The Use of Lethal Force for Counterterrorism: Legal Issues

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U.S. Law, Policy, and Practice

Now we turn our attention to key aspects of how the United States has approached the legal, policy, and practical aspects of lethal counterterrorism, both before and after 9/11.

a. The Ban on Assassinations

In the early 1970s, a series of leaks and Congressional investigations revealed to the public that the CIA on a few occasions had attempted to kill foreign leaders. The following excerpt is from a preliminary report written by a Senate investigative committee (known as the "Church Committee," for its chair Senator Frank Church):

> The Committee finds that officials of the United States Government initiated and participated in plots to assassinate Patrice Lumumba [Congo] and Fidel Castro [Cuba].
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> The plot to kill Lumumba was conceived in the latter half of 1960 by officials of the United States Government, and quickly advanced to the point of sending poisons to the Congo to be used for the assassination. The effort to assassinate Castro began in 1960 and continued until 1965. The plans to assassinate Castro using poison cigars, exploding seashells, and a contaminated diving suit did not advance beyond the laboratory phase. The plot involving underworld figures reached the stage of producing poison pills, establishing the contacts necessary to send them into Cuba, procuring potential assassins within Cuba, and apparently delivering the pills to the island itself. One 1960 episode involved a Cuban who initially had no intention of engaging in assassination, but who finally agreed, at the suggestion of the CIA, to attempt to assassinate Raul Castro if the opportunity arose. In the SW/LASH operation, which extended from 1963 through 1965, the CIA gave active support and encouragement to a Cuban whose intent to assassinate Castro was known, and provided him with the means of carrying out an assassination.
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> ... The poisons intended for use against Patrice Lumumba were never administered to him, and there is no evidence that the United States was in any way involved in Lumumba's death at the hands of his Congolese enemies. The efforts to assassinate Castro failed.
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> ...We condemn the use of assassination as a tool of foreign policy. Aside from pragmatic arguments against the use of assassination supplied to the Committee by witnesses with extensive experience in covert operations, we find that assassination violates moral precepts fundamental to our way of life. ...

President Ford responded by issuing an executive order prohibiting anyone acting on behalf of the U.S. government from engaging in "political assassination." That order was reissued by President Carter, and then again by President Reagan as part of Executive Order 12,333 (which we studied in detail in Unit I for its provisions relating to foreign intelligence). The presidential ban on assassination remains in place to this day, and reads as follows:

> 2.11*Prohibition on Assassination.*
>
> No person employed by or acting on behalf of the United States Government shall engage in, or conspire to engage in, assassination.

Give thought to what it means to say that an action is prohibited by executive order, as opposed to, say, a criminal statute.

Notice that Executive Order 12,333 does not provide a definition of the term "assassination." This has led to no small amount of debate as to just what is, and what is not, prohibited.

One occasion for such debate arose when the U.S. Army was revising its "Field Manual" providing guidance on LOAC rules for land warfare, in the 1980s. This in turn led to the creation of an interpretive memo by Hays Parks, then serving as Chief of the International Law Branch in the International Affairs Division in the Office of the Army Judge Advocate General. Though not an official statement of U.S. government policy, the Hays Parks memo has been cited quite often over the years as an illustration of how the U.S. government typically interprets the assassination ban (the memo was published in the December 1989 issue of *The Army Lawyer*). Here are some key excerpts from W. Hays Parks, *Memorandum of Law: Executive Order 12333 and Assassination*:

> In general, assassination involves murder of a targeted individual for political purposes.
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> While assassination generally is regarded as an act **of** murder for political reasons, its victims are not necessarily limited to persons of public office or prominence.
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> The murder of a private person, if carried out for political purposes, may constitute an act of assassination. For example, the 1978 "poisoned-tip umbrella" killing of Bulgarian defector Georgi Markov by Bulgarian State Security agents on the streets of London falls into the category of an act of murder carried out for political purposes, and constitutes an assassination. In contrast, the murder of Leon Klinghoffer, a private citizen, by the terrorist Abu el Abbas during the 1985 hijacking of the Italian cruise ship *Achille Lauro,* though an act of murder for political purposes, would not constitute an assassination. The distinction lies not merely in the purpose of the act and/or its intended victim, but also under certain circumstances in its covert nature. Finally, the killing of Martin Luther King and Presidents Abraham Lincoln, James A. Garfield, William McKinley and John F. Kennedy generally are regarded as assassination

because each involved the murder of a public figure or national leader for political purposes accomplished through a surprise attack.

[In the context of armed conflict:] ... enemy combatants are legitimate targets at all times, regardless of their duties or activities at the time of their attack. Such attacks do not constitute assassination unless carried out in a "treacherous" manner.... The wearing of civilian attire does not make a guerrilla immune from lawful attack, and does not make a lawful attack on a guerrilla an act of assassination. As with the attack of civilians who have combatant responsibilities in conventional war, the difficulty lies in determining where the line should be drawn between guerrillas/combatants and the civilian population in order to provide maximum protection from intentional attack to innocent civilians. The law provides no precise answer to this problem, and one of the most heated debates arising during and after the U.S. war in Vietnam surrounded this issue. ... If a member of a guerrilla organization falls above the line established by competent authority for combatants, a military operation to capture or kill an individual designated as a combatant would not be assassination.

[In contexts not constituting armed conflict:] ... there is historical precedent for the use of military force to capture or kill individuals whose peacetime actions constitute a direct threat to U.S. citizens or U.S. national security.... A national decision to employ military force in self-defense against a legitimate terrorist or related threat would not be unlike the employment of force in response to a threat by conventional forces; only the nature of the threat has changed, rather than the international legal right of self-defense. ...

Summary. Assassination constitutes an act of murder that is prohibited by international law and Executive Order 12333. The purpose of Executive Order 12333 and its predecessors was to preclude unilateral actions by individual agents or agencies against selected foreign public officials and to establish beyond any doubt that the United States does not condone assassination as an instrument of national policy. Its intent was not to limit lawful self-defense options against legitimate threats to the national security of the United States or individual U.S. citizens. Acting consistent with the Charter of the United Nations, a decision by the President to employ clandestine, low visibility or overt military force would not constitute assassination if U.S. military forces were employed against the combatant forces of another nation, a guerrilla force, or a terrorist or other organization whose actions pose a threat to the security of the United States.

Do you agree with this analysis in terms of what various presidents most likely intended by banning assassination? Apart from that, do you think this is in fact the best understanding of what should be prohibited by way of an assassination ban?

b. A survey of pre-9/11 uses of lethal force by the United States in the counterterrorism context

Consider the following excerpt from my 2014 article *Postwar* (5 Harv. Nat. Sec. J. 318, 324-27):

Though this fact is not widely appreciated, counterterrorism in the pre-9/11 period was very much influenced by the continuous-threat standard. 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. Would this 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. 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. 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. A 1986 successor to this underlying presidential authority stayed on the books, available should future occasions present a similar continuous-threat scenario involving terrorism. 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 Cap Weinberger pushed back, having concluded after Vietnam that military force ought not to be used on an isolated or limited basis. Faced with a terrorist attack sponsored by Libya, however, the Reagan Administration was ultimately willing to carry out a limited but substantial set of overt airstrikes as a continuing-self-defense response.

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. 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.

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. 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.

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.

Consider the implications of this history in light of what you have learned about U.S. domestic law relating to the separation of war powers between the President and Congress. Were all of these actions compatible with that framework? Do you think the law of armed conflict applied to some or all of these actions, and if so did the United States comply with those rules? And what about International Human Rights Law?

Famously, the United States determined after 9/11 that a state of armed conflict existed between it and al Qaeda (a position taken first by President George W. Bush under color of his Article II authority, and then reinforced by the decision of Congress a few days later to enact a formal "Authorization for Use of Military Force" ("AUMF") statute). In relevant part, the AUMF provides:

the President is authorized to use all necessary and appropriate force against those nations, organizations, or persons he determines planned, authorized, committed, or aided the terrorist attacks that occurred on September 11, 2001, or harbored such organizations or persons, in order to prevent any future acts of international terrorism against the United States by such nations, organizations or persons.

Soon, the United States was using lethal force under color of the law of armed conflict in Afghanistan, as it (and NATO allies) joined the ongoing armed conflict there. And before too long, the United States also began using lethal force on a more episodic basis in other locations, including Yemen and Pakistan. Especially in those locations, the United States often (though not always) relied on unmanned aircraft as the weapons platform for these airstrikes. And in some cases the strikes were conducted as part of a covert-action program under CIA authority.

A great deal of controversy followed from all of this. In some cases, the controversy had to do with the location in which the force was used (including disputes about whether the government of the country in question had given effective consent to the use of force on its territory, and whether the absence of such effective consent mattered as a legal matter in circumstances where the U.S. might maintain that the government in question either was unable or unwilling to take effective action of its own against terrorists operating from within its borders). In other cases, the controversy had to do with disputes over the individual identity of the targets in question, or the organizational affiliation of those targets, or both. And in other cases the controversy had to do with the possibility of erroneous airstrikes, or airstrikes causing harm to innocent bystanders, or both.

c. Speech by Harold Koh, Legal Adviser, U.S. Department of State
At the Annual Meeting of the American Society of International Law
March 25, 2010

... [I]n all of our operations involving the *use of force*, including those in the armed conflict with al-Qaeda, the Taliban and associated forces, the Obama Administration is committed by word and deed to conducting ourselves in accordance with all applicable law. With respect to the subject of targeting, which has been much commented upon in the media and international legal circles, there are obviously limits to what I can say publicly. What I can say is that it is the considered view of this Administration—and it has certainly been my experience during my time as Legal Adviser—that U.S. targeting practices, including lethal operations conducted with the use of unmanned aerial vehicles, comply with all applicable law, including the laws of war.

The United States agrees that it must conform its actions to all applicable law. As I have explained, as a matter of international law, the United States is in an armed conflict with al-Qaeda, as well as the Taliban and associated forces, in response to the horrific 9/11 attacks, and may use force consistent with its inherent right to self-defense under international law. As a matter of domestic law, Congress authorized the use of all necessary and appropriate force

through the 2001 Authorization for Use of Military Force (AUMF). These domestic and international legal authorities continue to this day.

As recent events have shown, al-Qaeda has not abandoned its intent to attack the United States, and indeed continues to attack us. Thus, in this ongoing armed conflict, the United States has the authority under international law, and the responsibility to its citizens, to use force, including lethal force, to defend itself, including by targeting persons such as high-level al-Qaeda leaders who are planning attacks. As you know, this is a conflict with an organized terrorist enemy that does not have conventional forces, but that plans and executes its attacks against us and our allies while hiding among civilian populations. That behavior simultaneously makes the application of international law more difficult and more critical for the protection of innocent civilians. Of course, whether a particular individual will be targeted in a particular location will depend upon considerations specific to each case, including those related to the imminence of the threat, the sovereignty of the other states involved, and the willingness and ability of those states to suppress the threat the target poses. In particular, this Administration has carefully reviewed the rules governing targeting operations to ensure that these operations are conducted consistently with law of war principles, including:

- First, the principle of *distinction*, which requires that attacks be limited to military objectives and that civilians or civilian objects shall not be the object of the attack; and
- Second, the principle of *proportionality*, which prohibits attacks that may be expected to cause incidental loss of civilian life, injury to civilians, damage to civilian objects, or a combination thereof, that would be excessive in relation to the concrete and direct military advantage anticipated.

In U.S. operations against al-Qaeda and its associated forces-- including lethal operations conducted with the use of unmanned aerial vehicles-- great care is taken to adhere to these principles in both planning and execution, to ensure that only legitimate objectives are targeted and that collateral damage is kept to a minimum.

Recently, a number of legal objections have been raised against U.S. targeting practices. While today is obviously not the occasion for a detailed legal opinion responding to each of these objections, let me briefly address four:

First, some have suggested that the *very act of targeting* a particular leader of an enemy force in an armed conflict must violate the laws of war. But individuals who are part of such an armed group are belligerents and, therefore, lawful targets under international law. During World War II, for example, American aviators tracked and shot down the airplane carrying the architect of the Japanese attack on Pearl Harbor, who was also the leader of enemy forces in the Battle of Midway. This was a lawful operation then, and would be if conducted today. Indeed, targeting particular individuals serves to narrow the focus when force is employed and to avoid broader harm to civilians and civilian objects.

Second, some have challenged *the very use of advanced weapons systems*, such as unmanned aerial vehicles, for lethal operations. But the rules that govern targeting do not turn on the type of weapon system used, and there is no prohibition under the laws of war on the use of

technologically advanced weapons systems in armed conflict-- such as pilotless aircraft or so-called smart bombs-- so long as they are employed in conformity with applicable laws of war. Indeed, using such advanced technologies can ensure both that the best intelligence is available for planning operations, and that civilian casualties are minimized in carrying out such operations.

Third, some have argued that the use of lethal force against specific individuals fails to provide adequate process and thus constitutes *unlawful extrajudicial killing*. But a state that is engaged in an armed conflict or in legitimate self-defense is not required to provide targets with legal process before the state may use lethal force. Our procedures and practices for identifying lawful targets are extremely robust, and advanced technologies have helped to make our targeting even more precise. In my experience, the principles of distinction and proportionality that the United States applies are not just recited at meetings. They are implemented rigorously throughout the planning and execution of lethal operations to ensure that such operations are conducted in accordance with all applicable law.

Fourth and finally, some have argued that our targeting practices violate *domestic law,* in particular, the long-standing *domestic ban on assassinations*. But under domestic law, the use of lawful weapons systems—consistent with the applicable laws of war—for precision targeting of specific high-level belligerent leaders when acting in self-defense or during an armed conflict is not unlawful, and hence does not constitute "assassination."

Are you persuaded by Koh's arguments?

d. Philip Alston "Study on Targeted Killings" May 28, 2010

A few months later, Philip Alston (the U.N. Human Rights Council's Special Rapporteur on Extrajudicial Killings) weighed in with his own "Study on Targeted Killings (May 28, 2010).

47. ...both the US and Israel have invoked the existence of an armed conflict against alleged terrorists ("non-state armed groups"). The appeal is obvious: the IHL [remember, IHL = LOAC] applicable in armed conflict arguably has more permissive rules for killing than does human rights law or a State's domestic law, and generally provides immunity to State armed forces. Because the law of armed conflict has fewer due process safeguards, States also see a benefit to avoiding compliance with the more onerous requirements for capture, arrest, detention or extradition of an alleged terrorist in another State. IHL is not, in fact, more permissive than human rights law because of the strict IHL requirement that lethal force be necessary. But labeling a situation as an armed conflict might also serve to expand executive power both as a matter of domestic law and in terms of public support.

48. Although the appeal of an armed conflict paradigm to address terrorism is obvious, so too is the significant potential for abuse. Internal unrest as a result of insurgency or other violence by non-state armed groups, and even terrorism, are common in many parts of the world. If States

unilaterally extend the law of armed conflict to situations that are essentially matters of law enforcement that must, under international law, be dealt with under the framework of human rights, they are not only effectively declaring war against a particular group, but eviscerating key and necessary distinctions between international law frameworks that restricts States' ability to kill arbitrarily.

49. The IHL applicable to non-international armed conflict is not as well-developed as that applicable to international armed conflict. Since 11 September 2001, this fact has often been cited either to criticize IHL in general or as a justification for innovative interpretations which go well beyond generally accepted approaches. It is true that non-international armed conflict rules would benefit from development, but the rules as they currently exist offer more than sufficient guidance to the existence and scope of an armed conflict. The key is for States to approach them with good faith intent to apply the rules as they exist and have been interpreted by international bodies, rather than to seek ever expanding flexibility.

...

53. Taken cumulatively, these factors make it problematic for the US to show that – outside the context of the armed conflicts in Afghanistan or Iraq – it is in a transnational non-international armed conflict against "al Qaeda, the Taliban, and other associated forces" without further explanation of how those entities constitute a "party" under the IHL of non-international armed conflict, and whether and how any violence by any such group rises to the level necessary for an armed conflict to exist.

54. The focus, instead, appears to be on the "transnational" nature of the terrorist threat. Al-Qaeda and entities with various degrees of "association" with it are indeed known to have operated in numerous countries around the world including in Saudi Arabia, Indonesia, Pakistan, Germany, the United Kingdom and Spain, among others, where they have conducted terrorist attacks. Yet none of these States, with the possible exception of Pakistan, recognize themselves as being part of an armed conflict against al-Qaeda or its "associates" in their territory. Indeed, in each of those States, even when there have been terrorist attacks by al-Qaeda or other groups claiming affiliation with it, the duration and intensity of such attacks has not risen to the level of an armed conflict. Thus, while it is true that non-international armed conflict can exist across State borders, and indeed often does, that is only one of a number of cumulative factors that must be considered for the objective existence of an armed conflict.

55. With respect to the existence of a non-state group as a "party", al-Qaeda and other alleged "associated" groups are often only loosely linked, if at all. Sometimes they appear to be not even groups, but a few individuals who take "inspiration" from al Qaeda. The idea that, instead, they are part of continuing hostilities that spread to new territories as new alliances form or are claimed may be superficially appealing but such "associates' cannot constitute a "party" as required by IHL – although they can be criminals, if their conduct violates US law, or the law of the State in which they are located.

...

68. The failure of States to disclose their criteria for DPH is deeply problematic because it gives no transparency or clarity about what conduct could subject a civilian to killing. It also leaves open the likelihood that States will unilaterally expand their concept of direct participation beyond permissible boundaries. Thus, although the US has not made public its definition of DPH, it is clear that it is more expansive than that set out by the ICRC; in Afghanistan, the US has said that drug traffickers on the "battlefield" who have links to the insurgency may be targeted and killed. This is not consistent with the traditionally understood concepts under IHL – drug trafficking is understood as criminal conduct, not an activity that would subject someone to a targeted killing. And generating profits that might be used to fund hostile actions does not constitute DPH.

Can you explain just how it is that Koh and Alston disagree, if at all?

e. John Brennan
Assistant to the President for Homeland Security and Counterterrorism
Speech at Harvard Law School (September 16, 2011)

The year after the Koh speech, John Brennan (currently director of the CIA, but then the lead White House official managing counterterrorism) gave a speech at Harvard Law School. During the speech, Brennan suggested that there is less of a tension between the LOAC and IHRL models of counterterrorism than many assume. Key excerpts follow:

... As the President has said many times, we are at war with al-Qa'ida. ...

An area in which there is some disagreement is the geographic scope of the conflict. The United States does not view our authority to use military force against al-Qa'ida as being restricted solely to "hot" battlefields like Afghanistan. Because we are engaged in an armed conflict with al-Qa'ida, the United States takes the legal position that —in accordance with international law—we have the authority to take action against al-Qa'ida and its associated forces without doing a separate self-defense analysis each time. And as President Obama has stated on numerous occasions, we reserve the right to take unilateral action if or when other governments are unwilling or unable to take the necessary actions themselves.

That does not mean we can use military force whenever we want, wherever we want. International legal principles, including respect for a state's sovereignty and the laws of war, impose important constraints on our ability to act unilaterally—and on the way in which we can use force—in foreign territories.

Others in the international community—including some of our closest allies and partners—take a different view of the geographic scope of the conflict, limiting it only to the "hot" battlefields. As such, they argue that, outside of these two active theatres, the United States can only act in self-defense against al-Qa'ida when they are planning, engaging in, or threatening an armed attack against U.S. interests if it amounts to an "imminent" threat.

In practice, the U.S. approach to targeting in the conflict with al-Qa'ida is far more aligned with our allies' approach than many assume. This Administration's counterterrorism efforts outside of Afghanistan and Iraq are focused on those individuals who are a threat to the United States, whose removal would cause a significant – even if only temporary – disruption of the plans and capabilities of al-Qa'ida and its associated forces. Practically speaking, then, the question turns principally on how you define "imminence."

We are finding 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. After all, al-Qa'ida 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. Nonetheless, it possesses the demonstrated capability to strike with little notice and cause significant civilian or military casualties. 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 the modern-day capabilities, techniques, and technological innovations of terrorist organizations. ...

Can you explain how this argument relates to the criticisms advanced by Philip Alston? Are you persuaded by it?

f. A Quiet End or Just Quiet Continuation?

Much has transpired in the intervening decade, to say the least. Al Qaeda eventually receded to some extent from the public eye in the U.S., as the rise of its erstwhile affiliate the Islamic State took center stage. Then, just as conventional military action against the Islamic State in Syria and Iraq achieved success, new challenges (the rise of China, troubles with Russia, the emergence of statecraft in the cyber domain, and then the pandemic) tended to consume attention. And yet the United States as of 2021 continues to assert the authority to use lethal force in some counterterrorism settings. Consider this recent account, by Charlie Savage and Eric Schmitt of the *New York Times:*

The Biden administration has quietly imposed temporary limits on counterterrorism drone strikes and commando raids outside conventional battlefield zones like Afghanistan and Syria, and it has begun a broad review of whether to tighten Trump-era rules for such operations, according to officials.

The military and the C.I.A. must now obtain White House permission to attack terrorism suspects in poorly governed places where there are scant American ground troops, like Somalia and Yemen. Under the Trump administration, they had been allowed to decide for themselves whether circumstances on the ground met certain conditions and an attack was justified.

Officials characterized the tighter controls as a stopgap while the Biden administration reviewed how targeting worked — both on paper and in practice — under former President Donald J.

Trump and developed its own policy and procedures for counterterrorism kill-or-capture operations outside war zones, including how to minimize the risk of civilian casualties.

The Biden administration did not announce the new limits. But the national security adviser, Jake Sullivan, issued the order on Jan. 20, the day of President Biden's inauguration, said the officials, who spoke on the condition of anonymity to discuss internal deliberations.

Any changes resulting from the review would be the latest turn in a long-running evolution over rules for drone strikes outside conventional battlefield zones, a gray-area intermittent combat action that has become central to America's long-running counterterrorism wars that took root with the response to the attacks on Sept. 11, 2001.

Counterterrorism drone warfare has reached its fourth administration with Mr. Biden. As President Barack Obama's vice president, Mr. Biden was part of a previous administration that oversaw a major escalation in targeted killings using remote-piloted aircraft in its first term, and then imposed significant new restraints on the practice in its second.

While the Biden administration still permits counterterrorism strikes outside active war zones, the additional review and bureaucratic hurdles it has imposed may explain a recent lull in such operations. The United States military's Africa Command has carried out about half a dozen airstrikes this calendar year in Somalia targeting the Shabab, a terrorist group affiliated with Al Qaeda — but all were before Jan. 20.

Emily Horne, a spokeswoman for the National Security Council, acknowledged that Mr. Biden had issued "interim guidance" about the use of military force and related national security operations.

"The purpose of the interim guidance is to ensure the president has full visibility on proposed significant actions into these areas while the National Security Council staff leads a thorough interagency review of the extant authorizations and delegations of presidential authority with respect to these matters," Ms. Horne said.

Though Mr. Trump significantly relaxed limits on counterterrorism strikes outside war zones, fewer occurred on his watch than under Mr. Obama. That is largely because the nature of the war against Al Qaeda and its splintering, morphing progeny keeps changing.

In particular, during Mr. Obama's first term, there was a sharp escalation in drone strikes targeting Qaeda suspects in the tribal region of Pakistan and in rural Yemen. Mr. Obama broke new ground by deciding to approve the deliberate killing in 2011 of an American citizen, Anwar al-Awlaki, a radical Muslim cleric who was part of Al Qaeda's Yemen branch.

Then, after the Islamic State arose in Iraq and Syria, its "caliphate" became a magnet for jihadists during Mr. Obama's final years and much of Mr. Trump's presidency. But the region ISIS controlled was considered a conventional war zone, so airstrikes there did not raise the same novel legal and policy issues as targeted killings away from so-called hot battlefields.

The Biden administration's review of legal and policy frameworks governing targeting is still in preliminary stages. Officials are said to be gathering data, like official estimates of civilian casualties in both military and C.I.A. strikes outside of battlefield zones during the Trump era. No decisions have been made about what the new rules will be, Ms. Horne said.

"This review includes an examination of previous approaches in the context of evolving counterterrorism threats in order to refine our approach going forward," she said. "In addition, the review will seek to ensure appropriate transparency measures."

Among the issues said to be under consideration is whether to tighten a limit intended to prevent civilian bystander casualties in such operations. The current rules generally require "near certainty" that no women or children are present in the strike zone, but the Trump team apparently permitted operators to use a lower standard of merely "reasonable certainty" that no civilian adult men were likely to be killed, the officials said.

Permitting that greater risk of killing civilian men made it easier for the military and the C.I.A. to meet the standards to fire missiles. But it is also routine for civilian men to be armed in the kinds of lawless badlands and failed states for which the rules are written.

Among the trade-offs under discussion, officials said, is that intelligence-gathering resources are finite. For example, keeping surveillance drones over a potential strike zone for a longer period to watch who comes and goes means rendering them less available for other operations.

Biden administration officials are also discussing whether to write general rules that are more strictly applied than the Trump-era system sometimes was in practice. They discovered that the Trump system was very flexible and allowed officials to craft procedures for strikes in particular countries using lower standards than those laid out in the general policy, so that administration's safeguards were sometimes stronger on paper than in reality.

Officials are also confronting a broader philosophical issue: whether to return to the Obama-era approach, which was characterized by centralized oversight and high-level vetting of intelligence about individual terrorism suspects, or maintain something closer to the Trump-era approach, which was looser and more decentralized.

Under the previous rules, which Mr. Obama codified in a 2013 order known as the P.P.G., an acronym for Presidential Policy Guidance, a suspect had to pose a "continuing and imminent threat" to Americans to be targeted outside a war zone. The system resulted in numerous interagency meetings to debate whether particular suspects met that standard.

Mr. Obama imposed his rules after the frequency of counterterrorism strikes soared in tribal Pakistan and rural Yemen, prompting recurring controversies over civilian deaths and a growing impression that armed drones — a new technology that made it easier to fire missiles at presumed enemies in regions that were difficult to reach — were getting out of control.

But military and intelligence operators chafed under the limits of the 2013 rules, complaining that the process had become prone to too much lawyering and interminable meetings. In October

2017, Mr. Trump scrapped that system and imposed a different set of policy standards and procedures for using lethal force outside war zones.

His replacement centered instead on crafting general standards for strikes and raids in particular countries. It permitted the military and the C.I.A. to target suspects based on their status as members of a terrorist group, even if they were merely foot soldier jihadists with no special skills or leadership roles. And it permitted operators to decide whether to carry out specific actions.

During the presidential transition, Mr. Sullivan and Avril D. Haines, who oversaw development of Mr. Obama's drone strike playbook and is now Mr. Biden's director of national intelligence, raised the prospect of tightening the Trump-era rules and procedures to reduce the risk of civilian casualties and blowback from excessive use of drone strikes, but not necessarily going all the way back to the Obama-era system, one official said.

Since Mr. Biden took office, the ensuing interagency review has been primarily overseen by Elizabeth D. Sherwood-Randall, his homeland security adviser, and Clare Linkins, the senior director for counterterrorism on the National Security Council.

The Biden team is also weighing whether to restore an Obama-era order that had required the government to annually disclose estimates of how many suspected terrorists and civilian bystanders it had killed in airstrikes outside war zones. Mr. Obama invoked that requirement in 2016, but Mr. Trump removed it in 2019. The military separately publishes some information about its strikes in places like Somalia, but the C.I.A. does not.

While The New York Times reported on Mr. Trump's replacement rules in 2017, the Trump administration never released its drone policy or publicly discussed the parameters and principles that framed it, noted Luke Hartig, who worked as a top counterterrorism aide in Mr. Obama's White House.

Asserting that there was good reason to believe the government did not publicly acknowledge the full range of strikes carried out under Mr. Trump, Mr. Hartig said it was appropriate for the Biden team to gather more information about that period before deciding whether and how to change the system that governed it.

"There is a lot the administration needs to do to reinstate higher standards after the Trump administration, but they shouldn't just snap back to the Obama rules," he said. "The world has changed. The counterterrorism fight has evolved."

Is this situation legally different from what came before?

g. The Special Case of U.S. Person Targets

How, if at all, should the analysis change when the target of lethal force in the counterterrorism setting is a U.S. person? Consider first some basic Fourth Amendment caselaw.

Tennessee v. Garner is a 1985 Supreme Court decision involving a Memphis police officer who shot and killed an unarmed man who was fleeing arrest. The decedent's father brought suit, leading the Court to issue the following observations:

> [T]here can be no question that apprehension by the use of deadly force is a seizure subject to the reasonableness requirement of the Fourth Amendment. ...
>
> The use of deadly force to prevent the escape of all felony suspects, whatever the circumstances, is constitutionally unreasonable. It is not better that all felony suspects die than that they escape. Where the suspect poses no immediate threat to the officer and no threat to others, the harm resulting from failing to apprehend him does not justify the use of deadly force to do so. It is no doubt unfortunate when a suspect who is in sight escapes, but the fact that the police arrive a little late or are a little slower afoot does not always justify killing the suspect. A police officer may not seize an unarmed, nondangerous suspect by shooting him dead. ...
>
> It is not, however, unconstitutional on its face. Where the officer has probable cause to believe that the suspect poses a threat of serious physical harm, either to the officer or to others, it is not constitutionally unreasonable to prevent escape by using deadly force. Thus, if the suspect threatens the officer with a weapon or there is probable cause to believe that he has committed a crime involving the infliction or threatened infliction of serious physical harm, deadly force may be used if necessary to prevent escape, and if, where feasible, some warning has been given.

Many years later, in 2007, the Supreme Court decided *Scott v. Harris*. In that case, a sheriff's deputy ended a high-speed chase by ramming the suspect's vehicle. The suspect was badly injured in the ensuing crash, and sued the officer on the grounds that it was an unreasonable seizure in violation of the Fourth Amendment. The Supreme Court ultimately concluded that there was no such violation:

> ...we are loath to lay down a rule requiring the police to allow fleeing suspects to get away whenever they drive *so recklessly* that they put other people's lives in danger. It is obvious the perverse incentives such a rule would create: Every fleeing motorist would know that escape is within his grasp, if only he accelerates to 90 miles per hour, crosses the double-yellow line a few times, and runs a few red lights. The Constitution assuredly does not impose this invitation to impunity-earned-by-recklessness. Instead, we lay down a more sensible rule: A police officer's attempt to terminate a dangerous high-speed car chase that threatens the lives of innocent bystanders does not violate the Fourth Amendment, even when it places the fleeing motorist at risk of serious injury or death. The car chase that respondent initiated in this case posed a substantial and immediate risk of serious physical injury to others; no reasonable jury could conclude otherwise. Scott's attempt to terminate the chase by forcing respondent off the road was reasonable, and Scott is entitled to summary judgment.

Against that backdrop, consider the story of Anwar al-Awlaki. He was a U.S. citizen who joined al Qaeda in the Arabian Peninsula (AQAP is a Yemen-based entity), and in that capacity became notorious as (i) a prominent English-language propagandist encouraging violent jihad both in general and in specific cases and (ii) a suspected orchestrator or facilitator of AQAP attacks on western targets.

Eventually, the U.S. government included him on the list of persons approved for a drone strike attack in Yemen, and after at least one failed attempt he was killed by drone strike in September 2011 (a few weeks after the Brennan speech at Harvard). A few weeks later, Charlie Savage of the New York Times published this account of the legal basis for targeting al-Awlaki:

> The Obama administration's secret legal memorandum that opened the door to the killing of Anwar al-Awlaki...found that it would be lawful only if it were not feasible to take him alive, according to people who have read the document.
>
> The memo, written last year, followed months of extensive interagency deliberations and offers a glimpse into the legal debate that led to one of the most significant decisions made by President Obama — to move ahead with the killing of an American citizen without a trial.
>
> The secret document provided the justification for acting despite an executive order banning assassinations, a federal law against murder, protections in the Bill of Rights and various strictures of the international laws of war, according to people familiar with the analysis. The memo, however, was narrowly drawn to the specifics of Mr. Awlaki's case and did not establish a broad new legal doctrine to permit the targeted killing of any Americans believed to pose a terrorist threat.
>
> ...The legal analysis, in essence, concluded that Mr. Awlaki could be legally killed, if it was not feasible to capture him, because intelligence agencies said he was taking part in the war between the United States and Al Qaeda and posed a significant threat to Americans, as well as because Yemeni authorities were unable or unwilling to stop him.
>
> ...It was principally drafted by David Barron and Martin Lederman, who were both lawyers in the Office of Legal Counsel at the time, and was signed by Mr. Barron. The office may have given oral approval for an attack on Mr. Awlaki before completing its detailed memorandum. Several news reports before June 2010 quoted anonymous counterterrorism officials as saying that Mr. Awlaki had been placed on a kill-or-capture list around the time of the attempted bombing of a Detroit-bound airliner on Dec. 25, 2009. Mr. Awlaki was accused of helping to recruit the attacker for that operation.
>
> Mr. Awlaki, who was born in New Mexico, was also accused of playing a role in a failed plot to bomb two cargo planes last year, part of a pattern of activities that counterterrorism officials have said showed that he had evolved from merely being a propagandist — in sermons justifying violence by Muslims against the United States — to playing an operational role in Al Qaeda in the Arabian Peninsula's continuing efforts to carry out terrorist attacks.

Other assertions about Mr. Awlaki included that he was a leader of the group, which had become a "cobelligerent" with Al Qaeda, and he was pushing it to focus on trying to attack the United States again. The lawyers were also told that capturing him alive among hostile armed allies might not be feasible if and when he were located.

Based on those premises, the Justice Department concluded that Mr. Awlaki was covered by the authorization to use military force against Al Qaeda that Congress enacted shortly after the terrorist attacks of Sept. 11, 2001 — meaning that he was a lawful target in the armed conflict unless some other legal prohibition trumped that authority.

It then considered possible obstacles and rejected each in turn.

Among them was an executive order that bans assassinations. That order, the lawyers found, blocked unlawful killings of political leaders outside of war, but not the killing of a lawful target in an armed conflict.

A federal statute that prohibits Americans from murdering other Americans abroad, the lawyers wrote, did not apply either, because it is not "murder" to kill a wartime enemy in compliance with the laws of war.

But that raised another pressing question: would it comply with the laws of war if the drone operator who fired the missile was a Central Intelligence Agency official, who, unlike a soldier, wore no uniform? The memorandum concluded that such a case would not be a war crime, although the operator might be in theoretical jeopardy of being prosecuted in a Yemeni court for violating Yemen's domestic laws against murder, a highly unlikely possibility.

Then there was the Bill of Rights: the Fourth Amendment's guarantee that a "person" cannot be seized by the government unreasonably, and the Fifth Amendment's guarantee that the government may not deprive a person of life "without due process of law."

The memo concluded that what was reasonable, and the process that was due, was different for Mr. Awlaki than for an ordinary criminal. It cited court cases allowing American citizens who had joined an enemy's forces to be detained or prosecuted in a military court just like noncitizen enemies.

It also cited several other Supreme Court precedents, like a 2007 case involving a high-speed chase and a 1985 case involving the shooting of a fleeing suspect, finding that it was constitutional for the police to take actions that put a suspect in serious risk of death in order to curtail an imminent risk to innocent people.

The document's authors argued that "imminent" risks could include those by an enemy leader who is in the business of attacking the United States whenever possible, even if he is not in the midst of launching an attack at the precise moment he is located.

There remained, however, the question of whether — when the target is known to be a citizen — it was permissible to kill him if capturing him instead were a feasible way of suppressing the threat.

Killed in the strike alongside Mr. Awlaki was another American citizen, Samir Khan, who had produced a magazine for Al Qaeda in the Arabian Peninsula promoting terrorism. He was apparently not on the targeting list, making his death collateral damage. His family has issued a statement citing the Fifth Amendment and asking whether it was necessary for the government to have "assassinated two of its citizens."

"Was this style of execution the only solution?" the Khan family asked in its statement. "Why couldn't there have been a capture and trial?"

Last month, President Obama's top counterterrorism adviser, John O. Brennan, delivered a speech in which he strongly denied the accusation that the administration had sometimes chosen to kill militants when capturing them was possible, saying the policy preference is to interrogate them for intelligence.

The memorandum is said to declare that in the case of a citizen, it is legally required to capture the militant if feasible — raising a question: was capturing Mr. Awlaki in fact feasible?

It is possible that officials decided last month that it was not feasible to attempt to capture him because of factors like the risk it could pose to American commandos and the diplomatic problems that could arise from putting ground forces on Yemeni soil. Still, the raid on Osama bin Laden's compound in Pakistan demonstrates that officials have deemed such operations feasible at times.

Last year, Yemeni commandos surrounded a village in which Mr. Awlaki was believed to be hiding, but he managed to slip away.

The administration had already expressed in public some of the arguments about issues of international law addressed by the memo, in a speech delivered in March 2010 by Harold Hongju Koh, the top State Department lawyer.

The memorandum examined whether it was relevant that Mr. Awlaki was in Yemen, far from Afghanistan. It concluded that Mr. Awlaki's geographical distance from the so-called hot battlefield did not preclude him from the armed conflict; given his presumed circumstances, the United States still had a right to use force to defend itself against him.

As to whether it would violate Yemen's sovereignty to fire a missile at someone on Yemeni soil, Yemen's president secretly granted the United States that permission, as secret diplomatic cables obtained by WikiLeaks have revealed.

The memorandum did assert that other limitations on the use of force under the laws of war — like avoiding the use of disproportionate force that would increase the possibility of civilian deaths — would constrain any operation against Mr. Awlaki.

That apparently constrained the attack when it finally came. Details about Mr. Awlaki's location surfaced about a month ago, American officials have said, but his hunters delayed the strike until he left a village and was on a road away from populated areas.

Several months later, in the spring of 2012, Attorney General Eric Holder expanded on these themes in a speech at Northwestern Law School:

Any decision to use lethal force against a United States citizen – even one intent on murdering Americans and who has become an operational leader of al-Qaeda in a foreign land – is among the gravest that government leaders can face. The American people can be – and deserve to be – assured that actions taken in their defense are consistent with their values and their laws. So, although I cannot discuss or confirm any particular program or operation, I believe it is important to explain these legal principles publicly.

Let me be clear: an operation using lethal force in a foreign country, targeted against a U.S. citizen who is a senior operational leader of al Qaeda or associated forces, and who is actively engaged in planning to kill Americans, would be lawful at least in the following circumstances:

- first, the U.S. government has determined, after a thorough and careful review, that the individual poses an imminent threat of violent attack against the United States;
- second, capture is not feasible; and
- third, the operation would be conducted in a manner consistent with applicable law of war principles.

The evaluation of whether an individual presents an "imminent threat" incorporates 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 disastrous attacks against the United States. As we learned on 9/11, al Qaeda has demonstrated the ability to strike with little or no notice – and to cause devastating casualties. Its leaders are continually planning attacks against the United States, and they do not behave like a traditional military – wearing uniforms, carrying arms openly, or massing forces in preparation for an attack. Given these facts, the Constitution does not require the President to delay action until some theoretical end-stage of planning – when the precise time, place, and manner of an attack become clear. Such a requirement would create an unacceptably high risk that our efforts would fail, and that Americans would be killed.

Whether the capture of a U.S. citizen terrorist is feasible is a fact-specific, and potentially time-sensitive, question. It may depend on, among other things, whether capture can be accomplished in the window of time available to prevent an attack and without undue risk to civilians or to U.S. personnel. Given the nature of how terrorists act and where they tend to hide, it may not always be feasible to capture a United States citizen terrorist who presents an imminent threat of violent attack. In that case, our government has the clear authority to defend the United States with lethal force.

... Some have argued that the President is required to get permission from a federal court before taking action against a United States citizen who is a senior operational leader of al Qaeda or associated forces. This is simply not accurate. "Due process" and "judicial process" are not one and the same, particularly when it comes to national security. The Constitution guarantees due process, not judicial process.

The conduct and management of national security operations are core functions of the Executive Branch, as courts have recognized throughout our history. Military and civilian officials must often make real-time decisions that balance the need to act, the existence of alternative options, the possibility of collateral damage, and other judgments – all of which depend on expertise and immediate access to information that only the Executive Branch may possess in real time. The Constitution's guarantee of due process is ironclad, and it is essential – but, as a recent court decision makes clear, it does not require judicial approval before the President may use force abroad against a senior operational leader of a foreign terrorist organization with which the United States is at war – even if that individual happens to be a U.S. citizen.

That is not to say that the Executive Branch has – or should ever have – the ability to target any such individuals without robust oversight. Which is why, in keeping with the law and our constitutional system of checks and balances, the Executive Branch regularly informs the appropriate members of Congress about our counterterrorism activities, including the legal framework, and would of course follow the same practice where lethal force is used against United States citizens.

Now, these circumstances are sufficient under the Constitution for the United States to use lethal force against a U.S. citizen abroad – but it is important to note that the legal requirements I have described may not apply in every situation – such as operations that take place on traditional battlefields.

Are you persuaded?