officials. On that dimension, what impact might follow from a formal proclamation recognizing an end to the armed conflict with al Qaeda? Such a move would be widely publicized and endlessly discussed in the media, and for at least some members of the public, it would likely alter baseline assumptions regarding the sorts of activities they might expect to see the government engaging in for counterterrorism purposes going forward. The continued use of military detention would surely seem incongruous to many, for example, or at least it would begin to seem increasingly so as time passed. Likewise, the further use of armed attacks—

whether using drones, manned aircraft, or some other weapons platform—would also be surprising to some under the postwar rubric.

Such incongruities would not necessarily spark a negative reaction in every quarter. Those who would prefer not to move to a postwar model, after all, might be pleasantly surprised by them. But there is little doubt that incongruous actions would generate a negative reaction in at least some quarters, and it is possible that the negative reaction would in fact be substantial—particularly if the surrounding circumstances contributed to a perception that the government must have been acting hypocritically all along in proclaiming an end to the armed conflict. Of course, insofar as incongruous actions are conducted in secret—a quite likely state of affairs for a postwar model, given the extensive reliance on the CIA and Joint Special Operations Command to conduct lethal operations on a covert or clandestine basis even while still under the armed-conflict model⁷⁵—the constraining impact of public opinion would be substantially muted. Even then, though, the possibility of eventual public disclosure would remain, as the Snowden affair in the summer of 2013 reminds us. Government officials operating in the shadow of these considerations could be expected to take them into account, even if they would not be dispositive. In that sense, domestic political considerations would be more constraining in the postwar context than they are under the status-quo model of armed conflict.

Something similar can be said about the constraining impact of diplomatic considerations. “Diplomatic considerations” refers broadly to the full spectrum of actions other governments might take in order to express displeasure with American policy, whether out of actual disagreement or in response to their own domestic political considerations. There are many possibilities in addition to the easily belittled example in which a state merely expresses displeasure, privately or publicly. A given country may be in a position to decrease cooperation on security issues (decreased sharing of intelligence, for example, or withdrawal of personnel from a joint deployment), or it might reduce or refuse valuable cooperation on unrelated subjects. Two points follow from all this. First, proclaiming the end to the armed conflict with al Qaeda unquestionably will be very well-received in most foreign capitals and among most foreign populations. Second, if the U.S. government ended up persisting in the use of military detention or

⁷⁵ See generally MAZZETTI, *supra* note 72; KLAIDMAN, *supra* note 4; SANGER, *supra* note 2.

lethal force for counterterrorism purposes despite such a proclamation, it seems likely that the aforementioned diplomatic costs will be higher than is currently the case, for the same reasons of incongruity and surprise mentioned above in the context of domestic politics. This suggests that diplomatic pressure, too, will be more constraining postwar than currently.

Finally, consider the constraint embodied in what one might call the “balance of equities” across departments and agencies within the Executive Branch. Many different agencies and departments, and different organizations within agencies and departments, have a stake in the development and implementation of counterterrorism policy—what insiders usually refer to as “equity”—and they do not always agree. As they contend with one another in the interagency process, it may matter a great deal whether the President continues to assert that a state of armed conflict exists or instead that it has ended. The former tends to empower the military around the interagency conference table by directly implicating its equities, while the latter would tend to weaken it for the same reason.

In summary, a formal shift from war to postwar would tend to increase the bite of at least three distinct soft-constraint mechanisms, and the collective impact from these changes could be substantial. This, in turn, *could* tend to dissuade the Executive Branch from employing the full potential for using lethal force that follows from the combination of the continuing-threat legal model and the technological and intelligence advances described above. That said, it is unlikely that these soft-constraint mechanisms would dissuade the Executive Branch altogether from acting on the continuous-threat model. There are powerful offsetting domestic political costs to be born, after all, should a given administration forego an opportunity to use force against a target that later is linked to a successful terrorist attack. The government might resort to lethal force less often in a postwar setting than it would under the status-quo model, then, but it nonetheless will likely use force much more often than both critics and supporters of the status quo assume would be the case in that circumstance. And that is the critical point that seems to be missing from the current debate, fixated as it is on the question of whether to persist with the armed-conflict framework.

V. Conclusion

Writing in response to President Obama's National Defense University speech, a triumphalist *New York Times* editorial page recently declared:

While there are some, particularly the more hawkish Congressional Republicans, who say this war should essentially last forever, Mr. Obama told the world that the United States must return to a state in which counterterrorism is handled, as it always was before 2001, primarily by law enforcement and the intelligence agencies. That shift is essential to preserving the democratic system and rule of law for which the United States is fighting, and for repairing its badly damaged global image.⁷⁶

The *Times* was right to note the importance of ensuring democratic accountability and legal compliance in connection with counterterrorism. But it was mistaken in assuming that the postwar model necessarily will depart from the status quo in terms of the use of lethal force and military detention. The fact of the matter is that the armed-conflict model has never been terribly important as a legal matter when it comes to using lethal force in the counterterrorism setting in the contexts that matter most—that is, locations other than boots-on-the-ground combat deployments, as in Afghanistan and Iraq—while the military detention option many years ago became largely defunct, aside from the handful of legacy cases. The sooner all sides in these debates come to appreciate this, the better.

⁷⁶ Editorial Board, *The End of the Perpetual War*, N.Y. TIMES (May 23, 2013), http://www.nytimes.com/2013/05/24/opinion/obama-vows-to-end-of-the-perpetual-war.html?_r=3&adxnml=1&ref=opinion&pagewanted=1&adxnmlx=1384143449-nmQmIS8AKqM33gI0e5jJxw&pagewanted=all, [<http://www.perma.cc/0YnXjt6daWG/>].