



REPORT ON THE LEGAL AND POLICY  
FRAMEWORKS GUIDING THE  
UNITED STATES' USE OF MILITARY  
FORCE AND RELATED NATIONAL  
SECURITY OPERATIONS

December 2016



# FOREWORD

From President Lincoln’s issuance of the Lieber Code during the Civil War to our nation’s leadership at the Nuremberg Trials following World War II, the United States has a long history of emphasizing the development and enforcement of a framework under which war can be waged lawfully and effectively, with due regard for humanitarian considerations, and consistent with our national interests and values.

Consistent with this long tradition, since my first days in office I have underscored the importance of adhering to standards—including international legal standards—that govern the use of force. Far from eroding our nation’s influence, I have argued, adherence to these standards strengthens us, just as it isolates those nations who do not follow such standards. Indeed, as I have consistently emphasized, what makes America truly remarkable is not the strength of our arms or our economy, but rather our founding values, which include respect for the rule of law and universal rights.

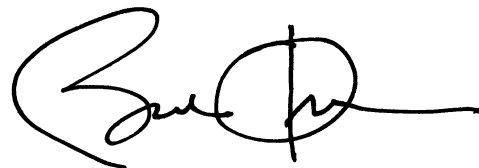
Decisions regarding war and peace are among the most important any President faces. It is critical, therefore, that such decisions are made pursuant to a policy and legal framework that affords clear guidance internally, reduces the risk of an ill-considered decision, and enables the disclosure of as much information as possible to the public, consistent with national security and the proper functioning of the Government, so that an informed public can scrutinize our actions and hold us to account. When I took office, our nation was already years into a new and different kind of conflict against enemies who do not wear uniforms or respect geographic boundaries and who disregard the legal principles of warfare. Recognizing the novelty of this threat and the difficult legal and policy questions it raised and continues to raise, the United States complies with all applicable domestic and international law in conducting operations against these enemies. And, over the course of my Administration, I directed my team to work continually to refine, clarify, and strengthen the standards and processes pursuant to which the United States conducts its national security operations.

This report details the results of these efforts. It describes, among other things, how my Administration has ensured that our uses of force overseas are supported by a solid domestic law framework and consistent with an international legal framework predicated on the concepts of sovereignty and self-defense embedded in the United Nations Charter. And it describes how the United States has applied rules, practices, and policies long used in traditional warfare to this new type of conflict. In addition, the report recounts actions my Administration has taken to institutionalize a policy framework to ensure that, in carrying out certain critical operations, the United States not only meets but also in important respects exceeds the safeguards that apply as a matter of law in the course of an armed conflict—particularly in the areas of the preservation of civilian life, transparency, and accountability. For, as I have previously emphasized, to say that a military tactic is legal, or effective, is not to say that it is wise or moral in every instance.

To be sure, even with the release of this report today, there remains information about U.S. national security operations that we cannot disclose consistent with national security. Nor does this report address all conceivable legal aspects or justifications for the use of military force in every context or provide an exhaustive discussion of how the United States wages war. Rather, this report is intended to explain the domestic and international bases for the United States' ongoing use of military force overseas and to describe some of the key legal and policy frameworks my Administration has developed to govern such uses of force and related national security operations, such as detention, transfer, and interrogation operations. The report builds on a long line of public speeches and statements by members of my Administration that reflect my commitment to being as transparent as possible about how and in what circumstances the United States conducts national security operations. Even as working toward that degree of transparency can be challenging at times, it is ultimately critical to reinforcing the process of democratic decision-making, to demonstrating the legitimacy of our actions, and to reinforcing our relationships with our allies and partners.

Given the dynamic nature of today's security environment, the United States will no doubt continue to confront new issues as our nation's national security professionals work tirelessly to protect U.S. persons and interests. That is why, in conjunction with the release of this report, I am issuing a Presidential Memorandum that encourages future Administrations to build on this report and carry forward the principles of transparency it represents. In particular, the memorandum states that the National Security Council staff shall be asked, as appropriate, to update the report at least on an annual basis and to arrange for the report to be released to the public.

Through this report, I hope to enhance the public's understanding of the legal and policy principles that have guided U.S. national security operations, and to reinforce the fact that we defend our interests at home and around the world in a manner consistent with the laws, values, and traditions that are the source of our greatest strength.

A handwritten signature in black ink, appearing to be "Barack Obama", written in a cursive style.

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# INTRODUCTION

This report has been drafted pursuant to the Presidential Memorandum of December 5, 2016, which directed national security departments and agencies to prepare for the President a formal report that describes key legal and policy frameworks that currently guide the United States' use of military force and related national security operations.

The Presidential Memorandum of December 5, 2016, further states that the National Security Council staff shall be asked to, as appropriate, coordinate a review and update of this report, provide any updated report to the President, and arrange for the report to be released to the public.<sup>1</sup>

# PART ONE: KEY FRAMEWORKS RELATED TO THE USE OF U.S. MILITARY FORCE OVERSEAS

The primary focus of Part One is to describe the domestic and international legal frameworks for the United States' current uses of military force overseas.

The War Powers Resolution states that the President shall submit a report to Congress within 48 hours after, among other things, U.S. Armed Forces are introduced into "hostilities or into situations where imminent involvement in hostilities is clearly indicated by the circumstances."<sup>2</sup> It further requires the President to report to Congress no less than every six months on the status of such hostilities. President Obama has submitted these periodic War Powers reports every June and December of his Presidency, and they provide a summary of the circumstances in which the United States is using military force overseas.

Part One describes the domestic and international legal framework for the uses of military force described in the recent periodic War Powers report, submitted in December 2016.<sup>3</sup> In particular, as described in that report, the United States is currently using military force in the following countries:<sup>4</sup>

- *Afghanistan:* In Afghanistan, U.S. Armed Forces have transitioned the lead for security to Afghan security forces while preventing Afghanistan from being used to launch attacks against the United States. A limited number of U.S. forces remain in Afghanistan for the purposes of, among other things, training, advising, and assisting Afghan forces; conducting and supporting counterterrorism operations against the remnants of core al-Qa'ida, as well as the Islamic State of Iraq and the Levant (ISIL); and taking appropriate measures against those who directly threaten U.S. and coalition forces in Afghanistan. Active hostilities are ongoing.<sup>5</sup>
- *Iraq and Syria:* U.S. Armed Forces are conducting a systematic campaign of airstrikes and other necessary operations against ISIL forces in Iraq and Syria. U.S. Armed Forces are also conducting airstrikes and other necessary operations against al-Qa'ida in Syria. In Iraq, U.S. Armed Forces are advising and coordinating with Iraqi forces and providing training, equipment, communications support, intelligence support, and other support to select elements of the Iraqi security forces, including Iraqi Kurdish Peshmerga forces. Additionally, small teams of U.S. special operations forces have deployed to Syria to help coordinate U.S. operations with indigenous ground forces conducting operations against ISIL.<sup>6</sup>
- *Yemen:* The U.S. military continues to work closely with the Government of Yemen to dismantle operationally and ultimately eliminate the threat posed by al-Qa'ida in the Arabian Peninsula (AQAP). U.S. joint efforts have resulted in direct action, including airstrikes, against a limited number of AQAP operatives and senior leaders who posed a terrorist threat

to the United States.<sup>7</sup> The United States has also deployed small numbers of U.S. military personnel to Yemen to support operations against AQAP, including support for operations to capture AQAP leaders and key personnel. Additionally, on October 12, 2016, the United States conducted military strikes on radar facilities in Houthi-controlled territory in Yemen in response to anti-ship cruise missile launches that threatened U.S. Navy warships in the international waters of the Red Sea on October 9 and October 12, 2016. The targeted radar facilities were involved in the October 9, 2016 launches and other recent attacks.<sup>8</sup>

- *Libya:* U.S. military forces have conducted airstrikes against ISIL targets in Libya, including in support of ongoing efforts by forces aligned with the Government of National Accord (GNA) to recapture the city of Sirte from ISIL.
- *Somalia:* U.S. forces in Somalia continue to counter the terrorist threat posed by al-Qa’ida and al-Shabaab and to provide advice and assistance to regional counterterrorism forces, including Somali and African Union Mission in Somalia (AMISOM) forces. U.S. forces have conducted airstrikes against al-Qa’ida and al-Shabaab and in the defense of U.S. and partnered forces.<sup>9</sup>

When using military force overseas, the United States complies with domestic law—including relevant constitutional and statutory authorities—and international law. In doing so, the Administration regularly informs Congress and the public of the status and circumstances of its use of military force overseas.

## I. The Domestic Law Bases for the Ongoing Use of U.S. Military Force

### A. *Statutory Authorization: The 2001 AUMF*

Shortly after the September 11th attacks, Congress passed the Authorization for Use of Military Force (2001 AUMF). In that joint resolution, Congress authorized the President “to use all necessary and appropriate force against those nations, organizations, or persons he determines planned, authorized, committed, or aided the terrorist attacks that occurred on September 11, 2001, or harbored such organizations or persons.”<sup>10</sup> Through the 2001 AUMF, Congress intended to give the President the statutory authority he needed “in order to prevent any future acts of international terrorism against the United States by such nations, organizations or persons.”<sup>11</sup> The 2001 AUMF plainly covers al-Qa’ida, the “organization” that “planned, authorized, committed, [and] aided the terrorist attacks that occurred on September 11, 2001,” as well as the Taliban, which “harbored” al-Qa’ida.<sup>12</sup> Thus, in accordance with this statutory authorization, the United States commenced military operations against al-Qa’ida and the Taliban on October 7, 2001. The 2001 AUMF continues to provide the domestic legal authority for the United States to use military force against the terrorist threats identified above.



## 1. The Scope of the 2001 AUMF

All three branches of the U.S. Government have affirmed the ongoing authority conferred by the 2001 AUMF and its application to al-Qa'ida, to the Taliban, and to forces associated with those two organizations within and outside Afghanistan.<sup>13</sup>

In March 2009, the Department of Justice filed a brief addressing the question of the scope of the government's detention authority under the 2001 AUMF in litigation over detention at Guantanamo Bay.<sup>14</sup> The brief explained that the 2001 AUMF authorizes detention of enemy forces as an aspect of the authority to use force.<sup>15</sup> With respect to the scope of detention authority under the 2001 AUMF, the brief explained that the 2001 AUMF authorized the detention of "persons who were part of, or substantially supported, Taliban or al-Qa'ida forces or associated forces that are engaged in hostilities against the United States or its coalition partners, including any person who has committed a belligerent act, or has directly supported hostilities, in aid of such enemy armed forces."<sup>16</sup> The brief stated that, in applying that standard, "[p]rinciples derived from law-of-armed-conflict rules governing international armed conflicts . . . must inform the interpretation of the detention authority Congress has authorized" in the 2001 AUMF.<sup>17</sup>

In the National Defense Authorization Act for Fiscal Year 2012 (2012 NDAA), Congress expressly affirmed "that the authority of the President to use all necessary and appropriate force pursuant to the [2001] Authorization for Use of Military Force includes the authority for the Armed Forces of the United States to detain covered persons (as defined in subsection (b)) pending disposition under the law of war."<sup>18</sup> In turn, subsection (b) of that Act defined a "covered person" as "any person" who either "planned, authorized, committed, or aided the terrorist attacks that occurred on September 11, 2001, or harbored those responsible for those attacks" or "who was a part of or substantially supported al-Qa'ida, the Taliban, or associated forces that are engaged in hostilities against the United States or its coalition partners, including any person who has committed a belligerent act or has directly supported such hostilities in aid of such enemy forces."<sup>19</sup>

Similarly, the Federal courts have issued rulings in the detention context that affirmed the President's authority to detain individuals who are part of al-Qa'ida, the Taliban, or associated forces, or who substantially supported those forces in the armed conflict against them.<sup>20</sup>

## 2. Definition of "Associated Forces"

As noted in the previous sub-section, all three branches of government have recognized that the 2001 AUMF authorizes the use of force against "al-Qa'ida, the Taliban, or associated forces that are engaged in hostilities against the United States or its coalition partners."

To be considered an "associated force" of al-Qa'ida or the Taliban for purposes of the authority conferred by the 2001 AUMF, an entity must satisfy two conditions. First, the entity must be an organized, armed group that has entered the fight alongside al-Qa'ida or the Taliban. Second, the group must be a co-belligerent with al-Qa'ida or the Taliban in hostilities against the United States or its coalition partners. Thus, a group is not an associated force simply because it

aligns with al-Qa'ida or the Taliban or embraces their ideology. Merely engaging in acts of terror or merely sympathizing with al-Qa'ida or the Taliban is not enough to bring a group within the scope of the 2001 AUMF. Rather, a group must also have entered al-Qa'ida or the Taliban's fight against the United States or its coalition partners.

### 3. Application of the 2001 AUMF to Particular Groups and Individuals

Consistent with the above, the 2001 AUMF does not authorize the President to use force against every group that commits terrorist acts. Rather, the U.S. military is currently taking direct action against solely the following individuals and groups under the authority of the 2001 AUMF: al-Qa'ida;<sup>21</sup> the Taliban; certain other terrorist or insurgent groups affiliated with al-Qa'ida or the Taliban in Afghanistan; AQAP; al-Shabaab; individuals who are part of al-Qa'ida in Libya;<sup>22</sup> al-Qa'ida in Syria;<sup>23</sup> and ISIL.

A determination was made at the most senior levels of the U.S. Government that each of the groups named above is covered by the 2001 AUMF only after a careful and lengthy evaluation of the intelligence concerning each group's organization, links with al-Qa'ida or the Taliban, and participation in al-Qa'ida or the Taliban's ongoing hostilities against the United States or its coalition partners. Moreover, the Administration also regularly briefs Congress about U.S. operations against these groups and the legal basis for these operations.

Although much of the intelligence underlying a determination that a group is covered by the 2001 AUMF is necessarily sensitive, many of these groups have made plain their continued allegiance and operational ties to al-Qa'ida. For example, this determination was made recently with respect to al-Shabaab because, among other things, al-Shabaab has pledged loyalty to al-Qa'ida in its public statements; made clear that it considers the United States one of its enemies; and been responsible for numerous attacks, threats, and plots against U.S. persons and interests in East Africa. In short, al-Shabaab has entered the fight alongside al-Qa'ida and is a co-belligerent with al-Qa'ida in hostilities against the United States, making it an "associated force" and therefore within the scope of the 2001 AUMF.

A particularly prominent group that the Administration has determined to fall within the ambit of the 2001 AUMF is the enemy force now called ISIL. As discussed below, Congress has expressed support for this action.<sup>24</sup>

As the Administration has explained publicly, the 2001 AUMF has authorized the use of force against the group now called ISIL since at least 2004. The facts underlying this determination are as follows: a terrorist group founded by Abu Mu'sab al-Zarqawi—whose ties to Osama bin Laden dated from al-Zarqawi's time in Afghanistan and Pakistan before the September 11th attacks—conducted a series of terrorist attacks in Iraq beginning in 2003. These attacks prompted bin Laden to ask al-Zarqawi to merge his group with al-Qa'ida. In 2004, al-Zarqawi publicly pledged his group's allegiance to bin Laden, and bin Laden publicly endorsed al-Zarqawi as al-Qa'ida's leader in Iraq. For years afterwards, al-Zarqawi's group, which adopted the name al-Qa'ida in Iraq (AQI) when it merged with al-Qa'ida, conducted deadly terrorist attacks against U.S. and coalition forces. In response to these attacks, U.S. forces engaged in combat operations against the group from 2004 until U.S. and coalition forces left

Iraq in 2011. The group has continued to plot attacks against U.S. persons and interests in Iraq and the region—including the brutal murder of kidnapped American citizens in Syria and threats to U.S. military personnel that are now present in Iraq at the invitation of the Iraqi Government.

The subsequent 2014 split between ISIL and current al-Qa’ida leadership does not remove ISIL from coverage under the 2001 AUMF. Although ISIL broke its affiliation with al-Qa’ida, the same organization continues to wage hostilities against the United States as it has since 2004, when it joined bin Laden’s al-Qa’ida organization in its conflict against the United States. As AQI, ISIL had a direct relationship with bin Laden himself and waged that conflict in allegiance to him while he was alive. ISIL now claims that it—not al-Qa’ida’s current leadership—is the true executor of bin Laden’s legacy. There are rifts between ISIL and parts of the network bin Laden assembled, but some members and factions of al-Qa’ida-aligned groups have publicly declared allegiance to ISIL. At the same time, ISIL continues to denounce the United States as its enemy and to target U.S. citizens and interests. In these circumstances, the President is not divested of the previously available authority under the 2001 AUMF to continue using force against ISIL—a group that has been subject to that AUMF for more than a decade—simply because of conflicts between the group and al-Qa’ida’s current leadership. A contrary interpretation of the statute would allow an enemy force—rather than the President and Congress—to control the scope of the 2001 AUMF by splintering into rival factions while continuing to prosecute the same conflict against the United States.<sup>25</sup>

As is also true with respect to the broader conflict against al-Qa’ida, the Taliban, and associated forces, Congress has repeatedly and specifically funded the President’s military actions against ISIL through an unbroken stream of appropriations over multiple years. Shortly after announcing the military operation against ISIL in 2014, the President asked for and obtained from Congress \$5.6 billion for the express purpose of carrying out specific military activities against ISIL in Iraq and Syria.<sup>26</sup> Congress has since appropriated an additional \$5 billion in support of the U.S. counter-ISIL effort, virtually all of it in line with the specific amounts and categories requested by the President. These funds were made available over the course of two annual budget cycles, in connection with close congressional oversight of the status and scope of U.S. counter-ISIL activities, and with knowledge of the specific measures the President was taking to counter ISIL and the statutory provisions under which he was acting.<sup>27</sup>

Congressional support for the military campaign against ISIL extends beyond the appropriation of funds for specific military activities. Congress has also authorized the President to provide lethal and nonlethal assistance to select groups and forces fighting ISIL in Iraq and Syria. In doing so, Congress has defined the parameters of the assistance programs and provided specific direction for the use of its appropriations. Throughout this period, Congress has also reinforced its oversight role through reporting requirements relating to the costs and status of U.S. counter-ISIL operations, including monthly reports documenting incremental costs of the operation<sup>28</sup>; quarterly reports on the status of U.S. forces deployed in support of the operation<sup>29</sup>; regular reporting from the inspector general for the military operation against ISIL<sup>30</sup>; and reporting consistent with the requirements in the War Powers Resolution.<sup>31</sup> This reporting is in addition to information Congress receives from the Executive Branch during regular oversight hearings.<sup>32</sup>

These funding, oversight, and authorizing measures convey Congress's support for the President's use of force against ISIL, including his determination that he had and continues to have authority to act under prior congressional authorizations for the use of military force.<sup>33</sup>

In summary, the Executive Branch's decision that a group is covered by the 2001 AUMF is not taken lightly. That determination is made at the most senior levels of the U.S. Government, and it follows careful consideration and fact-intensive reviews by senior government lawyers and is informed by departments and agencies with relevant expertise and institutional roles, including all-source intelligence from the U.S. Intelligence Community. Finally, the fact that an al-Qa'ida or Taliban-affiliated group has not been identified as covered by the 2001 AUMF does not mean that the United States has made a final determination that it lacks the statutory authority to use force against the group. The United States remains prepared to review this question whenever a situation arises in which it may be necessary to take direct action against a terrorist group.

#### *B. The President's Constitutional Authority to Take Military Action in Certain Circumstances Without Specific Prior Authorization of Congress*

In addition to directing the exercise of force pursuant to the 2001 AUMF, the President has also recently directed the use of military force overseas pursuant to his authority under Article II of the U.S. Constitution.

The President's power to employ military force abroad in the absence of specific prior congressional approval derives from his constitutional responsibility as Commander in Chief and Chief Executive for foreign and military affairs, and it has been confirmed by longstanding Executive Branch practice.<sup>34</sup> In considering the President's authority to use military force in Libya in 2011, the Department of Justice's Office of Legal Counsel (OLC) asked whether the operations would "serve sufficiently important interests to permit the President's action as Commander in Chief and Chief Executive and pursuant to his authority to conduct U.S. foreign relations."<sup>35</sup> In that opinion, OLC noted that defense of the United States to repel a direct and immediate military attack is one basis—but not the exclusive one—on which the President may use military force without congressional approval.<sup>36</sup> OLC also recognized that a "possible constitutionally-based limit" on such Presidential authority may exist where a planned military engagement constitutes a "war" within the meaning of the U.S. Constitution's Declaration of War Clause.<sup>37</sup> OLC explained that "whether a particular planned engagement constitutes a 'war' for constitutional purposes . . . requires a fact-specific assessment of the 'anticipated nature, scope, and duration' of the planned military operations."<sup>38</sup>

As an example, the President recently relied on his constitutional authority to direct U.S. military strikes against radar facilities in Houthi-controlled territory in Yemen in October 2016. The strikes advanced the important national interest in, among other things, protecting U.S. forces, and their limited nature, scope, and duration meant that the operation did not rise to the level of "war" within the meaning of the Declaration of War Clause.

When the President is acting under his constitutional authority, the War Powers Resolution calls for the President to submit a report to Congress within 48 hours after U.S.

Armed Forces are introduced into “hostilities or into situations where imminent involvement in hostilities is clearly indicated by the circumstances.”<sup>39</sup> The War Powers Resolution further states that, after the submission of such a report, the President is generally required to “terminate” any use of the U.S. Armed Forces with respect to which the report was submitted within 60 days thereafter, unless Congress either is physically unable to meet or declares war, specifically authorizes the action, or extends the deadline.<sup>40</sup>

## II. International Law and the U.S. Use of Military Force

In addition to being carried out in accordance with domestic law, the United States’ uses of military force overseas described above are also consistent with international law.

The U.N. Charter identifies the key international law principles that must guide State behavior when considering whether to resort to the use of force, a question that is governed by the body of international law known as the *jus ad bellum*. In particular, Article 2(4) of the U.N. Charter provides in relevant part that “[a]ll Members shall refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any state.”<sup>41</sup> Article 51 of the U.N. Charter, however, specifies that “[n]othing in this Charter shall impair the inherent right of individual or collective self-defence if an armed attack occurs.”<sup>42</sup>

Although a comprehensive discussion of when a State may resort to force on the territory of another State under international law is beyond the scope of this report, the United States generally recognizes three circumstances under which international law does not prohibit such a use of force: (1) use of force authorized by the U.N. Security Council acting under the authority of Chapter VII of the U.N. Charter; (2) use of force in self-defense; and (3) use of force in an otherwise lawful manner with the consent of the territorial State. Each of these three bases is described below and their application to the United States’ current uses of military force is described in Part One, Section V.

The three international law bases for using force on the territory of another State are not mutually exclusive, and States may have more than one international legal basis for using force. The United States has relied on all three bases at various points during this Administration. Moreover, although this portion of the report is focused on the *jus ad bellum*, all U.S. military operations involving the use of military force under any of the justifications noted above are conducted consistent with the law of armed conflict, also known as the *jus in bello*.

### A. U.N. Security Council Authorization

The U.N. Security Council may, under Chapter VII of the U.N. Charter, authorize the use of force as may be necessary to maintain or restore international peace and security.<sup>43</sup> For example, during this Administration, the United States and other States have used force pursuant to a U.N. Security Council resolution under Chapter VII to protect civilian populated areas under threat of attack in Libya,<sup>44</sup> to combat piracy in and off the coast of Somalia,<sup>45</sup> and to support the International Security Assistance Force (ISAF) in Afghanistan.<sup>46</sup>

## B. *The Inherent Right of Individual and Collective Self-Defense*

### 1. Basic Principles

The U.N. Charter recognizes the inherent right of States to resort to force in individual or collective self-defense against an armed attack, subject to the customary international law requirement that any use of force in self-defense must be limited to what is necessary and proportionate to address the threat.

### 2. Self-Defense Against Non-State Actors

The inherent right of self-defense is not restricted to threats posed by States. Even before the September 11th attacks, it was clear that the right of self-defense applies to the use of force against non-State actors on the territory of another State. For centuries, States have invoked the right of self-defense to justify taking action on the territory of another State against non-State actors. As one example, the oft-cited *Caroline* incident involved the use of force by the United Kingdom in self-defense against a non-State actor located in the United States. Nearly two hundred years later, this right remains widely accepted.<sup>47</sup> Moreover, States may use force in self-defense against non-State actors either individually or collectively; for example, the United States is currently using force against ISIL in Syria in the collective self-defense of Iraq (and other States).

### 3. Self-Defense in Response to Imminent Armed Attacks

Under the *jus ad bellum*, a State may use force in the exercise of its inherent right of self-defense not only in response to armed attacks that have already occurred, but also in response to *imminent* attacks before they occur. When considering whether an armed attack is imminent under the *jus ad bellum* for purposes of the initial use of force against another State or on its territory, the United States analyzes a variety of factors.<sup>48</sup> These factors include “the nature and immediacy of the threat; the probability of an attack; whether the anticipated attack is part of a concerted pattern of continuing armed activity; the likely scale of the attack and the injury, loss, or damage likely to result therefrom in the absence of mitigating action; and the likelihood that there will be other opportunities to undertake effective action in self-defense that may be expected to cause less serious collateral injury, loss, or damage.”<sup>49</sup> Moreover, “the absence of specific evidence of where an attack will take place or of the precise nature of an attack does not preclude a conclusion that an armed attack is imminent for purposes of the exercise of the right of self-defense, provided that there is a reasonable and objective basis for concluding that an armed attack is imminent.”<sup>50</sup> Finally, as is now increasingly recognized by the international community, the traditional conception of what constitutes an “imminent” attack must be understood in light of the modern-day capabilities, techniques, and technological innovations of terrorist organizations.<sup>51</sup>

#### 4. Self-Defense and “Unable or Unwilling”

Under international law, a State may use force on the territory of another State in self-defense only if it is necessary to do so in order to address the threat giving rise to the right to use force in the first instance. States therefore must consider whether actions in self-defense that would impinge on another State’s sovereignty are necessary, which entails assessing whether the territorial State is able and willing to mitigate the threat emanating from its territory and, if not, whether it would be possible to secure the territorial State’s consent before using force on its territory against a non-State actor.

In some cases, international law does not require a State to obtain the consent of the State on whose territory force will be used against a non-State armed group. Under international law, States may defend themselves, in accordance with the inherent right of individual and collective self-defense, when they face actual or imminent armed attacks by a non-State armed group and the use of force is necessary because the government of the State where the threat is located is unable or unwilling to prevent the use of its territory by the non-State actor for such attacks. In particular, there will be cases in which there is a reasonable and objective basis for concluding that the territorial State is unable or unwilling to confront effectively a non-State actor in its territory so that it is necessary to act in self-defense against the non-State actor in that State’s territory without its consent.<sup>52</sup>

As the Executive Branch has said previously, this “unable or unwilling” standard, in the circumstances here, is “an important application of the requirement that a State, when relying on self-defense for its use of force in another State’s territory, may resort to force only if it is necessary to do so—that is, if measures short of force have been exhausted or are inadequate to address the threat posed by the non-State actor emanating from the territory of another State.”<sup>53</sup> Through this legal basis for action, customary international law recognizes that a State may defend itself against a non-State actor that is able to launch attacks from within another State’s territory.

The unable or unwilling standard is not a license to wage war globally or to disregard the borders and territorial integrity of other States. Indeed, this legal standard does not dispense with the importance of respecting the sovereignty of other States. To the contrary, applying the standard ensures that the sovereignty of other States is respected. Specifically, applying the standard ensures that force is used on foreign territory without consent only in those exceptional circumstances in which a State cannot or will not take effective measures to confront a non-State actor that is using the State’s territory as a base for attacks and related operations against other States. With respect to the “unable” prong of the standard, inability perhaps can be demonstrated most plainly where, for example, a State has lost or abandoned effective control over the portion of its territory where the armed group is operating. With respect to the “unwilling” prong of the standard, unwillingness might be demonstrated where, for example, a State is colluding with or harboring a terrorist organization operating from within its territory and refuses to address the threat posed by the group.

## 5. Application of the *Jus ad Bellum* in an Ongoing Armed Conflict

Once a State has lawfully resorted to force in self-defense against a particular actor in response to an actual or imminent armed attack by that group, it is not necessary as a matter of international law to reassess whether an armed attack is occurring or imminent prior to every subsequent action taken against that group, provided that hostilities have not ended. In addition, in armed conflicts with non-State actors that are prone to shifting operations from country to country, the United States does not view its ability to use military force against a non-State actor with which it is engaged in an ongoing armed conflict as limited to “hot” battlefields. This does not mean the United States can strike wherever it chooses: the use of force in self-defense in an ongoing armed conflict is limited by respect for States’ sovereignty and the considerations discussed above, including the customary international law requirements of necessity and proportionality when force could implicate the rights of other States.<sup>54</sup>

### C. *Consent to Use Force in an Otherwise Lawful Manner*

Another circumstance in which the use of force on the territory of another sovereign does not violate international law is when undertaking an otherwise lawful use of force with the consent of a territorial State. The provision of such consent need not be made public. The United States has relied on State consent in various military operations. In many cases, consent operates in conjunction with the right of self-defense in an ongoing armed conflict. In operations against ISIL, for example, the United States has relied on both its right of self-defense and the consent of certain territorial States.

The concept of consent can pose challenges in certain countries where governments are rapidly changing, have lost control of significant parts of their territory, or have shown no desire to address the threat. Thus, it sometimes can be a complex matter to identify the appropriate person or entity from whom consent should be sought and the form such consent should take. The U.S. Government carefully considers these issues when examining the question of consent.

## III. The End of Armed Conflict with Non-State Armed Groups

Hostilities against an enemy like al-Qa’ida are unconventional and presumably will not come to a conventional end. Groups like al-Qa’ida are highly unlikely to disarm and sign instruments of surrender. And given their radical objectives, groups like al-Qa’ida are also highly unlikely ever to denounce terrorism and violence and to seek to address their perceived grievances through some form of reconciliation or participation in a political process. As President Obama has stated, “[n]egotiations cannot convince al-Qa’ida’s leaders to lay down their arms.”<sup>55</sup> There is therefore little chance that there will be an agreement to end these hostilities.

As the President has also said, however, “this war, like all wars, must end.”<sup>56</sup> At a certain point, the United States will degrade and dismantle the operational capacity and supporting networks of terrorist organizations like al-Qa’ida to such an extent that they will have been



effectively destroyed and will no longer be able to attempt or launch a strategic attack against the United States. At that point, there will no longer be an ongoing armed conflict between the United States and those forces.<sup>57</sup>

Unfortunately, that day has not yet come. Progress has been made in disrupting and degrading al-Qa'ida's core and senior leadership, and in disrupting and degrading ISIL. But these groups still pose a real and profound threat to U.S. national security. As a result, the United States remains in a state of armed conflict against these groups as a matter of international law, and the 2001 AUMF continues to provide the President with domestic legal authority to defend against these ongoing threats.

#### **IV. Working with Others in an Armed Conflict**

The President's counterterrorism strategy has prioritized the development of partnerships with those who share U.S. interests. In the countries described at the outset of this report and in other theaters, the United States partners with States, multinational forces, and in some cases, non-State actors. For example, sixty-eight State partners are today engaged as part of the counter-ISIL coalition led by the United States.

The United States and foreign partners provide one another a range of support, including training, provision of materiel, intelligence sharing, and operational support. When supporting foreign partners, the United States ensures that it understands their legal basis for acting, and, as laid out in more detail below, takes a number of steps to ensure U.S. assistance is used lawfully and appropriately under domestic and international law. Although a complete discussion of the legal and policy frameworks pursuant to which the United States works with partners is beyond the scope of this report, some of the key legal and policy considerations relevant to such support for partners are detailed below, with a focus on those theaters where, in addition to working with partners, the United States is also using force itself.

##### *A. Domestic Authorities and Limitations*

In the campaign against ISIL and beyond, coalitions and partnerships with other States and non-State actors are increasingly prominent features of current U.S. military operations. The U.S. Government has a number of authorities to provide assistance to foreign partner forces and takes a variety of measures to help partners comply with the law of armed conflict and to avoid the misuse of U.S. assistance. Examples of such measures include vetting and training recipients of U.S. assistance, monitoring how U.S. assistance is used, and suspending or terminating such assistance as appropriate.

For example, Section 1209 of the National Defense Authorization Act for Fiscal Year 2015 (2015 NDAA) authorizes assistance to appropriately vetted Syrian groups and individuals for certain purposes.<sup>58</sup> Under that provision, the Secretary of Defense, in coordination with the Secretary of State, is authorized to "provide assistance, including training, equipment, supplies, stipends, construction of training and associated facilities, and sustainment, to appropriately

vetted elements of the Syrian opposition and other appropriately vetted Syrian groups and individuals.”<sup>59</sup> Section 1209 defines “appropriately vetted” to include, at a minimum, assessments of the Syrian opposition groups or individuals receiving assistance for associations with terrorist groups and a commitment from those groups or individuals “to promoting the respect for human rights and the rule of law.”<sup>60</sup> To help ensure compliance with these standards, the United States uses longstanding U.S. military and intelligence processes and practices for vetting and training foreign forces.<sup>61</sup> The United States has also made monitoring the use of U.S. military equipment, ammunition, and other assistance provided to these groups part of the mission of U.S. forces in Syria to help ensure that any assistance is used appropriately by recipients.

The United States also supports its partners and allies by providing intelligence in furtherance of shared objectives. Sometimes this sharing occurs as part of combined military operations, where the United States is directly involved in an armed conflict. Intelligence sharing in such situations allows coalition members to have a common picture of the battlefield, to fully integrate and synchronize operations, and to promote force protection. On other occasions, the United States provides intelligence support to foreign partners engaged in conflicts in which the United States is not participating directly. As appropriate, the United States can take a variety of measures, including diplomatic assurances, vetting, training, and monitoring, to ensure that the recipient of U.S. intelligence respects human rights and complies with the law of armed conflict. Sharing must always be consistent with U.S. domestic law, including the requirement that intelligence agencies cannot ask another party to undertake activities which they are themselves prohibited from undertaking.

Several statutes impose requirements on the security-related assistance that the United States may provide to partner countries, including in the context of an armed conflict. Most prominently, the so-called Department of Defense and Department of State “Leahy Laws” prohibit, respectively, the Department of Defense from using funds “for any training, equipment, or other assistance for a unit of a foreign security force if the Secretary of Defense has credible information that the unit has committed a gross violation of human rights,”<sup>62</sup> and the State Department from furnishing assistance “to any unit of the security forces of a foreign country if the Secretary of State has credible information that such unit has committed a gross violation of human rights.”<sup>63</sup> Reports of gross violations of human rights are examined on a fact-specific basis. Section 502B of the Foreign Assistance Act provides that the term “gross violations of internationally-recognized human rights” includes, among other violations, torture or cruel, inhuman, or degrading treatment or punishment and other flagrant denials of the right to life, liberty, or the security of person.<sup>64</sup>

Under the Leahy Laws, assistance may in some instances be reinstated to units previously found to be ineligible. In early 2015, the Administration established a joint Department of Defense and Department of State Leahy Law implementation policy for “remediating” units of foreign security forces that were previously found ineligible to receive assistance through the vetting process by which the Executive Branch implements the Leahy Laws. Under the Department of State Leahy Law, the State Department may reinstate assistance to a unit if the State Department determines and reports to Congress that the foreign government has taken or is taking effective measures to bring to justice the responsible members of the security forces.<sup>65</sup>

Under the Department of Defense Leahy Law, the Department of Defense may resume assistance if, after consultation with the Department of State, it determines that the government of the foreign country has taken all necessary corrective steps and provides a report to the appropriate congressional committees within fifteen days.<sup>66</sup> Such steps may include impartial and thorough investigations, prosecutions or administrative actions, and appropriate and proportional sentencing.

Additionally, the United States is limited in the aid it can provide to others by longstanding policies, including those reflected in Executive Order 12333.<sup>67</sup> Under Section 2.11 of that order, “[n]o person employed by or acting on behalf of the United States Government shall engage in, or conspire to engage in, assassination.”<sup>68</sup>

### *B. International Law Considerations*

The U.S. military’s ability to engage and work with partners can and often does turn on international legal considerations. The United States military seeks to work with partners that will comply with international law, and U.S. partners expect the same from the United States. The United States’ commitment to upholding the law of armed conflict also extends to promoting compliance by U.S. partners with the law of armed conflict. Receiving credible and reliable assurances that U.S. partners will comply with applicable international law, including the law of armed conflict, is an important measure that the United States military routinely employs in its partnered operations. As a matter of policy, the United States always seeks to promote adherence to the law of armed conflict and encourages other States and partners to do the same.

As a matter of international law, the United States looks to the law of State responsibility and U.S. partners’ compliance with the law of armed conflict in assessing the lawfulness of U.S. military assistance to, and joint operations with, military partners. The United States has taken the position that a State incurs responsibility under international law for aiding or assisting another State in the commission of an internationally wrongful act when: (1) the act would be internationally wrongful if committed by the supporting State; (2) the supporting State is both aware that its assistance will be used for an unlawful purpose and intends its assistance to be so used; and (3) the assistance is clearly and unequivocally connected to the subsequent wrongful act.<sup>69</sup>

Some U.S. allies and partners have different international legal obligations because of the different treaties to which they are parties, and others may hold different legal interpretations of common obligations. The United States seeks to build on common understandings of international law, while also seeking to bridge or manage the specific differences in any particular State’s international obligations or interpretations of those obligations. In the context of the campaign against ISIL, for example, the United States meets with coalition partners on a regular basis to discuss legal obligations and good practices in implementing those obligations.

## V. Application to Key Theaters

This section of the report outlines the application of these key domestic and international legal principles to the six theaters identified at the outset—Afghanistan, Iraq, Syria, Somalia, Libya, and Yemen.

### A. Afghanistan

*Background.* Since October 7, 2001, the United States has conducted counterterrorism combat operations in Afghanistan. Active hostilities in Afghanistan remain ongoing, and U.S. persons and interests continue to be actively targeted by terrorist and insurgent groups operating there. Although the United States has transitioned the lead for security to Afghan security forces, a limited number of U.S. forces remain in Afghanistan for the purposes of, among other things: training, advising, and assisting Afghan forces; conducting and supporting U.S. counterterrorism operations against the remnants of core al-Qa’ida and against ISIL; and taking appropriate measures against those who directly threaten U.S. and coalition forces in Afghanistan.

*Domestic Law.* As a matter of domestic law, the 2001 AUMF authorizes U.S. counterterrorism combat operations in Afghanistan.<sup>70</sup> Congress has also repeatedly authorized U.S. support for Afghan military forces. In the National Defense Authorization Act for Fiscal Year 2016 (2016 NDAA), for example, Congress extended authorization of the Afghanistan Security Forces Fund.<sup>71</sup>

*International Law.* As a matter of international law, the United States initiated counterterrorism combat operations in Afghanistan in U.S. national self-defense. On October 7, 2001, the United States notified the U.N. Security Council consistent with Article 51 of the U.N. Charter that the United States was taking action in the exercise of its right of self-defense in response to the September 11th attacks.<sup>72</sup> U.S. military operations and support for Afghan military forces in the ongoing armed conflict in Afghanistan are now undertaken consistent with the Bilateral Security Agreement between the United States and Afghanistan and with the consent of the Government of Afghanistan.<sup>73</sup>

### B. Iraq

*Background.* In Iraq, the United States is conducting a systematic campaign of airstrikes against ISIL and has also captured some of its members. More broadly, the United States is also advising and coordinating with Iraqi forces and providing training, equipment, communications support, and other support to select elements of the Iraqi security forces, including Iraqi Kurdish Peshmerga forces. U.S. forces are also providing support and security for U.S. citizens and property.

*Domestic Law.* As a matter of domestic law, the 2001 AUMF and the 2002 AUMF authorize the U.S. use of force against ISIL in Iraq. As previously noted, Congress has supported the

President's military actions against ISIL through an unbroken stream of appropriations.<sup>74</sup> Among other actions it has taken, Congress has authorized the United States to provide "the military and other security forces of or associated with the Government of Iraq, including Kurdish and tribal security forces and other local security forces, with a national security mission, with defense articles, defense services, and related training to more effectively partner with the United States and other international coalition members to defeat ISIL."<sup>75</sup>

*International Law.* As a matter of international law, the United States is using force against ISIL in Iraq at the request and with the consent of the Government of Iraq, which has sought U.S. and coalition support in its defense of the country against ISIL.<sup>76</sup> U.S. operations against ISIL in Iraq are thus conducted in the context of an armed conflict and in furtherance of Iraq and others' armed operations against the group and in furtherance of U.S. national self-defense.

### C. Syria

*Background.* As part of the campaign against ISIL outlined above, the United States is using force against ISIL in Syria. The United States is conducting a systematic campaign of airstrikes against ISIL and has provided U.S. military equipment, ammunition, and other assistance to indigenous ground forces conducting operations against ISIL in Syria. Small teams of U.S. special operations forces have also deployed to Syria to help coordinate U.S. operations with some of these indigenous ground forces. Furthermore, the United States is conducting airstrikes against al-Qa'ida in Syria, including against those leaders of al-Qa'ida in Syria who are involved in plotting against the United States and its partners.

*Domestic Law.* The 2001 AUMF and, in certain circumstances, the 2002 AUMF authorize the use of force in Syria against al-Qa'ida in Syria and ISIL; as previously noted, Congress has also supported this military campaign through an unbroken stream of appropriations.<sup>77</sup> As previously mentioned, Congress has also authorized assistance to appropriately vetted Syrian groups and individuals for certain purposes. In the 2015 NDAA, for example, Congress authorized the Secretary of Defense, in coordination with the Secretary of State, to "provide assistance, including training, equipment, supplies, stipends, construction of training and associated facilities, and sustainment, to appropriately vetted elements of the Syrian opposition and other appropriately vetted Syrian groups and individuals."<sup>78</sup>

*International Law.* As a matter of international law, the United States is using force in Syria against ISIL and providing support to opposition groups fighting ISIL in the collective self-defense of Iraq (and other States) and in U.S. national self-defense. Upon commencing airstrikes against ISIL in Syria in September 2014, the United States submitted a letter to the U.N. Security Council consistent with Article 51 of the U.N. Charter explaining the international legal basis for its use of force.<sup>79</sup> As the letter explained, Iraq has made clear that it is facing a serious threat of continuing armed attacks from ISIL coming out of safe havens in Syria. The Government of Iraq has asked the United States to lead international efforts to strike ISIL sites and strongholds in Syria in order to end the continuing armed attacks on Iraq, to protect Iraqi citizens, and ultimately to enable Iraqi forces to regain control of Iraqi borders.<sup>80</sup> Moreover, ISIL is a threat not only to Iraq and U.S. partners in the region, but also to the United States. Consistent with the

inherent right of individual and collective self-defense, the United States therefore initiated necessary and proportionate actions in Syria against ISIL in 2014, and those actions continue to the present day.

Similarly, the United States is using force in Syria against al-Qa'ida in Syria in self-defense of the United States and in furtherance of the security of U.S. partners and allies.

In its 2014 letter to the U.N. Security Council, the United States explained that Syria is unable or unwilling to confront effectively the threat that ISIL poses to Iraq, the United States, and U.S. partners and allies. The Syrian Government has shown that it cannot and will not confront ISIL effectively.<sup>81</sup> Syria is similarly unable or unwilling to confront effectively the threat posed by al-Qa'ida in Syria.

#### *D. Somalia*

*Background.* In Somalia, the United States continues to counter the terrorist threat posed by al-Qa'ida and its Somalia-based associated force, al-Shabaab. The United States has conducted airstrikes and other operations against al-Qa'ida and al-Shabaab.<sup>82</sup> As part of its campaign against al-Qa'ida and its associated force al-Shabaab, the United States is also providing advice and assistance to regional counterterrorism forces, including Somali and African Union Mission in Somalia (AMISOM) forces.

*Domestic Law.* As noted above, the 2001 AUMF authorizes counterterrorism combat operations in Somalia against al-Qa'ida and al-Shabaab.<sup>83</sup>

*International Law.* As a matter of international law, U.S. counterterrorism operations in Somalia, including airstrikes, have been conducted with the consent of the Government of Somalia in support of Somalia's operations in the context of the armed conflict against al-Shabaab and in furtherance of U.S. national self-defense.

#### *E. Libya*

*Background.* In Libya, the United States is conducting airstrikes against ISIL targets, including in support of efforts by forces aligned with the GNA to recapture the city of Sirte from ISIL.

*Domestic Law.* As previously described, the 2001 AUMF provides authority as a matter of domestic law for U.S. airstrikes in Libya against ISIL.<sup>84</sup>

*International Law.* As a matter of international law, airstrikes in Libya against ISIL are being conducted at the request and with the consent of the GNA in the context of the ongoing armed conflict against ISIL and in furtherance of U.S. national self-defense.

## F. Yemen

*Background.* The United States has been working closely with the Government of Yemen to dismantle operationally and ultimately eliminate the terrorist threat posed by AQAP. As part of this effort, the United States has taken direct action, including airstrikes, against a limited number of AQAP operatives and senior leaders in Yemen who posed a threat to the United States. The United States has also deployed small numbers of U.S. military personnel to Yemen to support operations against AQAP, including support for operations to capture AQAP leaders and key personnel.

In addition, on October 12, 2016, in response to the launch of anti-ship cruise missiles by Houthi insurgents that threatened U.S. Navy warships in the international waters of the Red Sea, the President ordered missile strikes on radar facilities in Houthi-controlled territory in Yemen that were involved in the missile launch that had threatened U.S. warships.

Since 2015, the United States has also provided limited support to Saudi-led coalition military operations against Houthi and Saleh-aligned forces in Yemen. U.S. forces are not taking direct military action in Yemen in this Saudi-led effort; instead, the United States provides certain logistical support (including air-to-air refueling), intelligence sharing, best practices, and other advisory support when requested and appropriate. Additionally, the United States has provided advice to the Saudi-led coalition regarding compliance with the law of armed conflict and regarding best practices for reducing the risk of civilian casualties.

*Domestic Law.* As discussed above, the 2001 AUMF confers authority to use force against AQAP.<sup>85</sup> And, also as noted above, the October 12, 2016, strikes were taken to protect U.S. vessels and personnel and were directed by the President pursuant to his constitutional authority as Commander in Chief and Chief Executive. Certain statutory authorities and the President's constitutional authorities as Commander in Chief and Chief Executive and to conduct the foreign affairs of the United States authorize the provision of limited support for counter-Houthi operations by the Saudi-led coalition.

*International Law.* As a matter of international law, the United States has conducted counterterrorism operations against AQAP in Yemen with the consent of the Government of Yemen in the context of the armed conflict against AQAP and in furtherance of U.S. national self-defense. The October 12, 2016, strikes taken to protect U.S. vessels and personnel were also conducted with the consent of the Yemeni Government.<sup>86</sup> The U.S. support for the Saudi-led coalition military operations is being provided in the context of the Coalition's military operations being undertaken in response to the Government of Yemen's request for assistance, including military support, to protect the sovereignty, peace, and security of Yemen.

# PART TWO: KEY LEGAL AND POLICY FRAMEWORKS RELATED TO THE CONDUCT OF HOSTILITIES

This part of the report highlights key legal and policy frameworks relevant to the conduct of hostilities: targeting; capture, detention, and interrogation of detainees in armed conflicts; and prosecutions and transfers of such detainees.

Because the United States is currently engaged in hostilities against only non-State actors, the applicable international legal regime governing these U.S. military operations is the law of armed conflict covering non-international armed conflicts, including Common Article 3 of the 1949 Geneva Conventions and other treaty and customary international law rules governing the conduct of hostilities in non-international armed conflicts.<sup>87</sup> As discussed below, the United States often applies policies that are more restrictive than what would be required as a matter of law. In doing so, the United States maintains the right to change its policies and practices consistent with applicable law.

## I. Targeting

The U.S. Government makes extensive efforts to ensure that its targeting efforts comply with all applicable international obligations, domestic laws, and policies. This section of the report does not discuss all of the legal and policy considerations relevant to these efforts, but instead focuses on (1) the law of armed conflict framework underlying U.S. targeting efforts; (2) two key topics relevant to the legal framework—constitutional constraints on the targeting of U.S. persons and law of armed conflict rules applicable to the targeting of money and revenue-generating objects; and (3) key policies concerning targeting military objectives and reducing incidental civilian casualties.

### A. *The Law of Armed Conflict and Targeting*

It is well- and long-established that under the law of armed conflict, States may target specific, identified individual members of an enemy force as well as individuals directly participating in hostilities. For example, during World War II, U.S. Navy forces lawfully shot down the aircraft of Admiral Yamamoto, the commander of the Japanese navy, specifically because he was on board. His loss was a significant setback for the Japanese war effort. Today, just as in 1943, the use of lethal force against an identified member of the enemy force in an ongoing armed conflict is consistent with law of armed conflict principles governing who may be made the object of attack.



Removing the senior leadership of terrorist groups against which the United States is engaged in hostilities—including those in charge of plotting attacks against the United States and its partners—is an important piece of the overall U.S. strategy for defeating these groups. It is also consistent with the U.S. commitment to minimizing civilian casualties. Indeed, targeting particular individuals serves to narrow the focus when force is employed and to avoid broader harm to civilians and civilian objects.

Under the law of armed conflict, States may also use technologically advanced weapons systems—including unmanned aerial vehicles, commonly referred to as “drones”—so long as they are employed in conformity with applicable law of armed conflict principles and rules. Technologically advanced weapons systems can often enhance the United States’ ability to implement its obligations under the law of armed conflict. Precision-guided munitions, enhanced sensors, and the ability to monitor targets for extended periods of time can allow the United States to distinguish more effectively between a member of the enemy forces and a civilian. It is U.S. policy to develop, acquire, and field weapons systems and other technological capabilities that further enable the discriminate use of force in different operational contexts.<sup>88</sup>

Additionally, using targeted lethal force against an enemy consistent with the law of armed conflict does not constitute an “assassination.” Assassinations are unlawful killings and are prohibited by Executive Order.<sup>89</sup> There is no requirement under international law to provide legal process before a State may use lethal force in accordance with the law of armed conflict.

None of the above diminishes longstanding and important obligations under both domestic and international law that constrain how and in what circumstances force may be used in the course of an armed conflict. In its targeting practices in the context of both international and non-international armed conflicts, the United States complies with—and in many important respects has policies that provide greater safeguards than—the requirements of all applicable law, including the law of armed conflict.

First, U.S. targeting practices comply with the principle of distinction, which in the targeting context requires that attacks be limited to military objectives and that civilians or civilian objects not be made the object of attack.<sup>90</sup> Even when the United States is dealing with enemy forces that do not wear uniforms or carry their arms openly, the United States goes to great lengths to apply this principle. In particular, the United States considers all available information about a potential target’s current and historical activities to inform an assessment of whether the individual is a lawful target. For example, an individual who is formally or functionally a member of an armed group against which the United States is engaged in an armed conflict is generally targetable. Determining that someone is a “functional” member of an armed group may include looking to, among other things, the extent to which that person performs functions for the benefit of the group that are analogous to those traditionally performed by members of a country’s armed forces; whether that person is carrying out or giving orders to others within the group; and whether that person has undertaken certain acts that reliably connote meaningful integration into the group.<sup>91</sup>

Second, U.S. targeting practices comply with the principle of proportionality, which, among other things, prohibits attacks in which the expected loss of life or injury to civilians and damage to civilian objects incidental to the attack would be excessive in relation to the concrete and direct military advantage expected to be gained.<sup>92</sup> Additionally, feasible precautions must be taken in conducting an attack to reduce the risk of harm to civilians and other protected persons and objects, such as, in certain circumstances when it is appropriate to do so, warning civilians before bombardments.<sup>93</sup> In U.S. operations against enemy forces, great care is taken to adhere to the principle of proportionality in both planning and execution to ensure that collateral damage is kept to a minimum. Indeed, as discussed below, the United States routinely applies certain heightened policy standards that are more protective of civilians than is required under the law of armed conflict.<sup>94</sup>

Third, U.S. targeting practices conform to the principle of necessity, which requires that the use of military force (including all measures needed to defeat the enemy as quickly and efficiently as possible that are not prohibited by the law of armed conflict) be directed at accomplishing a legitimate military purpose.<sup>95</sup> Individuals who are part of enemy forces are generally legitimate military targets, and the United States may use lethal force against enemy forces in the armed conflict in which it is engaged, subject to other applicable law of armed conflict rules. The law of armed conflict does not require that enemy combatants be warned before being made the object of attack,<sup>96</sup> and it does not require that enemy combatants be given an opportunity to surrender before being made the object of attack.<sup>97</sup>

Fourth, U.S. targeting practices conform to the principle of humanity, which prohibits the infliction of suffering, injury, or destruction unnecessary to accomplish a legitimate military purpose. For example, it is forbidden to use weapons that are calculated to cause superfluous injury.<sup>98</sup>

Finally, and as discussed further below, there is a robust review process before the United States uses military force against members of enemy forces, and that review process includes rigorous safeguards to protect civilians. Throughout the military chain of command, commanders, advised by trained and experienced staffs—including intelligence officers, operations officers, and judge advocates—review operations for compliance with applicable U.S. domestic and international law, including the law of armed conflict, and for consistency with the policies and orders of superiors in the military chain of command.

## *B. Selected Topics Regarding Targeting*

### *1. U.S. Constitutional Constraints Regarding Targeting U.S. Citizens Who Are Abroad and Part of an Enemy Force*

As discussed in Part One, the 2001 AUMF provides the primary domestic legal framework for targeting enemy forces in the context of the current hostilities. Additional constitutional considerations are implicated by the targeting of U.S. citizens abroad who are part of an enemy force.

In a small number of instances, U.S. citizens have joined enemy forces and planned attacks against the United States from abroad. This situation has historical precedent. In previous conflicts, U.S. citizens have fought in foreign armies against the United States, including with the Axis countries during World War II. Longstanding legal principles and court decisions confirm that being a U.S. citizen does not immunize a member of the enemy from attack.<sup>99</sup> As a plurality of the U.S. Supreme Court made clear in 2004 with respect to detention authority, “[a] citizen, no less than an alien, can be ‘part of or supporting forces hostile to the United States or coalition partners’ and ‘engaged in an armed conflict against the United States.’”<sup>100</sup>

However, the United States must take into account all relevant constitutional considerations with respect to U.S. citizens. When the United States knows in advance that the specific object of its attack is an individual U.S. citizen, it proceeds on the basis that constitutional rights—in particular, the Fifth Amendment’s Due Process Clause<sup>101</sup> and the Fourth Amendment’s prohibition on unreasonable searches and seizures<sup>102</sup>—attach to the U.S. citizen even while the individual is abroad.<sup>103</sup> Those rights are considered in assessing whether it is lawful to target the individual.

The United States has publicly provided this constitutional analysis in detail on numerous occasions.<sup>104</sup> In particular, these publicly released materials discuss how the United States has applied a due process balancing analysis to determine the circumstances under which it may use lethal force against a U.S. citizen who is a senior operational leader of an enemy force planning violent attacks against Americans,<sup>105</sup> and how, under this analysis, the United States would be able to use force against the senior operational leader in at least the following circumstances: (1) where an informed, high-level official of the U.S. Government has determined that the targeted individual poses an imminent threat of violent attack against the United States;<sup>106</sup> (2) where a capture operation would be infeasible and where those conducting the operation continue to monitor whether capture becomes feasible; and (3) where such an operation would be conducted consistent with applicable law of armed conflict principles.<sup>107</sup>

The United States applied these three criteria for the use of force against a U.S. citizen in the only specific, targeted strike against an identified U.S. citizen that it has conducted—the strike that targeted Anwar al-Aulaqi. First, Anwar al-Aulaqi posed an imminent threat of violent attack on U.S. persons. He was the chief of external operations of AQAP, one of the most dangerous regional affiliates of al-Qa’ida and a group that has committed numerous terrorist attacks overseas and attempted multiple times to conduct terrorist attacks against the U.S. homeland. In this role, al-Aulaqi repeatedly made clear his intent to attack U.S. persons; he was also directly and personally involved in the continued planning and execution of terrorist attacks against the U.S. homeland. Based on this information, high-level U.S. Government officials appropriately concluded that al-Aulaqi posed an imminent threat of violent attack against the United States. Second, before carrying out the operation that killed al-Aulaqi, senior officials conducted a careful evaluation of the circumstances at the time and determined that it was not feasible to capture al-Aulaqi. Third, senior officials determined that the operation would be conducted consistent with applicable law of armed conflict principles. In addition, the operation was undertaken with the consent of the Government of Yemen.<sup>108</sup>

Beyond the Fifth Amendment’s Due Process Clause, the United States has also proceeded on the basis that a lethal operation targeting a U.S. citizen abroad who is planning attacks against the United States would result in a “seizure” under the Fourth Amendment.<sup>109</sup> The U.S. Supreme Court has made clear that the constitutionality of a seizure is determined by “balanc[ing] the nature and quality of the intrusion on the individual’s Fourth Amendment interests against the importance of the governmental interests alleged to justify the intrusion.”<sup>110</sup> Even in domestic law enforcement operations, the Court has noted that “[w]here 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.”<sup>111</sup> 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.”<sup>112</sup>

At least in circumstances where the targeted person is an operational leader of an enemy force and an informed, high-level U.S. Government official has determined that the individual poses an imminent threat of violent attack against the United States, and those conducting the operation would carry out the operation only if capture were infeasible, the use of lethal force would not violate the Fourth Amendment.<sup>113</sup> Under such circumstances, the intrusion on any Fourth Amendment interests would be outweighed by the “importance of the governmental interests [that] justify the intrusion”—the interests in protecting the lives of U.S. nationals.<sup>114</sup>

Notably, although the three circumstances outlined above are sufficient to render a lethal operation against a U.S. citizen lawful under the circumstances described, they are not necessarily required. In particular, the three circumstances may not apply to operations that take place on traditional battlefields. Rather, the United States has concluded only that the stated circumstances would be sufficient to make lawful a lethal operation in a foreign country directed against a specific individual U.S. citizen.<sup>115</sup>

## 2. Targeting Money and Revenue-Generating Objects

Under certain conditions, attacks on money and revenue-generating objects are consistent with the law of armed conflict. As described above, under the principle of distinction, parties to a conflict must discriminate between military objectives, on the one hand, and civilians and civilian objects, on the other hand. Parties to a conflict may make enemy combatants and other military objectives the object of attack.<sup>116</sup> They may not make civilians, persons who are *hors de combat*, and other protected persons and objects the object of attack.<sup>117</sup> Accordingly, subject to other applicable law of armed conflict rules, States may make only military objectives the object of attack in an armed conflict.<sup>118</sup>

Insofar as objects are concerned, military objectives are those objects that by their nature, location, purpose, or use make an effective contribution to military action and whose total or partial destruction, capture, or neutralization, in the circumstances ruling at the time, offers a definite military advantage.<sup>119</sup> That definition may encompass objects that make an effective contribution to the enemy’s war-fighting or war-sustaining capabilities.<sup>120</sup> Money and certain

revenue-generating objects can, under the circumstances ruling at the time, make an effective contribution to armed action by enabling a non-State armed group to conduct and sustain its operations. Destroying such objects may offer a definite military advantage by denying revenue to a non-State armed group. Although definite military advantage is assessed in its operational and strategic context, the U.S. interpretation of “definite military advantage” excludes advantages that are merely hypothetical or speculative. Moreover, as in all targeting decisions, the United States would apply all other relevant law of armed conflict principles and rules, including the principle of proportionality. Subject to these rules, the United States may target money and revenue-generating objects that constitute military objectives consistent with the principle of distinction.

As part of military operations against ISIL, the United States and other States have taken military action against money and certain revenue-generating objects controlled by ISIL as part of a broader strategy to deny funding for the terrorist organization’s armed operations. These attacks have targeted ISIL-controlled oil infrastructure, tanker trucks, wells, and refineries, significantly reducing ISIL’s oil production and the revenues that are used to support its armed operations.<sup>121</sup> The United States has also targeted certain storage sites that ISIL has used to store the money it controls. As a result of these strikes, ISIL has been forced to reduce the salaries of its fighters, diminishing their morale and leading to defections that undermine ISIL’s overall war-fighting capability.

### *C. U.S. Policies Regarding Targeting and Incidental Civilian Casualties*

The United States is committed to complying with its obligations under the law of armed conflict, including those obligations that address the protection of civilians. In addition to the moral and legal imperatives to protect civilians, the protection of civilians is fundamentally consistent with the effective, efficient, and decisive use of force in pursuit of U.S. national interests. Minimizing civilian casualties can further mission objectives; help maintain the support of partner governments and vulnerable populations, especially in the conduct of counterterrorism and counterinsurgency operations; and demonstrate the legitimacy and enhance the sustainability of U.S. operations critical to U.S. national security.<sup>122</sup>

As a matter of policy, the United States therefore frequently applies certain heightened policy standards and procedures that underscore its commitment to reducing civilian casualties and to enhancing transparency and strengthening accountability for its actions. These standards and procedures cover all phases of military operations from planning to completion to after-action assessment. These standards frequently result in practices that are more protective of civilians than required under the law of armed conflict.

#### *1. The Presidential Policy Guidance*

One such policy document, approved in 2013, is the Presidential Policy Guidance on Procedures for Approving Direct Action Against Terrorist Targets Located Outside the United States and Areas of Active Hostilities (PPG).<sup>123</sup> The PPG establishes standard operating procedures for when the United States takes direct action against terrorist targets outside of the United States and areas of active hostilities. For purposes of the PPG, the term “direct action”

refers to lethal and non-lethal uses of force, including capture operations.<sup>124</sup> The determination as to whether a region constitutes an “area of active hostilities” does not turn exclusively on whether there is an armed conflict under international law taking place in the country at issue, but also takes into account, among other things, the size and scope of the terrorist threat, the scope and intensity of U.S. counterterrorism operations, and the necessity of protecting any U.S. forces in the relevant location. Afghanistan, Iraq, Syria, and certain portions of Libya are currently designated as “areas of active hostilities,” such that the PPG does not apply to direct actions taken in those locations. The policy standards and processes contained in the PPG also do not apply to direct action taken when the United States is acting quickly to defend U.S. or partner forces from attack or outside the counterterrorism context, such as the October 12, 2016, U.S. military strikes on radar facilities in Houthi-controlled territory in Yemen.

Under the PPG, as with all U.S. uses of force, any direct action must be conducted lawfully and taken against lawful targets. As a matter of policy, the PPG sets forth additional standards for direct action, including:

- *Preference for Capture:* The PPG prioritizes capture operations over lethal action. Under the PPG, lethal action should be taken in an effort to prevent terrorist attacks against U.S. persons only when capture of an individual is not feasible and no other reasonable alternatives exist to address the threat effectively.<sup>125</sup>
- *Standards for Use of Lethal Force:* The PPG underscores that any decision to use force abroad outside areas of active hostilities—even against adversaries dedicated to killing Americans—is a significant one. It makes clear that lethal force should not be proposed or pursued as a substitute for prosecuting a terrorist suspect in a civilian court or a military commission, and it sets forth a series of policy conditions that are more restrictive than the law of armed conflict requires that must be met before such force will be used, including that:
  - The United States will use lethal force against only a terrorist target that poses “a continuing, imminent threat to U.S. persons,” underscoring that it is simply not the case that all terrorists overseas pose such a threat;
  - Before lethal action may be taken, the United States must have “near certainty” that the terrorist target is present and that non-combatants will not be injured or killed;<sup>126</sup>
  - There must be an assessment that the capture of the target is not feasible at the time of the operation<sup>127</sup> and that no other reasonable alternatives exist to address the threat to U.S. persons effectively; and
  - Lethal action requires an assessment that relevant governmental authorities in the country where the action is contemplated either cannot or will not effectively address the threat to U.S. persons.<sup>128</sup>

- *U.S. Government Coordination and Review:* The PPG ensures that decisions to capture or use lethal force against terrorist targets outside areas of active hostilities are made at the most senior levels of the U.S. Government, informed by departments and agencies with relevant expertise. It sets forth a decision making process for operations whereby senior national security officials—including the leadership of key departments and agencies—review and inform proposals to ensure that the legal and policy standards are met.<sup>129</sup>
- *After-Action Reviews and Congressional Notification:* The PPG includes procedures for after-action reports as well as requirements for congressional notification.<sup>130</sup>
- *Reservation of Authority:* Of course, the PPG reflects that the President always retains authority to take lethal action consistent with the law of armed conflict. Nothing in the PPG prevents the President from exercising his constitutional authority as Commander in Chief and Chief Executive, as well as his statutory authority, to consider a lawful proposal from operating agencies that he authorize direct action that would fall outside of the policy guidance contained within the PPG, including a proposal that he authorize lethal force against an individual who poses a continuing, imminent threat to another country's persons.<sup>131</sup> In every case in which the United States takes military action, however, whether in or outside an area of active hostilities, international legal principles, including respect for a State's sovereignty and the laws of armed conflict, impose important constraints on the ability of the United States to act unilaterally—and on the way in which the United States can use force—in foreign territories.

## 2. Executive Order Regarding Civilian Casualties

Another important example of how the United States has established policies related to reducing the risk of civilian casualties is Executive Order 13732 on U.S. Policy on Pre- and Post-Strike Measures to Address Civilian Casualties in U.S. Operations Involving the Use of Force.<sup>132</sup> The Executive Order applies to all operations, regardless of where they are conducted, and underscores that a commitment to the protection of civilians is fundamentally consistent with the effective, efficient, and decisive use of force in furtherance of U.S. national interests.

- *Best Practices:* The Executive Order catalogues existing best practices developed by the U.S. Government over many years to protect civilians in the context of operations involving the use of force inside and outside areas of active hostilities and directed relevant departments and agencies to continue such measures in present and future operations. In particular, the Executive Order requires relevant agencies, consistent with mission objectives and applicable law, to conduct training, develop intelligence systems, take feasible precautions, and conduct risk assessments in the interest of protecting civilians. The Executive Order also requires, as appropriate, reviewing or investigating incidents involving civilian casualties and taking measures to mitigate future incidents; acknowledging U.S. Government responsibility for civilian casualties when they have occurred and offering condolences, including *ex gratia* payments, to civilians who are injured or to the families of civilians who are killed; engaging with foreign partners to share and learn best practices; and maintaining channels for engagement with the International Committee of the Red Cross (ICRC) and non-

governmental organizations that can assist in efforts to distinguish between military objectives and civilians.<sup>133</sup>

- *Enhancing Intake of Information to Assess Reports of Civilian Casualties:* To help address certain challenges associated with addressing the credibility of reports of civilian casualties in non-permissive environments, the Executive Order emphasizes the U.S. Government's consideration of relevant and credible information from all available sources, including non-governmental organizations.<sup>134</sup>
- *Release of Information Related to Civilian Casualties:* The Executive Order also directs the Director of National Intelligence (DNI), or such other official as the President may designate, to release publicly an annual summary of information obtained from relevant departments and agencies about the number of strikes undertaken by the U.S. Government against terrorist targets outside areas of active hostilities and about the assessed range of combatant and non-combatant deaths resulting from those strikes. The annual report will also include information about the sources and methodology used to conduct this assessment and address discrepancies between post-strike assessments of the U.S. Government and credible reporting from non-governmental organizations.<sup>135</sup>
- *Consultation with Experts:* Finally, the Executive Order directs the National Security Council staff to convene experts from relevant U.S. Government departments and agencies to consult on civilian casualty trends and to consider potential improvements to the U.S. Government's civilian casualty mitigation efforts.<sup>136</sup>

The Executive Order reflects the fact that wherever the United States uses lethal force (whether or not taking action covered by the PPG), it is committed as a matter of policy and practice to minimizing the risk of civilian casualties and to promoting accountability. Moreover, the Executive Order and the practices it describes exemplify the continuing commitment of the U.S. Government to refining, clarifying, and strengthening the standards and procedures that govern U.S. use of force abroad to ensure that they continue to be informed by best practices and the most current information.

## II. Capture of Individuals in Armed Conflict

The capture of terrorist suspects is an essential part of U.S. counterterrorism strategy. It has been critical to ensure that intelligence is collected from these suspects in a manner that is consistent with the law and U.S. values; that captured terrorist suspects are detained through an appropriate legal framework; and that, wherever possible, the United States avails itself of a long-term disposition option such as prosecution in an Article III court or military commission. When considering U.S. capture operations overseas, departments and agencies carefully assess all relevant facts and legal authorities to determine whether an individual may be apprehended and detained and whether there is a potential for prosecution.



As discussed more fully below, as terrorist suspects have been captured or apprehended, the U.S. Government has used all available tools at its disposal—including military, law enforcement, and intelligence authorities—to maximize intelligence collection and to incapacitate terrorists while adhering to U.S. legal obligations, policies, and values. These tools include the use of law-of-armed-conflict detention authority, as authorized under the 2001 AUMF, as well as the use of the criminal justice system. In some cases, military and law enforcement authorities have worked together to seek longer-term disposition options through prosecution or, in some circumstances, through transfers to third countries. These collaborative efforts often provide the U.S. Government with a stable authority for long-term incapacitation of terrorists and a means of eliciting their cooperation while respecting the law.

The U.S. Government has also set forth additional policies and procedures governing certain capture operations through the PPG. In Section 2, the PPG sets forth the approval process for operations to capture terrorism suspects outside of the United States and areas of active hostilities.<sup>137</sup> Among other things, these procedures require that agencies proposing capture operations consider long-term disposition options wherever practicable, including prosecution in a civilian court or military commission.<sup>138</sup>

Where individuals have been held in long-term military detention, the U.S. Government has ensured that such detainees are held under a framework that protects national security and that is consistent with the interests of justice, and with international and domestic law. For example, with respect to the Guantanamo Bay detention facility, a Task Force established by the President in 2009 examined the status of each individual and recommended whether each should be transferred to a third country, prosecuted, or held in continued law-of-armed-conflict detention.<sup>139</sup> The President also ordered a periodic review of Guantanamo detainees designated for law-of-armed-conflict detention or referred for prosecution (but without charges pending or conviction) to determine whether continued detention of each detainee is necessary to protect against a continuing significant threat to the security of the United States. Pursuant to that order,<sup>140</sup> Periodic Review Boards (PRBs) continue to assess the threat posed by Guantanamo detainees who are not charged by a military commission or otherwise designated for transfer. As explained further below, based on these procedures and the Administration's efforts to repatriate and resettle detainees, the population at Guantanamo has been significantly reduced.

### **III. Detention of Individuals in Armed Conflict**

#### *A. Scope of Military Detention Authority Under the 2001 AUMF*

During this Administration, the United States has detained individuals captured in the hostilities authorized by the 2001 AUMF in Afghanistan, in Iraq, temporarily at sea, and at the Guantanamo Bay detention facility. As a plurality of the U.S. Supreme Court has observed, the capture and detention of enemy belligerents in order to prevent their return to the battlefield has long been recognized as an “important incident[] of war.”<sup>141</sup> The United States bases its authority to detain these individuals on the 2001 AUMF as informed by the law of armed conflict.<sup>142</sup>

Under the 2001 AUMF, the United States may detain those persons who were part of, or substantially supported, Taliban or al-Qa'ida forces or associated forces that are engaged in hostilities against the United States or its coalition partners, including any person who has committed a belligerent act, or has directly supported hostilities, in aid of such enemy armed forces.<sup>143</sup> To determine whether an individual is “part of” an enemy force, the United States may rely on either a formal or functional analysis of the individual’s role in that enemy force.<sup>144</sup> As noted above, such a functional analysis may include looking to, among other things, the extent to which that person performs functions for the benefit of the group that are analogous to those traditionally performed by members of a country’s armed forces; whether that person is carrying out or giving orders to others within the group; and whether that person has undertaken certain acts that reliably connote meaningful integration into the group.

Examination of whether an individual is “part of” an enemy force is informed by the fact that the armed groups against which the President is authorized to use force under the 2001 AUMF neither abide by the law of armed conflict nor typically issue membership cards or uniforms. Therefore, information relevant to a determination that an individual joined with or became part of an enemy force might range from formal membership, such as through an oath of loyalty, to more functional indications, such as training with al-Qa'ida (as reflected in some cases by staying at al-Qa'ida or Taliban safehouses that are regularly used to house militant recruits), taking positions with enemy forces, or in planning or carrying out attacks against the United States and its allies’ persons or interests, particularly U.S. persons or interests. Often these factors operate in combination. In each case, given the nature of the irregular forces and the practice of their participants or members to try to conceal their affiliations, judgments about whether a particular individual falls within the scope of the authority conferred by the 2001 AUMF will necessarily turn on the totality of the circumstances.<sup>145</sup>

In the detention context, the U.S. Court of Appeals for the D.C. Circuit has employed a functional approach to determining whether an individual is “part of” an enemy force under the 2001 AUMF.<sup>146</sup> As that Court of Appeals has explained:

[D]etermining whether an individual is part of al Qaeda, the Taliban, or an associated force almost always requires drawing inferences from circumstantial evidence, such as that individual’s personal associations. Unlike enemy soldiers in traditional wars, terrorists do not wear uniforms. Nor do terrorist organizations issue membership cards, publish their rosters on the Internet, or otherwise publicly identify the individuals within their ranks. So we must look to other indicia to determine membership in an enemy force.<sup>147</sup>

The Court of Appeals has also observed that, in the context of detention, it “is impossible to provide an exhaustive list of criteria for determining whether an individual is ‘part of’ al-Qaida. That determination must be made on a case-by-case basis” and must “focus[] upon the actions of the individual in relation to the organization.”<sup>148</sup> As developed in the D.C. Circuit’s habeas cases, relevant indicia and circumstances may include whether (1) the individual intended to fight against the United States or its coalition partners<sup>149</sup>; (2) the individual closely associated with members of enemy forces<sup>150</sup>; (3) other members of the enemy forces or documents created by the enemy forces identified the individual as a member<sup>151</sup>; (4) the individual trained in a camp

associated with an enemy force<sup>152</sup>; (5) the individual stayed at a guesthouse associated with an enemy force<sup>153</sup>; (6) the individual followed practices associated with enemy forces, such as the practice of turning over passports and money<sup>154</sup>; (7) the individual swore an oath of allegiance to an enemy force<sup>155</sup>; (8) the individual hosted leaders of the enemy force<sup>156</sup>; (9) the individual recruited or referred aspiring members to the enemy force<sup>157</sup>; (10) the individual traveled along routes conventionally used by the enemy force<sup>158</sup>; (11) the individual lied to interrogators or provided implausible explanations for his or her behavior<sup>159</sup>; and (12) the individual possessed a weapon.<sup>160</sup> Moreover, the U.S. Court of Appeals for the D.C. Circuit has clarified that “[e]vidence that an individual operated within al-Qaida’s command structure is ‘sufficient but is not necessary to show he is ‘part of’ the organization’” for purposes of detention.<sup>161</sup>

As noted above, the United States has also interpreted the 2001 AUMF to authorize the detention of individuals who “substantially support” enemy forces in the course of their hostilities against the United States or its coalition partners. This interpretation is informed by the law of armed conflict governing international armed conflicts, which allows for the detention of a narrow category of individuals who are not part of the enemy but bear sufficiently close ties to those forces as to be detainable. By providing “substantial support,” an individual is “more or less part of” the enemy force.<sup>162</sup> Thus, the concept of “substantial support” could encompass individuals whose support for enemy forces makes them analogous to those who accompany the armed forces without actually being members thereof, such as civilian members of military aircraft crews or members of services responsible for the welfare of the armed forces. Significantly, the provision of only unwitting or insignificant support to enemy forces does not qualify as “substantial support.” Nor does independent advocacy or journalism. In practice, the United States has not relied in court proceedings exclusively on the “substantial support” concept to justify the continued detention of any individual held at Guantanamo Bay.

Under the 2001 AUMF, as informed by the law of armed conflict, detention is generally authorized until the end of hostilities.<sup>163</sup> The relevant inquiry in determining whether detention remains authorized is whether active hostilities have ceased, not whether a particular combat mission is over. During ongoing hostilities, the U.S. Government’s legal authority to detain “is not dependent on whether an individual would pose a threat to the United States or its allies if released but rather upon the continuation of hostilities.”<sup>164</sup> However, as a matter of policy, a detainee may be released or transferred while active hostilities are ongoing if a competent authority determines that the threat the individual poses to the security of the United States can be mitigated by other lawful means. This discretionary designation of a detainee for possible transfer from a detention facility, including the facility at Guantanamo Bay, does not affect the legality of his continued detention under the 2001 AUMF pending transfer.<sup>165</sup>

## *B. Review of the Continued Detention of Detainees at Guantanamo Bay*

In his first week in office, President Obama issued Executive Order 13492 regarding the review and disposition of individuals detained at Guantanamo Bay and the closure of the detention facility. As the Administration has made clear, the facility’s continued operation weakens U.S. national security by furthering the recruiting propaganda of violent extremists, hindering relations with key allies and partners, and draining resources. Executive Order 13492

further required a comprehensive review of the status of Guantanamo detainees to determine their appropriate disposition by way of release, transfer, prosecution, or continued detention pursuant to the law of armed conflict.<sup>166</sup> That review was completed on January 22, 2010.<sup>167</sup>

In 2011, the President established a process to ensure that individuals detained at Guantanamo Bay under the law of armed conflict remain in detention only when necessary to protect against a continuing significant threat to the security of the United States.<sup>168</sup> Executive Order 13567 established Periodic Review Boards (PRBs) whose purpose is to determine, through a review of relevant and available information, including hearings in which the detainee may participate, whether detention of each eligible Guantanamo detainee remains necessary to protect against such a threat. The Order directed the PRBs to consider cases of detainees who were either designated for continued law-of-armed-conflict detention or referred for prosecution (except for those detainees who have been convicted or are facing pending charges) as a result of the review conducted pursuant to Executive Order 13492. Certain elements of the PRB process were codified into statute by the 2012 NDAA.<sup>169</sup>

Initial PRB hearings for each detainee at Guantanamo eligible for review under the Executive Order were completed as of September 8, 2016. Detainees for whom the PRB made a final determination that continued law-of-armed-conflict detention is warranted are subject to subsequent full reviews and hearings by the PRB on a triennial basis.<sup>170</sup> The continued detention of each detainee eligible for a PRB pursuant to the Executive Order is also subject to a file review every six months to determine whether any new information raises a significant question as to whether a detainee's continued detention is warranted.<sup>171</sup> If such a significant question is raised during the file review, the detainee will promptly receive a full review. Detainees are assisted in proceedings before the PRB by a government-provided personal representative who possesses the security clearance necessary for access to information compiled for the Board's review.<sup>172</sup> In addition, the detainee may be assisted in proceedings before the PRB by private counsel retained by the detainee at no expense to the United States.<sup>173</sup> The PRB does not address the legality of any individual's detention. But if at any time during the PRB process material information calls into question the legality of detention, the matter will be referred immediately to the Secretary of Defense and the Attorney General for appropriate action.<sup>174</sup>

President Obama has repeatedly reaffirmed that closing the Guantanamo Bay detention facility is a national security imperative.<sup>175</sup> The Administration is taking all possible steps to reduce the detainee population at Guantanamo and to close the detention facility in a responsible manner that protects U.S. national security. However, restrictions that Congress has placed on transfers of Guantanamo detainees since 2011 have served as significant impediments to closing the facility. As of the release of this report, there are 59 detainees at Guantanamo, compared to 242 detainees on January 20, 2009, when the President took office.

### *C. Treatment of Armed Conflict Detainees*

#### *1. Fundamental Treatment Guarantees for Armed Conflict Detainees*

The standards in Common Article 3 of the 1949 Geneva Conventions apply to detainees in any military operation.<sup>176</sup> Common Article 3 reflects a minimum standard of humane

treatment protections in non-international armed conflict for all persons taking no active part in hostilities, including members of armed forces who have laid down their arms and those placed *hors de combat* by sickness, wounds, detention, or any other cause. Additional rules regarding treatment of detainees will apply depending on the particular context. In particular, Article 75 of Additional Protocol I to the Geneva Conventions sets forth fundamental guarantees for persons in the hands of an opposing force in an international armed conflict, including prohibitions on torture and humiliating and degrading treatment, as well as fair trial guarantees.<sup>177</sup> The United States is not party to Additional Protocol I, but the United States has chosen out of a sense of legal obligation to treat the principles set forth in Article 75 as applicable to any individual it detains in an international armed conflict, and it expects all other nations to adhere to these principles as well.

Additional Protocol II to the Geneva Conventions contains detailed humane treatment standards and fair trial guarantees that would apply in the context of non-international armed conflicts, such as the hostilities authorized by the 2001 AUMF.<sup>178</sup> The United States signed Additional Protocol II in 1987 and President Reagan submitted it to the Senate for advice and consent to ratification. In March 2011, this Administration urged the Senate to act on the Protocol as soon as practicable. Prior to urging the Senate to act, the U.S. Government conducted an extensive interagency review, which concluded that U.S. military practice is already consistent with the Protocol's provisions.<sup>179</sup> The Executive Branch noted that joining the treaty would not only assist the United States in continuing to exercise leadership in the international community in developing the law of armed conflict, but would also reaffirm the United States' commitment to humane treatment in, and compliance with legal standards for, the conduct of armed conflict.

## 2. The Prohibition on Torture and Ill-Treatment

Torture and cruel, inhuman, or degrading treatment or punishment (CIDTP) are categorically prohibited under domestic and international law, including international human rights law and the law of armed conflict. These prohibitions exist everywhere and at all times.

### a. The Prohibition on Torture and Ill-Treatment Under U.S. Domestic Law

Torture and ill-treatment are prohibited as a matter of U.S. domestic law. The Detainee Treatment Act of 2005 requires that “no individual in the custody or under the physical control of the U.S. Government, regardless of nationality or physical location, shall be subject to cruel, inhuman, or degrading treatment or punishment.”<sup>180</sup> This language means that under U.S. domestic law, every U.S. official, wherever he or she may be, is prohibited from engaging in torture or CIDTP.

Additionally, immediately upon taking office in January 2009, President Obama issued Executive Order 13491, which requires that any individual detained in any armed conflict who is in the custody or under the effective control of the United States or detained within a facility owned, operated, or controlled by the United States “shall in all circumstances be treated humanely and shall not be subjected to violence to life and person (including murder of all kinds,

mutilation, cruel treatment, and torture), nor to outrages upon personal dignity (including humiliating and degrading treatment).<sup>181</sup>

Moreover, Executive Order 13491 requires that no individual in U.S. custody or under U.S. control in any armed conflict “shall . . . be subjected to any interrogation technique or approach, or any treatment related to interrogation, that is not authorized by and listed in [the] Army Field Manual.”<sup>182</sup> This requirement is applicable to all departments and agencies that conduct interrogations of terrorism suspects or detainees in armed conflict.

The President has stated repeatedly that waterboarding is torture, and the Army Field Manual explicitly prohibits it.<sup>183</sup> Executive Order 13491 also revoked all executive directives, orders, and regulations inconsistent with that order.<sup>184</sup>

The 2016 NDAA codified many of the key interrogation-related reforms required by that Executive Order.<sup>185</sup> Specifically, it codified the requirement that an individual in the custody or under the effective control of an officer, employee, or other agent of the U.S. Government, or detained within a facility owned, operated, or controlled by a U.S. department or agency, in any armed conflict, may not be subjected to any interrogation technique or approach, or any treatment related to interrogation, that is not authorized by and listed in Army Field Manual 2-22.3.<sup>186</sup> The 2016 NDAA also imposed new legal requirements, including that the Army Field Manual remain publicly available, and that any revisions be made publicly available 30 days in advance of their taking effect.<sup>187</sup>

#### **b. The Prohibition on Torture and Ill-Treatment in International Law**

The prohibition on torture is also binding as a matter of customary international law at all times on all States and all parties to an armed conflict, including the United States, regardless of a State’s status as party or non-party to any particular treaty.<sup>188</sup>

In the law of armed conflict, Common Article 3 of the 1949 Geneva Conventions explicitly prohibits torture and humiliating, degrading, or cruel treatment.<sup>189</sup> Article 75 of Additional Protocol I explicitly prohibits torture of all kinds, whether physical or mental. Article 4(2)(a) of Additional Protocol II, which applies in non-international armed conflicts, prohibits violence to the life, health, and physical or mental well-being of persons, in particular murder as well as cruel treatment such as torture, mutilation, or any form of corporal punishment. Although the United States is not a party to Additional Protocol II, U.S. military practices, including its detention and interrogation practices, are consistent with its requirements, as noted above.

In international human rights law, the International Covenant on Civil and Political Rights prohibits torture and CIDTP.<sup>190</sup> The United States has had international law obligations under this treaty as a State party since 1992.<sup>191</sup> The UN Convention Against Torture and Other Cruel, Inhuman, or Degrading Treatment or Punishment (UNCAT) creates a variety of legal obligations related to torture and CIDTP that are binding on the United States as a matter of international law,<sup>192</sup> including that each State Party must take effective legislative, administrative, judicial, or other measures to prevent acts of torture in any territory under its

jurisdiction,<sup>193</sup> to ensure that all acts of torture are offences under its criminal law,<sup>194</sup> and to promptly and impartially investigate credible allegations of torture in territory under its jurisdiction.<sup>195</sup> The United States ratified the UNCAT in 1994, and enacted the Torture Convention Implementation Act to implement certain aspects of the Convention's requirements that were not already codified as part of U.S. domestic law.<sup>196</sup>

The United States recognizes that a time of war does not suspend the operation of the UNCAT, which continues to apply even when a State is engaged in armed conflict.<sup>197</sup> The law of armed conflict and the UNCAT contain many provisions that complement one another and are in many respects mutually reinforcing: for example, the obligations to prevent torture and CIDTP in the UNCAT remain applicable in times of armed conflict and are reinforced by complementary prohibitions in the law of armed conflict. In accordance with the doctrine of *lex specialis*, where these bodies of law conflict, the law of armed conflict would take precedence as the controlling body of law with regard to the conduct of hostilities and the protection of war victims.<sup>198</sup> However, a situation of armed conflict does not automatically suspend nor does the law of armed conflict automatically displace the application of all international human rights obligations. International human rights treaties, according to their terms, may also be applicable in armed conflict.

Additionally, the United States has stated that where the text of the UNCAT provides that obligations apply to a State Party in "any territory under its jurisdiction," such obligations extend to certain places beyond the sovereign territory of the State Party, and more specifically, "territory under its jurisdiction" extends to "all places that the State Party controls as a governmental authority." The United States currently exercises such control at the U.S. Naval Station at Guantanamo Bay, Cuba, and over all proceedings conducted there, and with respect to U.S.-registered ships and aircraft.<sup>199</sup>

### c. The Prohibition on Torture and Ill-Treatment in U.S. Policy

As discussed above, the 2016 NDAA and Executive Order 13491 require that individuals in the custody or under the effective control of an officer, employee, or other agent of the U.S. Government, or detained within a facility owned, operated, or controlled by a department or agency of the United States, in any armed conflict, shall not be subject to any interrogation technique or approach, or any treatment related to interrogation, that is not authorized by and listed in Army Field Manual 2-22.3.<sup>200</sup> The requirements of Army Field Manual 2-22.3 are binding on the U.S. military, as well as on all federal government departments and agencies, including the intelligence agencies, with respect to individuals in U.S. custody or under U.S. effective control in any armed conflict, without prejudice to authorized non-coercive techniques of Federal law enforcement agencies.<sup>201</sup> The Army Field Manual explicitly prohibits threats, coercion, and physical abuse.<sup>202</sup> Army Field Manual 2-22.3 must also remain available to the public, and any revisions must be made available to the public 30 days before taking effect.<sup>203</sup>

Consistent with Executive Order 13491 and the 2016 NDAA, Army Field Manual 2-22.3 lists the 18 approved interrogation approaches. Those approaches include those that make use of incentives, emotions, and silence, as well as the limitations on their use.<sup>204</sup> Additionally,

Appendix M of Army Field Manual 2-22.3 lists the one approved restricted interrogation technique (separation) that may be authorized during the intelligence interrogation of detained “unlawful enemy combatants.” Appendix M also includes the limitations on the use of this technique. Separation involves separating a detainee from other detainees and their environment. The use of this restricted technique requires Combatant Commander approval, and approval of each interrogation plan by the first General Officer or Flag Officer in the interrogator’s chain of command.<sup>205</sup>

In addition to the Army Field Manual, the Department of Defense<sup>206</sup> has Department-wide policy directives in place to ensure humane treatment during intelligence interrogations and detention operations. For example, Department of Defense Directive 3115.09<sup>207</sup> requires that Department of Defense personnel and contractors promptly report any credible information regarding suspected or alleged violations of Department policy, procedures, or applicable law relating to intelligence interrogations, detainee debriefings, or tactical questioning. Reports must be promptly and thoroughly investigated by proper authorities, and remedied by disciplinary or administrative action, when appropriate.

Additionally, Department of Defense Directive 2311.01E requires that “[a]ll military and U.S. civilian employees, contractor personnel, and subcontractors assigned to or accompanying a Department of Defense Component shall report reportable incidents through their chain of command,” including “[a] possible, suspected, or alleged violation of the law of war, for which there is credible information.”<sup>208</sup> All reportable incidents must be investigated and, where appropriate, remedied by corrective action. Moreover, under U.S. law and policy, the Department of Defense does not use contract interrogators except in limited circumstances.<sup>209</sup>

Department of Defense policy also includes specific requirements with regard to humane treatment in medical care during the period of detention. Consistent with Additional Protocol II to the Geneva Conventions, Department of Defense policy requires that health care personnel charged with the medical care of detainees in armed conflict protect detainees’ physical and mental health and provide appropriate treatment for disease. Upon arrival in any Department of Defense detention facility, all detainees receive medical screening and any necessary medical treatment. The medical care that detainees receive throughout their time in U.S. custody is generally comparable to that which is available to U.S. personnel serving in the same location.<sup>210</sup>

### 3. [International Committee of the Red Cross \(ICRC\) Notification and Access](#)

The 2016 NDAA requires that any U.S. Government department or agency provide the ICRC with notification of, and prompt access to, any individual detained in any armed conflict in the custody or under the effective control of an officer, employee, or other agent of the U.S. Government or detained within a facility owned, operated, or controlled by a department or agency of the U.S. Government, consistent with existing Department of Defense regulations and policies.<sup>211</sup> This statute codified the identical legal requirement contained in Executive Order 13491.<sup>212</sup>

Department of Defense policy implements detailed procedures and requirements to ensure that detainees are treated humanely and in accordance with all applicable legal



obligations. Department of Defense Directive 2310.01E<sup>213</sup> requires that the Department of Defense assign internment serial numbers (ISNs) to all detainees interned by the United States in connection with armed conflict as soon as practicable and normally within 14 days of capture by, or transfer to, the custody or control of Department personnel, barring exceptional circumstances. Pursuant to this Directive, the ICRC is promptly made aware of all ISN assignments and has access to Department of Defense detention facilities and the detainees housed therein, subject to reasons of imperative military necessity. Further, the Directive requires that the Department of Defense keep detailed information regarding every individual it detains.

As a matter of policy, the United States also supports the Principles and Guidelines of the Copenhagen Process on the Handling of Detainees in International Military Operations,<sup>214</sup> including Paragraph 11, which states that in non-international armed conflict and where warranted in other situations, the detaining authority is to notify the ICRC or other impartial humanitarian organization of the deprivation of liberty, release, or transfer of a detainee. It also states that where practicable, the detainee's family is to be notified of the deprivation of liberty, release, or transfer of a detainee, and that detaining authorities are to provide the ICRC or other relevant impartial international or national organizations with access to detainees.

In partnership with the ICRC, the Department of Defense has greatly expanded the contact detainees held in the Guantanamo Bay detention facility have with their families. Detainees are given the opportunity to send and receive letters, facilitated by the ICRC, and are able to talk to their families periodically via phone or video teleconference.

#### **IV. Prosecution of Individuals Through the Criminal Justice System and Military Commissions**

When terrorism suspects are captured or brought into U.S. custody, the U.S. Government's first priorities are to ensure that they are unable to engage in terrorist activities and to collect as much intelligence as possible, consistent with the humane treatment laws, principles, and policies described above. While law-of-armed-conflict detention is permissible in the course of an armed conflict as described above, criminal trials can hold individuals accountable for their unlawful actions, offer victims a forum for redress, encourage cooperation, and provide a stable, long-term basis for incarceration for those found to be guilty.<sup>215</sup> Thus, the best way to ensure that a terrorism suspect can be brought to justice in the long term is often through prosecution in the criminal justice system. Therefore, the U.S. Government's policy has been to consider prosecution options for terrorism suspects even where the individuals are initially held under law-of-armed-conflict authorities, and, where possible, to take steps to preserve such options.<sup>216</sup> Article III courts have served as the venue for a significant number of successful terrorism prosecutions. Military commissions may also be an appropriate venue, depending on the facts and circumstances of a particular case; in some circumstances, transfer to a third country may provide for the best long-term disposition option. In practice, all of the terrorism suspects apprehended and held by the U.S. Government since January 2009 outside of

areas of active hostilities have ultimately been handled by the criminal justice system, as many others were in prior Administrations, or have been transferred to other countries.

#### A. Article III Courts

The Article III court system in the United States is a well-established forum for trying terrorism suspects. Both before and after the September 11th attacks, the Department of Justice successfully prosecuted hundreds of defendants for terrorism and terrorism-related offenses. The U.S. Government has prosecuted not only terrorism suspects apprehended in the United States, but also those captured in various places abroad including Afghanistan,<sup>217</sup> Pakistan,<sup>218</sup> and off the Somali coast.<sup>219</sup>

A number of Federal statutes provide a basis for prosecuting individuals for offenses that involve not only planning and committing terrorist attacks,<sup>220</sup> but also providing material support to terrorist organizations or terrorist plots (such as arms, money, or personnel),<sup>221</sup> soliciting the commission of terrorism-related offenses,<sup>222</sup> or conspiring to commit such offenses.<sup>223</sup> Congress in recent years has also expanded extraterritorial jurisdiction over certain offenses and enhanced terrorism-related penalties.<sup>224</sup> Additionally, even where an individual is not tried directly for planning an attack or providing support to a terrorist organization, other statutes—such as weapons-related offenses or the prohibition against lying to investigators—may provide important tools to disrupt a plot and ensure that offenders face justice.<sup>225</sup> Federal statutes also allow for the protection of classified information during the course of a trial.<sup>226</sup>

When terrorism suspects are apprehended by law enforcement authorities, the U.S. Government has prioritized obtaining intelligence within existing legal parameters in order to prevent imminent attacks. The U.S. Supreme Court has recognized a limited exception to the rule that statements made by suspects placed under arrest will not be admissible unless the suspect is first advised of his or her *Miranda* rights. Pursuant to this exception, statements by a suspect placed under arrest may be admissible if the officers' questions were reasonably prompted by a concern for public safety.<sup>227</sup> In order to ensure consistent application of the public safety exception, the Attorney General has approved guidance for the FBI with respect to terrorism cases that allows agents to ask all questions that are reasonably prompted by an immediate concern for public safety before advising arrestees of their *Miranda* rights.<sup>228</sup> Agents have used the public safety exception in several instances where there is a reasonable belief that a terrorism suspect has information about an imminent attack or there is immediate concern for the safety of the public or the arresting agents.<sup>229</sup> In many cases, terrorism suspects have agreed to continue speaking with law enforcement agents after having been read their *Miranda* rights.

The federal criminal justice system also affords prosecutors a means to secure plea agreements that entail cooperation with law enforcement and intelligence officials. Cooperation can be facilitated through measures such as agreements to delay sentencing while the accused continues to assist authorities and provide intelligence. The stringent penalties provided under relevant anti-terrorism statutes create incentives for defendants to cooperate.

A number of high-profile terrorists have been convicted in Article III courts. Defendants who have pleaded guilty before trial have included Faisal Shahzad (who attempted to detonate a

car bomb in Times Square in 2010 and was sentenced to life imprisonment) and Umar Farouk Abdulmutallab (who attempted to detonate a bomb on an airplane on Christmas Day of 2009 and was sentenced to life imprisonment). Defendants who have proceeded to trial and were convicted include Sulaiman Abu Ghaith (Osama bin Laden's son-in-law, who was sentenced to life in prison in 2014 for conspiring to kill Americans); Dzhokar Tsarnaev (who was sentenced to death for his role in the 2013 Boston Marathon bombing); and Ahmed Khalfan Ghailani (who was sentenced to life imprisonment for his role in al-Qa'ida's 1998 bombings of the U.S. embassies in Kenya and Tanzania). Earlier high-profile terrorism cases prosecuted in Article III courts include trials of the plotters who carried out the first World Trade Center bombing in 1993, and of Richard Reid, who attempted to blow up an American jetliner with a shoe-bomb in late 2001. After being convicted, terrorists have been held securely in Federal prisons.

As noted above, in some cases, Article III courts have been used where defendants were first apprehended overseas by the U.S. military.<sup>230</sup> In these cases, military and intelligence authorities have been able to coordinate effectively with law enforcement to ensure that terrorists could be apprehended and intelligence could be gathered while preserving the potential for criminal prosecution. For example, in 2011, the U.S. military captured Ahmed Abdulkadir Warsame in the Gulf of Aden. Warsame had worked as a senior operative for the terrorist group al-Shabaab and as a link between al-Shabaab and al-Qa'ida in the Arabian Peninsula. He was initially held under authority of the 2001 AUMF and questioned for intelligence purposes for several months. He was then read his *Miranda* rights, spoke voluntarily to law enforcement agents, and was brought to the Southern District of New York to face prosecution. Warsame pleaded guilty to terrorism-related charges and has cooperated with authorities by providing valuable intelligence about the two terrorist organizations. Other cases where individuals have been captured by the U.S. military overseas and then brought to the United States to face Federal criminal charges include Irek Ilgiz Hamidullin, who was captured in Afghanistan and convicted for conspiring to shoot down American helicopters and to kill U.S. and Afghan soldiers, and Ahmed Abu Khatalla, who was captured in Libya and is awaiting trial on charges relating to his alleged role in the 2012 attacks on U.S. facilities in Benghazi.

### *B. Military Commissions*

In appropriate circumstances, the United States may prosecute individuals detained in armed conflict in military commissions. This Administration worked in a bipartisan manner to reform military commissions through the Military Commissions Act of 2009 (MCA).<sup>231</sup> These reforms helped ensure core protections for the accused, such as the exclusion of evidence obtained by torture or by cruel, inhuman, or degrading treatment.<sup>232</sup> Other basic protections include the presumption of innocence and the U.S. Government's burden to prove guilt beyond a reasonable doubt<sup>233</sup>; the right to counsel<sup>234</sup>; the right to cross-examine witnesses<sup>235</sup>; the right to present one's own witnesses and to compel favorable testimony<sup>236</sup>; and the right to exculpatory evidence, including mitigating evidence.<sup>237</sup> In addition, the 2009 MCA provides for the right to appeal final judgments rendered by a military commission to the U.S. Court of Military Commission Review and to the U.S. Court of Appeals for the D.C. Circuit, and ultimately to the U.S. Supreme Court.<sup>238</sup>

These procedures accord with applicable international law safeguards. Common Article 3 of the 1949 Geneva Conventions prohibits “the passing of sentences and the carrying out of executions without previous judgment pronounced by a regularly constituted court, affording all the judicial guarantees which are recognized as indispensable by civilized peoples.”<sup>239</sup> Additionally, Article 15 of the UNCAT, which is applicable to military commissions proceedings at Guantanamo, prohibits the use of a statement which is established to have been made as a result of torture as evidence in any proceedings, except against a person accused of torture as evidence that the statement was made.

For an accused to be tried by a military commission, he or she must be charged with an enumerated offense, typically constituting a violation of the law of armed conflict. Offenses described in the MCA include violations of certain provisions in the Uniform Code of Military Justice as well as certain additional offenses such as attacking civilians or engaging in acts of terrorism.<sup>240</sup> To be eligible for trial by military commission, the defendant cannot be a U.S. citizen and must be an “unprivileged enemy belligerent,” which is defined under the statute to mean that he or she (1) has engaged in hostilities against the U.S. or its coalition partners; (2) has purposefully and materially supported such hostilities; or (3) was a part of al-Qa’ida at the time of the alleged offense.<sup>241</sup> As a result, there may be members of certain terrorist groups who fall outside the jurisdiction of military commissions because, for example, they lack ties to al-Qa’ida and their conduct does not otherwise make them subject to prosecution in the military commission forum.

Currently, military commission proceedings are pending against Khalid Sheikh Mohammed and four other alleged co-conspirators accused of planning the September 11th attacks, as well as against Abd Al-Rahim Hussein Muhammed Abdu Al-Nashiri for his alleged role in the 2000 attack on the USS Cole, and Abd Al Hadi Al-Iraqi for planning and leading attacks on Coalition forces in Afghanistan from 2001 to 2004.<sup>242</sup> Several individuals have been convicted through military commission proceedings (either through trial or guilty pleas) and are serving sentences or have completed their sentences. One conviction was vacated on appeal to the D.C. Circuit after the defendant had been released,<sup>243</sup> another conviction has recently been upheld by the D.C. Circuit,<sup>244</sup> and an appeal in one case is pending before the U.S. Court of Military Commission Review.<sup>245</sup>

As a matter of policy, the United States has sought to make military commissions proceedings as transparent as possible. Proceedings are transmitted via live video feed to locations at Guantanamo and in the United States so that the press and the public can view them, with a 40-second delay to protect against the disclosure of classified information. Additionally, court transcripts, filings, and other materials are also available to the public online via the Office of Military Commissions website.<sup>246</sup>

### *C. Transfers to Third Countries for Purposes of Prosecution*

In some circumstances the U.S. Government may determine that prosecution by a third country would serve as an appropriate forum to bring a captured terrorist suspect to justice. Transfers to third countries for prosecution have been made only after careful consideration of

the facts of each particular case, including an assessment of the relevant legal authorities under U.S. law and the third country's laws (including any jurisdictional issues), the citizenship of the accused and any victims, the location of the offense, and any diplomatic considerations. Importantly, as discussed in Part Two, Section V below, the U.S. Government will not transfer any captured suspect if it is more likely than not that the individual would be tortured by the receiving country.

## V. Transfer of Armed Conflict Detainees from U.S. Custody

The United States does not transfer any individual to a foreign country if it is more likely than not that the person would be tortured in that country. This includes transfers conducted in the context of an armed conflict. The U.S. Government's policy is reflected in a statutory statement of U.S. policy and memorialized in court submissions.<sup>247</sup>

For individuals who are detained at Guantanamo Bay, a decision to transfer a detainee from Guantanamo prior to the end of hostilities also reflects the best judgment of U.S. Government experts, including counterterrorism, intelligence, and law enforcement professionals, that, to the extent a detainee poses a continuing threat to the United States, the threat has been or will be sufficiently mitigated—and the national interest will be served—if the detainee is transferred to another country under appropriate security measures. When contemplating such a transfer of a detainee to another country, the United States considers the totality of relevant factors relating to the individual to be transferred and the government in question, including any security and humane treatment assurances received and the reliability of those assurances.<sup>248</sup>

### A. *Transfers and Domestic Law*

Section 2242(a) of the Foreign Affairs Reform and Restructuring Act of 1998 (FARRA) provides that “[i]t shall be the policy of the United States not to expel, extradite, or otherwise effect the involuntary return of any person to a country in which there are substantial grounds for believing the person would be in danger of being subjected to torture, regardless of whether the person is physically present in the United States.”<sup>249</sup> FARRA states a policy of applying the standard in UNCAT Article 3, discussed below, to all transfers by the United States.<sup>250</sup>

To further the goal of ensuring humane transfers in all contexts, including in the context of armed conflict, Executive Order 13491 required the formation of a special U.S. Government task force to study and evaluate the practices of transferring individuals to other nations in order to ensure consistency with all applicable laws and U.S. policies pertaining to treatment.<sup>251</sup> The Special Task Force issued a set of recommendations to ensure that U.S. transfer practices comply with the domestic laws, international obligations, and policies of the United States and do not result in the transfer of individuals to face torture. A document providing an overview of the Special Task Force Report was published by the Department of Justice when the Report was completed,<sup>252</sup> and the full text of the unclassified portion of the Report has now been publicly released.

Additionally, Section 1034 of the 2016 NDAA requires that prior to transferring any Guantanamo detainee to a foreign country, the Secretary of Defense must certify that the transfer “is in the national security interests of the United States” and that the receiving government “has taken or agreed to take appropriate steps to substantially mitigate any risk the individual could attempt to reengage in terrorist activity or otherwise threaten the United States or its allies or interests.”<sup>253</sup> In making each certification, the Secretary of Defense consults with the Attorney General, the Secretary of State, the Secretary of Homeland Security, the Chairman of the Joint Chiefs of Staff, and the Director of National Intelligence.<sup>254</sup>

When seeking security assurances from governments receiving Guantanamo detainees, the U.S. Government particularly seeks assurances that receiving governments will take certain security measures that, in the U.S. Government’s experience, have proven to be effective in mitigating threats posed by former detainees. The specific measures that are ultimately negotiated vary depending on a range of factors, including the specific threat a detainee may pose, the geographic location of the receiving country, the receiving country’s domestic laws, the receiving country’s capabilities and resources, and, where applicable, the receiving country’s international legal obligations.

#### *B. Transfers and International Law*

Article 3 of the UNCAT states that

(1) No State Party shall expel, return (“refouler”) or extradite a person to another State where there are substantial grounds for believing that he would be in danger of being subjected to torture.

(2) For the purpose of determining whether there are such grounds, the competent authorities shall take into account all relevant considerations including, where applicable, the existence in the State concerned of a consistent pattern of gross, flagrant or mass violations of human rights.

The United States issued an understanding of Article 3 upon its ratification of the UNCAT, stating that the United States understands the phrase “where there are substantial grounds for believing that he would be in danger of being subjected to torture” to mean “if it is more likely than not that he would be tortured.”<sup>255</sup> The purpose of the U.S. understanding on Article 3 is twofold: it clarifies the meaning of “substantial grounds” and it ensures harmonization in domestic implementation of Article 3 of the UNCAT and Article 33 of the 1951 Refugee Convention and its 1967 Protocol.<sup>256</sup> Prior to U.S. ratification of the UNCAT, the U.S. Supreme Court had interpreted Article 33 of the Refugee Convention to mean that a person falling within the scope of its protections could not be removed to a country where it was more likely than not that he or she would be persecuted on account of a protected ground (e.g., religion, political opinion).<sup>257</sup> Given that Article 3 of the UNCAT required extending the prohibition on removal under U.S. law to situations involving the risk of torture, the “more likely

than not” understanding ensured that the Article 3 protections would be applied in a manner consistent with existing protections under U.S. law.

Article 3 of the UNCAT has been implemented in U.S. law, among other ways, through immigration removal and extradition regulations issued pursuant to the FARRA.<sup>258</sup>

In 2008, the United States stated that Article 3 of UNCAT does not impose any legal obligations on the United States with respect to individuals located outside U.S. sovereign territory,<sup>259</sup> such that the Article is not applicable as a legal matter to transfers occurring from outside U.S. sovereign territory, including in the context of armed conflict. As discussed above, as a matter of policy, the United States applies the UNCAT Article 3 standard to all transfers regardless of location.

### *C. U.S. Policy on Transfers in the Context of Armed Conflict*

The U.S. Government carefully considers any transfer of a detainee from U.S. custody in the context of an armed conflict to determine whether it is more likely than not that the individual would face torture in the receiving country.

In making any such determination, U.S. officials consider the totality of relevant factors relating to the individual to be transferred and the proposed recipient government. When considering a transfer, the United States may consider, among other factors:

- the individual’s allegations of prior or potential future mistreatment in the receiving State;
- the receiving State’s overall human rights record;
- the specific factors suggesting that the individual in question is at risk of being tortured in the receiving State;
- whether similarly situated individuals have been tortured in the receiving State; and
- where applicable, any assurances of humane treatment from the receiving State (including an assessment of their credibility).

### *D. U.S. Policy on Humane Treatment Assurances and Post-Transfer Monitoring*

Humane treatment assurances may be sought in advance of a detainee transfer as a prudential matter or, in certain cases, where, if credible and reliable, the assurances could mitigate treatment concerns, such that the transfer would ultimately be consistent with applicable law and policy. The essential question in evaluating foreign government assurances relating to humane treatment in any post-transfer detention is whether, taking into account these assurances and the totality of other relevant factors relating to the individual and the government in question, it is more likely than not that the individual will be tortured in the country to which he or she is being transferred. There have been cases where the United States has considered the use

of assurances but nevertheless declined to transfer individuals because the United States was not satisfied that even with assurances the transfer would be consistent with its obligations, policies, or practices.

Although the content of any specific set of assurances must be determined on a case-by-case basis, assurances should fundamentally reflect a credible and reliable commitment by the receiving State to treat the transferred individual humanely and that such treatment would be consistent with applicable international and domestic law.

The U.S. Government considers a number of factors in evaluating the adequacy of assurances offered by the receiving State, including, but not limited to, information regarding the judicial and penal conditions and practices of the receiving State; U.S. relations with the receiving State; the receiving State's capacity and incentives to fulfill its assurances; political or legal developments in that State; the State's record in complying with similar assurances; the particular person or entity providing the assurances; and the relationship between that person or entity and the entity that will detain and/or monitor the individual transferee's activity.

Where appropriate, the U.S. Government also seeks assurances or a commitment that the receiving State will permit credible, independent organizations or, in some circumstances, U.S. Government officials to have consistent, private access to transferred detainees for post-transfer humanitarian monitoring. The U.S. Government has raised concerns, as appropriate, regarding both treatment and the process under which prosecutions have been pursued post-transfer when concerns come to its attention, whether from U.S. Government-obtained information, the results of monitoring by non-governmental organizations, or other sources. The United States has also taken other measures, such as training guard forces in anticipation of transfers, and has suspended transfers, where appropriate.

In a case in which the United States became aware of credible allegations that humane treatment assurances were not being honored, the United States would take diplomatic or other steps to ensure that the detainee in question would be appropriately treated, and to make clear the bilateral implications of continued non-observance of commitments made to the U.S. Government. A failure to honor humane treatment commitments would be a significant factor in determining whether to make any future detainee transfers from U.S. custody to the custody of a foreign government against which such a finding had been made. In specific cases where the United States had concerns about whether these commitments would be honored by the receiving country, the United States would not proceed with transfers to that country predicated on such assurances until those concerns had been appropriately addressed.



# APPENDIX: ADDITIONAL SPEECHES AND STATEMENTS FROM THE PRESIDENT AND ADMINISTRATION OFFICIALS ON THESE TOPICS

As noted in the Foreword, this report builds on a long line of public speeches and documents that reflect the President's commitment to being as transparent as possible about how and in what circumstances the United States uses military force and conducts related national security operations. Although this report cites these previous public statements when they are directly referenced in the text, it does not cite them in every instance where they support or are otherwise relevant to a discussion. A list of many such speeches and other materials follows for informational and reference purposes:

Executive Order No. 13491, *Ensuring Lawful Interrogations*, 74 Fed. Reg. 4893 (January 22, 2009)

Executive Order No. 13492, *Review and Disposition of Individuals Detained at the Guantanamo Bay Naval Base and Closure of Detention Facilities*, 74 Fed. Reg. 4897 (January 22, 2009)

Executive Order No. 13493, *Review of Detention Policy Options*, 74 Fed. Reg. 4901 (January 22, 2009)

Respondents' Memorandum Regarding the Government's Detention Authority Relative to the Detainees Held at Guantanamo Bay, *In re Guantanamo Bay Detainee Litigation*, No. 08-442 (D.D.C. March 13, 2009), available at <https://www.justice.gov/sites/default/files/opa/legacy/2009/03/13/memo-re-det-auth.pdf>

President Barack Obama, "Remarks by the President on National Security," the National Archives, Washington, D.C., May 21, 2009, available at <https://www.whitehouse.gov/the-press-office/remarks-president-national-security-5-21-09>

President Barack Obama, "A Just and Lasting Peace," 2009 Nobel Peace Prize Lecture, Oslo, Norway, December 10, 2009, available at <https://www.whitehouse.gov/the-press-office/remarks-president-acceptance-nobel-peace-prize>

Harold H. Koh, Legal Adviser to the Department of State, “The Obama Administration and International Law,” Address to the American Society of International Law, March 25, 2010, available at [www.state.gov/s/l/releases/remarks/139119.htm](http://www.state.gov/s/l/releases/remarks/139119.htm)

David S. Kris, Assistant Attorney General for National Security, “Law Enforcement as a Counterterrorism Tool,” Address at the Brookings Institution, June 11, 2010, available at <https://www.justice.gov/opa/speech/assistant-attorney-general-david-kris-speaks-brookings-institution>

Memorandum from David J. Barron, Acting Assistant Attorney General, Office of Legal Counsel, U.S. Department of Justice, to the Attorney General, *Applicability of Federal Criminal Laws and the Constitution to Contemplated Lethal Operations Against Shaykh Anwar al-Aulaqi* (July 16, 2010), available at [https://www.justice.gov/sites/default/files/olc/pages/attachments/2015/04/02/2010-07-16\\_-\\_olc\\_aaga\\_barron\\_-\\_al-aulaqi.pdf](https://www.justice.gov/sites/default/files/olc/pages/attachments/2015/04/02/2010-07-16_-_olc_aaga_barron_-_al-aulaqi.pdf)

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# ENDNOTES

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<sup>1</sup> This Report is intended to provide an overview of the U.S. Government’s existing legal and policy views on issues relating to the use of military force and related national security operations. The sources cited in the endnotes are included for informational purposes and do not necessarily constitute endorsement by the U.S. Government of every proposition in the underlying source.

<sup>2</sup> Joint Resolution Concerning the War Powers of Congress and the President, Pub. L. No. 93-148, 87 Stat. 555 (1973) (“War Powers Resolution”).

<sup>3</sup> This portion of the report focuses on theaters where the United States is taking direct action and thus does not discuss theaters such as Cuba, where U.S. forces continue to conduct humane and secure detention operations.

<sup>4</sup> Letter from the President to the Speaker of the House of Representatives and the President Pro Tempore of the Senate Providing a Supplemental Consolidated Report Consistent with the War Powers Resolution, December 5, 2016 (“2016 War Powers Report”).

<sup>5</sup> *Id.*

<sup>6</sup> *Id.*

<sup>7</sup> *Id.*

<sup>8</sup> *See* Letter from the President to the Speaker of the House of Representatives and the President Pro Tempore of the Senate, October 14, 2016, *available at* <https://www.whitehouse.gov/the-press-office/2016/10/14/letter-president-war-powers-resolution>.

<sup>9</sup> 2016 War Powers Report, *supra* note 4.

<sup>10</sup> Authorization for Use of Military Force, Pub. L. No. 107-40, §2(a), 115 Stat. 224, (2001) (“2001 AUMF”).

<sup>11</sup> *Id.*

<sup>12</sup> *Id.*

<sup>13</sup> Although Afghanistan was the focus when the 2001 AUMF was enacted in September 2001, the President’s authority to use force pursuant to that statute is not limited to Afghanistan. The 2001 AUMF itself contains no such geographic limitation, and neither Congress nor U.S. Federal courts have limited the President’s ability to use force in that way. As the United States has pointed out in the context of detainee litigation, imposing such a geographic limit on the authority conferred by the 2001 AUMF would “unduly hinder both the President’s ability to protect our country from future acts of terrorism and his ability to gather vital intelligence regarding the capability, operations, and intentions of this elusive and cunning adversary.” Respondents’ Memorandum Regarding the Government’s Detention Authority Relative to the Detainees Held at Guantanamo Bay, *In re Guantanamo Bay Detainee Litigation*, No. 08-442 (D.D.C. Mar. 13, 2009) (“March 13 Brief”) (quoting *Khalid v. Bush*, 355 F. Supp. 2d 311, 320 (D.D.C. 2005), *rev’d on other grounds sub nom.*, *Boumediene v. Bush*, 553 U.S. 723 (2008)).

<sup>14</sup> *Id.*

<sup>15</sup> Detention authority is addressed in greater depth in this report at Part Two, Section III-A.

<sup>16</sup> March 13 Brief, *supra* note 13, at 2.

<sup>17</sup> *Id.* at 1.

<sup>18</sup> National Defense Authorization Act for Fiscal Year 2012, Pub. L. No. 112-81, §1021(a), 125 Stat. 1562 (2011) (“2012 NDAA”). In another section, Congress made clear that the “disposition of a person under the law of war as described in subsection (a) may include the following: (1) Detention under the law of war without trial until the end of the hostilities authorized by the Authorization for Use of Military Force. (2) Trial under chapter 47A of title 10, United States Code (as amended by the Military Commissions Act of 2009 (title XVIII of Public Law 111–84)). (3) Transfer for trial by an alternative court or competent tribunal having lawful jurisdiction. (4) Transfer to the custody or control of the person’s country of origin, any other foreign country, or any other foreign entity.” *Id.* §1021(c).

<sup>19</sup> *Id.* §1021(b).

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<sup>20</sup> See, e.g., *Ali v. Obama*, 736 F.3d 542, 544 (D.C. Cir. 2013) (“This Court has stated that the AUMF authorizes the President to detain enemy combatants, which includes (among others) individuals who are part of al Qaeda, the Taliban, or associated forces. As this Court has explained in prior cases, the President may also detain individuals who substantially support al Qaeda, the Taliban, or associated forces in the war.” (citation omitted)); *Al-Adahi v. Obama*, 613 F.3d 1102, 1102 (D.C. Cir. 2010) (“The government may therefore hold at Guantanamo and elsewhere those individuals who are ‘part of’ al-Qaida, the Taliban, or associated forces.”); *Khan v. Obama*, 655 F.3d 20, 23 (D.C. Cir. 2011) (“We have held that the AUMF grants the President authority (inter alia) to detain individuals who are ‘part of forces associated with Al Qaeda or the Taliban.’”); *Hussain v. Obama*, 718 F.3d 964, 967 (D.C. Cir. 2013) (“[The AUMF] justifies holding a detainee at Guantanamo if the government shows, by a preponderance of the evidence, that the detainee was part of al Qaeda, the Taliban, or associated forces at the time of his capture.” (internal citations omitted)).

<sup>21</sup> Al-Qa’ida is used here to refer to what has at times been called “core al-Qa’ida,” including the senior leaders and cadre of the organization based in Afghanistan and Pakistan who were primarily responsible for planning and carrying out the September 11th attacks in the United States. Since the degradation of those elements and the relocation of some senior leaders outside the region, the term “al-Qa’ida senior leaders” is now used to refer to the overall emir and other senior figures of the group.

<sup>22</sup> For example, the United States conducted an airstrike against Mokhtar Belmokhtar, a long-time terrorist who maintained his personal allegiance to al-Qa’ida, pursuant to the authority conferred on the President by the 2001 AUMF. Under that same authority, the United States captured al-Qa’ida member Abu Anas al-Libi, accused of participating in the 1998 U.S. embassy bombings in Kenya and Tanzania.

<sup>23</sup> References to al-Qa’ida in Syria encompass references to the Nusrat Front, which is al-Qa’ida’s official affiliate in Syria and which changed its name to Fatah al-Sham Front in July 2016. Additionally, there are some members of al-Qa’ida who have relocated to Syria from other conflict zones who are not members of the Nusrat Front.

<sup>24</sup> See Letter from President Barack Obama to Congressional Leaders Reporting on the Deployment of United States Armed Forces Personnel to Iraq and the Authorization of Military Operations in Syria (Sept. 23, 2014), available at <https://www.whitehouse.gov/the-press-office/2014/09/23/letter-president-war-powers-resolution-regarding-syria>.

<sup>25</sup> The President’s authority to use force against ISIL is further reinforced by the Authorization for Use of Military Force Against Iraq, Pub. L. No. 107-243, 116 Stat. 1498 (2002) (“2002 AUMF”). Under the relevant portions of the 2002 AUMF, “[t]he President is authorized to use the Armed Forces of the United States as he determines to be necessary and appropriate in order to . . . defend the national security of the United States against the continuing threat posed by Iraq.” *Id.* § 3(a)(1). Although the threat posed by Saddam Hussein’s regime in Iraq was the primary focus of the 2002 AUMF, the statute, in accordance with its express goals, has always been understood to authorize the use of force for the related dual purposes of helping to establish a stable, democratic Iraq and of addressing terrorist threats emanating from Iraq. After Saddam Hussein’s regime fell in 2003, the United States continued to take military action in Iraq under the 2002 AUMF to further these purposes, including action against AQI (now known as ISIL). Then, as now, that organization posed a terrorist threat to the United States and its partners and undermined stability and democracy in Iraq. Congress ratified this understanding of the 2002 AUMF by appropriating billions of dollars to support continued military operations in Iraq between 2003 and 2011. Accordingly, the 2002 AUMF reinforces the authority for military operations against ISIL in Iraq and, to the extent necessary to achieve these purposes, elsewhere.

<sup>26</sup> Consolidated and Further Continuing Appropriations Act of 2015, Pub. L. No. 113-235, 128 Stat. 2130, 2285-95 (2014) (“2015 Consolidated Appropriations Act”).

<sup>27</sup> See, e.g., Consolidated Appropriations Act, 2016 Committee Print of the H. Comm. on Appropriations, Explanatory Statement at 289, Pub. L. No. 113-114 (2015) (highlighting threat posed by the “rise of [ISIL]” and noting that the Act “moves funding from the base appropriation to the [overseas contingency operations] appropriation” for the military “to conduct counter-ISIL operations”); National Defense Authorization Act for Fiscal Year 2016, Pub. L. No. 114-92, §§ 1223-1224, 129 Stat. 726, 1049 (2015) (“2016 NDAA”) (expressing Congress’s sense that ISIL “poses an acute threat to the people and territorial integrity of Iraq” and that “defeating ISIL is critical to maintaining a unified Iraq”).

<sup>28</sup> See 2015 Consolidated Appropriations Act, *supra* note 26, § 8097; Consolidated Appropriations Act, 2016, Pub. L. No. 114-113, § 8093, 129 Stat. 2242, 2373 (2015) (“2016 Consolidated Appropriations Act”).

<sup>29</sup> See 2016 NDAA, *supra* note 27, § 1224.

<sup>30</sup> See LEAD INSPECTOR GENERAL FOR OVERSEAS CONTINGENCY OPERATIONS, OPERATION INHERENT RESOLVE, REPORT TO THE U.S. CONGRESS ii, 116-22 (Mar. 31, 2016), available at [https://oig.state.gov/system/files/oir\\_quarterly\\_march2016.pdf](https://oig.state.gov/system/files/oir_quarterly_march2016.pdf); see also 5 U.S.C. app. § 8L (2012).

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<sup>31</sup> See, e.g., 2015 Consolidated Appropriations Act, *supra* note 26, §§ 8140, 9014; 2016 Consolidated Appropriations Act, *supra* note 28, §§ 8122, 9019 (providing that funds could not be used “in contravention of the War Powers Resolution,” including the congressional consultation and reporting requirements).

<sup>32</sup> See, e.g., *U.S. Policy Towards Iraq and Syria and the Threat Posed by the Islamic State of Iraq and the Levant (ISIL): Hearing Before the S. Comm. on Armed Services*, 113th Cong. 5-72 (Sept. 2014) (statements of Chuck Hagel, Secretary of Defense, and General Martin E. Dempsey, Chairman of the Joint Chiefs of Staff); *The Administration’s Strategy and Military Campaign Against Islamic State in Iraq and the Levant: Hearing Before the H. Comm. on Armed Services*, 113th Cong. 4-46 (Nov. 2014) (statements of Chuck Hagel, Secretary of Defense, and General Martin E. Dempsey, Chairman, Joint Chiefs of Staff).

<sup>33</sup> See, e.g., *DaCosta v. Laird*, 448 F.2d 1368, 1369 (2d Cir. 1973) (“[T]here was sufficient legislative action in extending the Selective Service Act and in appropriating billions of dollars to carry on military and naval operations in Vietnam to ratify and approve the measures taken by the Executive.”).

<sup>34</sup> As the Office of Legal Counsel recounted in an opinion in 2011 regarding the use of military force in Libya, there are over two centuries of Executive Branch practice in support of this authority. Examples from recent decades in which Presidents directed the use of military force without specific prior authorization legislation include “bombing in Libya (1986), an intervention in Panama (1989), troop deployments to Somalia (1992), Bosnia (1995), and Haiti (twice, 1994 and 2004), air patrols and airstrikes in Bosnia (1993-1995), and a bombing campaign in Yugoslavia (1999).” Memorandum from Caroline D. Krass, Principal Deputy Assistant Attorney General, Office of Legal Counsel, U.S. Department of Justice, to the Attorney General, Authority to Use Military Force in Libya (April 1, 2011), *available at* [https://www.justice.gov/sites/default/files/olc/opinions/2011/04/31/authority-military-use-in-libya\\_0.pdf](https://www.justice.gov/sites/default/files/olc/opinions/2011/04/31/authority-military-use-in-libya_0.pdf).

<sup>35</sup> *Id.* at 10.

<sup>36</sup> *Id.* at 10 n.2.

<sup>37</sup> *Id.* at 8.

<sup>38</sup> *Id.*

<sup>39</sup> War Powers Resolution, *supra* note 2.

<sup>40</sup> *Id.*

<sup>41</sup> U.N. Charter, art. 2, para. 4.

<sup>42</sup> *Id.* art. 51.

<sup>43</sup> See U.N. Charter, arts. 39, 42. Article 39 states: “The Security Council shall determine the existence of any threat to the peace, breach of the peace, or act of aggression and shall make recommendations, or decide what measures shall be taken in accordance with Articles 41 and 42, to maintain or restore international peace and security.” Article 42 states: “Should the Security Council consider that measures provided for in Article 41 would be inadequate or have proved to be inadequate, it may take such action by air, sea, or land forces as may be necessary to maintain or restore international peace and security. Such action may include demonstrations, blockade, and other operations by air, sea, or land forces of Members of the United Nations.”

<sup>44</sup> See U.N. Security Council Resolution 1973 (2011).

<sup>45</sup> See U.N. Security Council Resolution 1851 (2008); U.N. Security Council Resolution 1846 (2008).

<sup>46</sup> See U.N. Security Council Resolution 1386 (2001); U.N. Security Council Resolution 1510 (2003).

<sup>47</sup> See Letter from the Representative of the United States of America to the President of the U.N. Security Council, September 23, 2014 (notifying the U.N. Security Council of military action against ISIL and al-Qa’ida in Syria and explaining that “States must be able to defend themselves, in accordance with the inherent right of individual and collective self-defense, as reflected in Article 51 of the UN Charter, when as is the case here, the government of the State where the threat is located is unwilling or unable to prevent the use of its territory for such attacks.”); *see also* Letter from the Permanent Representative of Germany to the United Nations to the President of the Security Council, December 10, 2015 (“[Germany] will now support the military measures of those states that have been subject to attacks by ISIL” on the grounds that “ISIL has occupied a certain part of Syrian territory over which the Government of the Arab Republic of Syria does not at this time exercise effective control. States which have been subject to armed attack by ISIL originating in this part of Syrian territory are therefore justified under Article 51 of the UN Charter to take necessary measures in self-defence, even without the consent of the Syrian Government.”); Letter from the Permanent Representative of Belgium to the President of the U.N. Security Council, June 9, 2016 (“ISIL occupied a certain part of Syrian territory over which the Government of the Syrian Arab Republic does not, at this time, exercise effective control. In light of this exceptional situation, States that have been subject to armed attack by ISIL originating in that part of the Syrian territory are therefore justified under Article 51 of the UN Charter to take necessary measures of self-defence.”).



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<sup>48</sup> These factors include those identified in Daniel Bethlehem, *Self-Defense Against an Imminent or Actual Armed Attack by Nonstate Actors*, 106 AM. J. INT'L L. 769 (2012).

<sup>49</sup> *Id.*

<sup>50</sup> *Id.*

<sup>51</sup> See John O. Brennan, Assistant to the President for Homeland Security and Counterterrorism, "Strengthening Our Security by Adhering to Our Values and Laws," Address at Harvard Law School, September 16, 2011, *available at* <https://www.whitehouse.gov/the-press-office/2011/09/16/remarks-john-o-brennan-strengthening-our-security-adhering-our-values-an>.

<sup>52</sup> See Letter from the Permanent Representative of Australia to the President of the U.N. Security Council, September 9, 2015 (explaining that "[s]tates must be able to act in self-defence when the Government of the State where the threat is located is unwilling or unable to prevent attacks originating from its territory"); Letter from the Permanent Representative of France to the President of the U.N. Security Council, March 31, 2015 (stating that "[i]n accordance with the inherent rights of individual and collective self-defence reflected in Article 51 of the United Nations Charter, States must be able to act in self-defence when the government of the State where a threat is located is unwilling or unable to prevent attacks emanating from its territory"); Letter from the Permanent Representative of Turkey to the President of the U.N. Security Council, July 24, 2015 (arguing that "[i]t is apparent that the regime in Syria is neither capable nor willing to prevent these threats emanating from its territory which clearly imperil the security of Turkey and the safety of its nationals").

<sup>53</sup> Brian Egan, Legal Adviser to the Department of State, Keynote Speech at the Annual Meeting of the American Society of International Law, April 4, 2016, *available at* <https://www.state.gov/s/l/releases/remarks/255493.htm>.

<sup>54</sup> In particular, *see supra* Part One, Section II-B(4), for a discussion of the "unable or unwilling" standard, which is an important application of the *jus ad bellum* necessity requirement.

<sup>55</sup> President Barack Obama, "A Just and Lasting Peace," 2009 Nobel Peace Prize Lecture, Oslo, Norway, December 10, 2009, *available at* <https://www.whitehouse.gov/the-press-office/remarks-president-acceptance-nobel-peace-prize>.

<sup>56</sup> President Barack Obama, "Remarks by the President at the National Defense University," Washington, D.C., May 23, 2013, *available at* <https://www.whitehouse.gov/the-press-office/2013/05/23/remarks-president-barack-obama>.

<sup>57</sup> See Jeh C. Johnson, General Counsel, Department of Defense, "The Conflict against Al Qa'ida and Its Affiliates: How Will It End?," Oxford University, November 30, 2012, *available at* <http://www.state.gov/documents/organization/211954.pdf>.

<sup>58</sup> National Defense Authorization Act for Fiscal Year 2015, Pub. L. No. 113-291, § 1209, 128 Stat. 3292 (2014) ("2015 NDAA").

<sup>59</sup> *Id.*

<sup>60</sup> *Id.*

<sup>61</sup> "Section 1209 Report: Department of Defense Assistance to Appropriately Vetted Elements of the Syrian Opposition," Unclassified Report to Congress, January 30, 2015.

<sup>62</sup> 10 U.S.C. § 2249e(a)(1) (2012 & 2016 Supp.).

<sup>63</sup> 22 U.S.C. § 2378d(a) (2012 & 2016 Supp.).

<sup>64</sup> Foreign Assistance Act of 1961, Pub. L. No. 87-195, §116, 75 Stat. 424-2.

<sup>65</sup> See 10 U.S.C. § 2249e(b); 22 U.S.C. § 2378d(b).

<sup>66</sup> 10 U.S.C. § 2249e(b).

<sup>67</sup> Executive Order No. 12333, *United States Intelligence Activities*, 46 Fed. Reg. 59941 (1981) ("E.O. 12333").

<sup>68</sup> *Id.* § 2.11.

<sup>69</sup> Draft Articles on State Responsibility – Comments of the Government of the United States of America (Mar. 1, 2001), *available at* <http://www.state.gov/documents/organization/28993.pdf>. See also International Law Commission Draft Articles on Responsibility of States for Internationally Wrongful Acts, with Commentaries 66 (2001).

<sup>70</sup> See *supra* Part One, Section I-A(2).

<sup>71</sup> 2016 NDAA, *supra* note 27, § 1531.

<sup>72</sup> Letter from the Permanent Representative of the United States to the President of the U.N. Security Council, U.N. SCOR, 56th Sess. at I, U.N. Doc. S/2001/946 (Oct. 7, 2001), *available at* [http://www.un.org/en/ga/search/view\\_doc.asp?symbol=S/2001/946](http://www.un.org/en/ga/search/view_doc.asp?symbol=S/2001/946).

<sup>73</sup> Security and Defense Cooperation Agreement Between the Islamic Republic of Afghanistan and the United States, Sept. 30, 2014, *available at* [mfa.gov.af/Content/files/BSA%20ENGLISH%20AFG.pdf](http://mfa.gov.af/Content/files/BSA%20ENGLISH%20AFG.pdf).

<sup>74</sup> See *supra* Part One, Sections I-A, I-C.

<sup>75</sup> 2016 NDAA, *supra* note 27, § 1223(a)(3).

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<sup>76</sup> See Letter from Hoshiyar Zebari, Minister for Foreign Affairs of the Republic of Iraq, to the Secretary General of the United Nations, S/2014/440, June 25, 2014, *available at* [www.securitycouncilreport.org/atf/cf/%7B65BF96FF9%7D/s\\_2014\\_440.pdf](http://www.securitycouncilreport.org/atf/cf/%7B65BF96FF9%7D/s_2014_440.pdf); Letter from Ibrahim al-Ushayqir al-Ja'fari, Minister for Foreign Affairs of Iraq, to the Secretary General of the United Nations, S/2014/691, Sept. 22, 2014, *available at* [www.securitycouncilreport.org/atf/cf/%7B65BF96FF9%7D/s\\_2014\\_691.pdf](http://www.securitycouncilreport.org/atf/cf/%7B65BF96FF9%7D/s_2014_691.pdf).

<sup>77</sup> See Part One, Section I-A.

<sup>78</sup> 2015 NDAA, *supra* note 58, § 1209.

<sup>79</sup> See Letter from the Representative of the United States of America to the President of the U.N. Security Council, September 23, 2014.

<sup>80</sup> *Id.*

<sup>81</sup> By September 2014, the Syrian Government had lost effective control of much of eastern and northeastern Syria, with much of that territory under ISIL's control.

<sup>82</sup> 2016 War Powers Report, *supra* note 4.

<sup>83</sup> See Part One, Section I-A(2)(a).

<sup>84</sup> See Part One, Section I-A(2)(b).

<sup>85</sup> See Part One, Section I-A(2)(a).

<sup>86</sup> Letter from the Representative of the United States to the President of the U.N. Security Council, October 15, 2016, *available at* [http://www.securitycouncilreport.org/atf/cf/%7B65BF96FF9%7D/s\\_2016\\_869.pdf](http://www.securitycouncilreport.org/atf/cf/%7B65BF96FF9%7D/s_2016_869.pdf).

<sup>87</sup> See, e.g., Geneva Convention (III) Relative to the Treatment of Prisoners of War ("Third Geneva Convention"), Aug. 12, 1949, 6 U.S.T. 3316, 2406.

<sup>88</sup> Executive Order No. 13732, *United States Policy on Pre- and Post-Strike Measures to Address Civilian Casualties in U.S. Operations Involving the Use of Force*, 81 Fed. Reg. 44483 (July 1, 2016) ("E.O. 13732") ("In particular, relevant agencies shall, consistent with mission objectives and applicable law, including the law of armed conflict . . . develop, acquire, and field weapon systems and other technological capabilities that further enable the discriminate use of force in different operational contexts . . .").

<sup>89</sup> See E.O. 12333, *supra* note 67, § 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."); see also W. Hays Parks, Memorandum of Law: Executive Order 12333 and Assassination, Department of the Army Pamphlet 27-50-204, December 1989, *available at* [https://www.loc.gov/rr/frd/Military\\_Law/pdf/12-1989.pdf](https://www.loc.gov/rr/frd/Military_Law/pdf/12-1989.pdf). Executive Orders are binding on government departments and agencies.

<sup>90</sup> See U.S. DEPARTMENT OF DEFENSE, LAW OF WAR MANUAL § 2.5 (2015) (revised May 2016), *available at* [www.defense.gov/Portals/1/Documents/DoD\\_Law\\_of\\_War\\_Manual-June\\_2015\\_Updated\\_May\\_2016.pdf](http://www.defense.gov/Portals/1/Documents/DoD_Law_of_War_Manual-June_2015_Updated_May_2016.pdf) ("DoD Law of War Manual") (Distinction); *id.* § 5.6 (Discrimination in Conducting Attacks).

<sup>91</sup> Considerations relevant to making this membership determination are discussed in more detail in Part Two, Section III-A. As described in that Section, in ongoing habeas litigation, the Federal courts have similarly taken a functional approach to determining which individuals are detainable under the 2001 AUMF.

<sup>92</sup> See DoD Law of War Manual, *supra* note 90, § 2.4.1.2 (Unreasonable or Excessive); *id.* § 5.12 (Proportionality—Prohibition on Attacks Expected to Cause Excessive Incidental Harm).

<sup>93</sup> See *id.* § 5.11 (Feasible Precautions in Conducting Attacks to Reduce the Risk of Harm to Protected Persons and Objects); see also Department of Defense Briefing by Operation Inherent Resolve Spokesman Col. Warren (Nov. 18, 2015), *available at* [www.defense.gov/News/Transcripts/Transcript-View/Article/630393/departement-of-defense-press-briefing-by-col-warren-via-dvids-from-baghdad-iraq](http://www.defense.gov/News/Transcripts/Transcript-View/Article/630393/departement-of-defense-press-briefing-by-col-warren-via-dvids-from-baghdad-iraq) ("In Al-Bukamal, we destroyed 116 tanker trucks, which we believe will reduce ISIL's ability to transport its stolen oil products. This is our first strike against tanker trucks, and to minimize risks to civilians, we conducted a leaflet drop prior to the strike. . . . As you can see, it's a fairly simple leaflet; it says, 'Get out of your trucks now, and run away from them.' A very simple message. And then, also, 'Warning: airstrikes are coming. Oil trucks will be destroyed. Get away from your oil trucks immediately. Do not risk your life.' And so, these are the leaflets that we dropped—about 45 minutes before the airstrikes actually began. Again, we combine these leaflet drops with very low altitude passes of some of our attack aviation, which sends a very powerful message.").

<sup>94</sup> See *infra* Part Two, Section I-C.

<sup>95</sup> See DoD Law of War Manual, *supra* note 90, § 2.2 (Military Necessity).

<sup>96</sup> *Id.* § 2.2.3.1 (Consideration of the Broader Imperatives of Winning the War); 1958 UK MANUAL ¶115 n.2 ("It is not forbidden to send a detachment or individual members of the armed forces to kill, by sudden attack, members or a member of the enemy armed forces.").

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<sup>97</sup> See DoD Law of War Manual, *supra* note 90, § 2.2.3.1 (Consideration of the Broader Imperatives of Winning the War); FINAL REPORT ON THE PERSIAN GULF WAR PURSUANT TO TITLE V OF THE PERSIAN GULF CONFLICT SUPPLEMENTAL AUTHORIZATION AND PERSONNEL BENEFITS ACT OF 1991 (P.L. 102-25), 629 (April 1992), *available at* [www.ssi.army.mil](http://www.ssi.army.mil) (“A combatant force involved in an armed conflict is not obligated to offer its opponent an opportunity to surrender before carrying out an attack.”).

<sup>98</sup> DoD Law of War Manual, *supra* note 90, § 6.6 (Weapons Calculated to Cause Superfluous Injury).

<sup>99</sup> *Ex Parte Quirin*, 317 U.S. 1, 37 (1942).

<sup>100</sup> *Hamdi v. Rumsfeld*, 542 U.S. 507, 519 (2004) (plurality opinion).

<sup>101</sup> See U.S. CONST. amend. V (“No person shall be . . . deprived of life, liberty, or property, without due process of law . . .”).

<sup>102</sup> See U.S. CONST. amend. IV (“The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.”).

<sup>103</sup> See David J. Barron, Acting Assistant Attorney General, Office of Legal Counsel, U.S. Department of Justice, to the Attorney General, *Applicability of Federal Criminal Laws and the Constitution to Contemplated Lethal Operations Against Shaykh Anwar al-Aulaqi* (July 16, 2010) (“Aulaqi Memo”), *available at* [https://www.justice.gov/sites/default/files/olc/pages/attachments/2015/04/02/2010-07-16\\_-\\_olc\\_aaga\\_barron\\_-\\_al\\_aulaqi.pdf](https://www.justice.gov/sites/default/files/olc/pages/attachments/2015/04/02/2010-07-16_-_olc_aaga_barron_-_al_aulaqi.pdf).

<sup>104</sup> See, e.g., *id.*; Letter from Attorney General Eric Holder to the Hon. Patrick J. Leahy, May 22, 2013 (“Holder Letter”), *available at* <https://www.justice.gov/sites/default/files/ag/legacy/2013/05/28/AG-letter-5-22-13.pdf>.

<sup>105</sup> Aulaqi Memo, *supra* note 103.

<sup>106</sup> In considering whether a senior operational leader poses an imminent threat of violent attack, the United States would consider the factors identified in Part One, Section II-B(3).

<sup>107</sup> See, e.g., Holder Letter, *supra* note 104.

<sup>108</sup> Aulaqi Memo, *supra* note 103.

<sup>109</sup> *Id.*

<sup>110</sup> *Tennessee v. Garner*, 471 U.S. 1, 8 (1985) (internal quotation marks omitted); *accord Scott v. Harris*, 550 U.S. 372, 383 (2007).

<sup>111</sup> *Garner*, 471 U.S. at 11.

<sup>112</sup> *Id.* at 11-12.

<sup>113</sup> Aulaqi Memo, *supra* note 103.

<sup>114</sup> *Id.*

<sup>115</sup> In these circumstances, the targeting of a U.S. citizen would also not violate the statutory prohibition against murder of U.S. nationals abroad, 18 U.S.C. § 1119. A lethal operation against an enemy leader that is undertaken in national self-defense or during an armed conflict, authorized by an informed, high-level official, and carried out in a manner that accords with applicable law of armed conflict principles would fall within a well established variant of the public authority justification and therefore would not be murder.

<sup>116</sup> DoD Law of War Manual, *supra* note 90, § 5.6 (Discrimination in Conducting Attacks).

<sup>117</sup> See *id.*

<sup>118</sup> See *id.* § 5.6.2 (Persons, Objects, and Locations That Are Protected From Being Made the Object of Attack).

<sup>119</sup> See *id.* § 5.7 (Objects That Are Military Objectives).

<sup>120</sup> See *id.* § 5.7.8.5 (Examples of Military Objectives—Economic Objects Associated With Military Operations).

<sup>121</sup> See, e.g., *id.* § 5.7.8.5 (Examples of Military Objectives—Economic Objects Associated With Military Operations) (“Oil refining and distribution facilities and objects associated with petroleum, oil, and lubricant products (including production, transportation, storage, and distribution facilities) have also been regarded as military objectives.”).

<sup>122</sup> E.O. 13732, *supra* note 88, § 1.

<sup>123</sup> Presidential Policy Guidance, U.S. Policy Standards and Procedures for the Use of Force in Counterterrorism Operations Outside the United States and Areas of Active Hostilities (May 22, 2013) (redacted) (“PPG”), *available at* [https://www.justice.gov/oip/foia-library/procedures\\_for\\_approving\\_direct\\_action\\_against\\_terrorist\\_targets/download](https://www.justice.gov/oip/foia-library/procedures_for_approving_direct_action_against_terrorist_targets/download).

<sup>124</sup> *Id.*

<sup>125</sup> *Id.*

<sup>126</sup> *Id.*

<sup>127</sup> *Id.* § 1.C.

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<sup>128</sup> *Id.*

<sup>129</sup> *Id.* §§ 1-4.

<sup>130</sup> *See id.* § 7 (Congressional Notification).

<sup>131</sup> *Id.* §5.B.

<sup>132</sup> E.O. 13732, *supra* note 88.

<sup>133</sup> *Id.* § 2.

<sup>134</sup> *Id.*

<sup>135</sup> *Id.* § 3. Additionally, under the Executive Order, “[t]he Assistant to the President for National Security Affairs may, as appropriate, request that the head of any relevant agency conduct additional reviews related to the intelligence assessments of deaths from strikes against terrorist targets outside areas of active hostilities.” *Id.* § 3(d).

<sup>136</sup> *Id.* § 4.

<sup>137</sup> PPG, *supra* note 123, § 2 (Approval Process for Certain Captures and the Long-Term Disposition of Certain Suspects).

<sup>138</sup> *Id.* § 2.A.1. Additionally, the PPG requires that all nominations for capturing or otherwise taking a suspect into custody must undergo a legal review by the General Counsel of the nominating agency to determine that the suspect may lawfully be captured or taken into custody by the United States and that the operation can be conducted in accordance with applicable law. *Id.* § 2.B.4.

<sup>139</sup> *See* FINAL REPORT: GUANTANAMO REVIEW TASK FORCE (Jan. 22, 2010) (“Guantanamo Final Report”), available at <https://www.justice.gov/sites/default/files/ag/legacy/2010/06/02/guantanamo-review-final-report.pdf>; Executive Order No. 13492, *Review and Disposition of Individuals Detained at the Guantanamo Bay Naval Base and Closure of Detention Facilities*, 74 Fed. Reg. 4897 (January 22, 2009) (“E.O. 13492”).

<sup>140</sup> Executive Order No. 13567, *Periodic Review of Individuals Detained at Guantanamo Bay Naval Station Pursuant to the Authorization for Use of Military Force*, 76 Fed. Reg. 13275 (March 10, 2011) (“E.O. 13567”); *see also* 2012 NDAA, *supra* note 18, § 1033.

<sup>141</sup> *Hamdi v. Rumsfeld*, 542 U.S. 507, 518 (2004) (plurality opinion) (internal quotations omitted).

<sup>142</sup> *See infra* Part One, Section I-A; *see also* March 13 Brief, *supra* note 13, at 1; *Hamdi*, 542 U.S. at 519 (2004) (plurality opinion).

<sup>143</sup> March 13 Brief, *supra* note 13, at 2; *see also* DoD Law of War Manual, *supra* note 90, § 4.18.4.1 (Being Part of a Hostile, Non-State Armed Group); *id.* § 5.8.3 (Persons Belonging to Non-State Armed Groups).

<sup>144</sup> March 13 Brief, *supra* note 13, at 6 (“[A]ny determination of whether an individual is part of [the armed groups that the President is authorized to detain under the AUMF] may depend on a formal or functional analysis of the individual’s role.”); *see also* *Awad v. Obama*, 608 F.3d 1, 11-12 (D.C. Cir. 2010).

<sup>145</sup> March 13 Brief, *supra* note 13, at 7 (“In each case, given the nature of the irregular forces, and the practice of their participants or members to try to conceal their affiliations, judgments about the detainability of a particular individual will necessarily turn on the totality of the circumstances.”); *see also* DoD Law of War Manual, *supra* note 90, § 4.18.4.1 (Being Part of a Hostile, Non-State Armed Group); *id.* § 5.8.3 (Persons Belonging to Non-State Armed Groups).

<sup>146</sup> *Odah v. United States*, 611 F.3d 8, 10 (D.C. Cir. 2010) (“[The 2001 AUMF] gives the United States government the authority to detain a person who is found to have been ‘part of’ al Qaeda or Taliban forces.”).

<sup>147</sup> *Ali v. Obama*, 736 F.3d 542, 546 (D.C. Cir. 2013).

<sup>148</sup> *Salahi v. Obama*, 625 F.3d 745, 751-52 (D.C. Cir. 2010) (quoting *Bensayah v. Obama*, 610 F.3d 718, 725 (D.C. Cir. 2010), judgment vacated as moot by *Bensayah v. Obama*, No. 08-5537, Order (D.C. Cir. Jan. 9, 2014)).

<sup>149</sup> *See* *Awad v. Obama*, 608 F.3d at 8 (“The government acknowledges that intention to fight is inadequate by itself to make someone ‘part of’ al Qaeda, but it is nonetheless compelling evidence when, as here, it accompanies additional evidence of conduct consistent with an effectuation of that intent.”); *see also, e.g., Al-Adahi v. Obama*, 613 F.3d 1102, 1108 (D.C. Cir. 2010); *Ali*, 736 F.3d at 546-49.

<sup>150</sup> *See, e.g., Awad*, 608 F.3d at 11; *Uthman v. Obama*, 637 F.3d 400, 404-05 (D.C. Cir. 2011); *Al Alwi v. Obama*, 653 F.3d 11, 17 (D.C. Cir. 2011); *Hussain v. Obama*, 718 F.3d 964, 968-69 (D.C. Cir. 2013); *Ali*, 736 F.3d at 546; *Odah v. United States*, 611 F.3d 8, 15-17 (D.C. Cir. 2010); *al-Bihani v. Obama*, 590 F.3d 866, 873 (D.C. Cir. 2010).

<sup>151</sup> *See, e.g., Awad*, 608 F.3d at 7-8; *Barhoumi v. Obama*, 609 F.3d 416, 425-26, 428-29 (D.C. Cir. 2010).

<sup>152</sup> *See, e.g., Barhoumi*, 609 F.3d at 425; *al-Adahi*, 613 F.3d at 1109; *Al Alwi*, 653 F.3d at 17-18; *cf. al-Bihani*, 590 F.3d at 873 n.2 (“[W]e need not rely on the evidence suggesting that Al-Bihani attended Al Qaeda training camps in Afghanistan and visited Al Qaeda guesthouses. We do note, however, that evidence supporting the military’s reasonable belief of either of those two facts with respect to a non-citizen seized abroad during the ongoing war on terror would seem to overwhelmingly, if not definitively, justify the government’s detention of such a non-citizen.”).

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<sup>153</sup> See *Ali*, 736 F.3d at 546 (“As this Court has stated before, a person’s decision to stay with the members of a terrorist force at a terrorist guesthouse can be highly probative evidence that he is part of that force and thus a detainable enemy combatant. One does not generally end up at al Qaeda or other terrorist guesthouses in Afghanistan or Pakistan by mistake—either by the guest or by the host.”); see also, e.g., *Barhoumi*, 609 F.3d at 427; *al-Adahi*, 613 F.3d at 1109; *Uthman*, 637 F.3d at 406; *Al Alwi*, 653 F.3d at 17-18; *Odah*, 611 F.3d at 16; cf. *al-Bihani*, 590 F.3d at 873 n.2.

<sup>154</sup> See, e.g., *Al Alwi*, 653 F.3d at 20; *Uthman*, 637 F.3d at 405-06.

<sup>155</sup> See, e.g., *Salahi v. Obama*, 625 F.3d 745, 751 (D.C. Cir. 2010).

<sup>156</sup> *Id.* at 751-52.

<sup>157</sup> *Id.*

<sup>158</sup> See, e.g., *Uthman*, 637 F.3d at 406; *Odah*, 611 F.3d at 15-16.

<sup>159</sup> See, e.g., *Uthman*, 637 F.3d at 406; *Aliv. Obama*, 736 F.3d 542, 546 (D.C. Cir. 2013).

<sup>160</sup> See, e.g., *Hussain v. Obama*, 718 F.3d 964, 969 (D.C. Cir. 2013); *Odah*, 611 F.3d at 15-16.

<sup>161</sup> *Salahi*, 625 F.3d at 752; *Al-Adahi v. Obama*, 613 F.3d 1102, 1109 (D.C. Cir. 2010) (“When the government shows that an individual received and executed orders from al-Qaida members in a training camp, that evidence is sufficient (but not necessary) to prove that the individual has affiliated himself with al-Qaida.”); *Awad v. Obama*, 608 F.3d 1, 10-11 (D.C. Cir. 2010).

<sup>162</sup> Red Cross Commentary on Third Geneva Convention 64 (Pictet, ed. 1960), available at <http://www.icrc.org/ihl.nsf/COM/375-590007>.

<sup>163</sup> *Hamdi v. Rumsfeld*, 542 U.S. 507, 521 (2004) (plurality opinion) (“[W]e understand Congress’ grant of authority for the use of ‘necessary and appropriate force’ to include the authority to detain for the duration of the relevant conflict, and our understanding is based on longstanding law-of-war principles.”); *Ali*, 736 F.3d at 544 (“Detention under the AUMF may last for the duration of hostilities.”); 2012 NDAA, *supra* note 18, §1021(c)(1) (affirming authorization of detention authority “until the end of hostilities authorized by the [AUMF]”); cf. Third Geneva Convention, *supra* note 87, art. 118 (prisoners of war should be released “after cessation of hostilities.”).

<sup>164</sup> *Awad*, 608 F.3d at 11.

<sup>165</sup> *Id.*; see also *Almerfedi v. Obama*, 654 F.3d 1, 4 n.3 (D.C. Cir. 2011).

<sup>166</sup> E.O. 13492, *supra* note 139, § 4.

<sup>167</sup> Guantanamo Final Report, *supra* note 139.

<sup>168</sup> E.O. 13567, *supra* note 140; see also Fact Sheet: New Actions on Guantanamo and Detainee Policy (Mar. 7, 2011) (“New Actions”), available at <https://www.whitehouse.gov/the-press-office/2011/03/07/fact-sheet-new-actions-guant-namo-and-detainee-policy>.

<sup>169</sup> 2012 NDAA, *supra* note 18, § 1033.

<sup>170</sup> E.O. 13567, *supra* note 168, § 3(b).

<sup>171</sup> *Id.* §3(c).

<sup>172</sup> Executive Order 13567 states that “[i]n exceptional circumstances where it is necessary to protect national security, including intelligence sources and methods, the PRB may determine that the representative must receive a sufficient substitute or summary, rather than the underlying information.” *Id.* § 3(a)(5).

<sup>173</sup> Executive Order 13491, *Ensuring Lawful Interrogations*, 74 Fed. Reg. 4893, § 3(a)(2) (Jan. 22, 2009) (“E.O. 13491”).

<sup>174</sup> *Id.* § 8.

<sup>175</sup> Department of Defense, PLAN FOR CLOSING THE GUANTANAMO BAY DETENTION FACILITY (May 23, 2016) (“Plan for Closing Guantanamo”), available at [www.defense.gov/Portals/1/Documents/pubs/GTMO\\_Closure\\_Plan\\_0216.pdf](http://www.defense.gov/Portals/1/Documents/pubs/GTMO_Closure_Plan_0216.pdf).

<sup>176</sup> Geneva Convention (I) for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field, Art. 3, Aug. 12, 1949, 6 U.S.T. 3114 (“Common Article 3”); DoD Law of War Manual, *supra* note 90, § 3.1.1.2

<sup>177</sup> Protocol Additional to the Geneva Conventions of August 12, 1949 and relating to the Protection of Victims of International Armed Conflicts (Protocol I), June 8, 1977, 1125 U.N.T.S. 3 (“Additional Protocol I”).

<sup>178</sup> Protocol Additional to the Geneva Conventions of 12 August 1949 and relating to the Protection of Victims of Non-International Armed Conflicts (Protocol II), June 8, 1977, 1125 U.N.T.S. 609, arts. 4-6 (“Additional Protocol II”); New Actions, *supra* note 168.

<sup>179</sup> New Actions, *supra* note 168. In particular, this comprehensive review assessed that subject to certain reservations, understandings, and declarations that were submitted to the Senate in 1987, along with refinements and additions to be submitted, Additional Protocol II was consistent with current U.S. military practice and beneficial to

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U.S. national security and foreign policy interests. *See* Letter from Secretary Clinton and Secretary Gates to Senator Kerry and Senator Lugar, March 7, 2011.

<sup>180</sup> Pub. L. No. 109-148, § 1003(a) (2005), codified at 42 U.S.C. § 2000dd(a).

<sup>181</sup> E.O. 13491, *supra* note 173, § 3(a).

<sup>182</sup> *Id.* § 3(b).

<sup>183</sup> *See, e.g.*, U.S. Department of the Army, ARMY FIELD MANUAL 2-22.3, § 5-75 (September 2006) (“Army Field Manual 2-22.3”), *available at*

[www.apd.army.mil/Search/ePubsSearch/ePubsSearchDownloadPage.aspx?docID=0902c85180012142](http://www.apd.army.mil/Search/ePubsSearch/ePubsSearchDownloadPage.aspx?docID=0902c85180012142); *see also* President Barack Obama, “Remarks on the End of the War in Iraq,” Fort Bragg, North Carolina, November 14, 2011, *available at* <https://www.whitehouse.gov/the-press-office/2011/12/14/remarks-president-and-first-lady-end-war-iraq>.

<sup>184</sup> The Executive Order further provides that no officer, employee, or agent of the U.S. Government may rely on any interpretation of the law governing interrogation issued by the Department of Justice between September 11, 2001, and January 20, 2009. *See* E.O. 13491, *supra* note 173, § 1, 3(c). The Office of Legal Counsel subsequently withdrew five opinions that were encompassed by this direction in the Order. The five withdrawn memos were: Memorandum for John Rizzo, Acting General Counsel of the Central Intelligence Agency, from Jay S. Bybee, Assistant Attorney General, Office of Legal Counsel, *Re: Interrogation of al Qaeda Operative* (Aug. 1, 2002); Memorandum for John A. Rizzo, Senior Deputy General Counsel, Central Intelligence Agency, from Steven G. Bradbury, Principal Deputy Assistant Attorney General, Office of Legal Counsel, *Re: Application of 18 U.S.C. §§ 2340-2340A to Certain Techniques That May Be Used in the Interrogation of a High Value al Qaeda Detainee* (May 10, 2005); Memorandum for John A. Rizzo, Senior Deputy General Counsel, Central Intelligence Agency, from Steven G. Bradbury, Principal Deputy Assistant Attorney General, Office of Legal Counsel, *Re: Application of 18 U.S.C. §§ 2340-2340A to the Combined Use of Certain Techniques in the Interrogation of High Value al Qaeda Detainees* (May 10, 2005); Memorandum for John A. Rizzo, Senior Deputy General Counsel, Central Intelligence Agency, from Steven G. Bradbury, Principal Deputy Assistant Attorney General, Office of Legal Counsel, *Re: Application of United States Obligations Under Article 16 of the Convention Against Torture to Certain Techniques that May be Used in the Interrogation of High Value al Qaeda Detainees* (May 30, 2005); Memorandum for John A. Rizzo, Acting General Counsel, Central Intelligence Agency, from Steven G. Bradbury, Principal Deputy Assistant Attorney General, Office of Legal Counsel, *Re: Application of the War Crimes Act, the Detainee Treatment Act, and Common Article 3 of the Geneva Conventions to Certain Techniques that May Be Used by the CIA in the Interrogation of High-Value al Qaeda Detainees* (July 20, 2007).

<sup>185</sup> 2016 NDAA, *supra* note 27, § 1045(a) and (b).

<sup>186</sup> Although this restriction is not directly applicable to FBI, DHS, or other Federal law enforcement entities, interrogation techniques used by these authorities are fully consistent with the other humane treatment standards described above. *Id.* §1045(a)(1-2).

<sup>187</sup> *Id.* §1045(a)(6)(A)(ii). The 2016 NDAA further requires that the Secretary of Defense complete a review of Army Field Manual 2-22.3 not sooner than three years after enactment of the statute to ensure that it complies with applicable legal obligations and that authorized practices do not involve the use or threat of force. *Id.* § 1045(a)(6)(A)(i). It also requires the High-Value Detainee Interrogation Group to develop a public report on best practices for interrogations. *Id.* § 1045(a)(6)(B).

<sup>188</sup> *See, e.g., Filartiga v. Pena-Irala*, 630 F.2d 876 (2d. Cir. 1980).

<sup>189</sup> Common Article 3, *supra* note 176, ¶ 1(a), (c) (“The following acts are and shall remain prohibited at any time and in any place whatsoever with respect to the above-mentioned persons: (a) violence to life and person, in particular murder of all kinds, mutilation, cruel treatment and torture; [...] (c) outrages upon personal dignity, in particular humiliating and degrading treatment.”).

<sup>190</sup> International Covenant on Civil and Political Rights, Dec. 16, 1966, 999 U.N.T.S. 171 (“ICCPR”). Article 7 of the ICCPR states: “No one shall be subjected to torture or to cruel, inhuman, or degrading treatment or punishment. In particular, no one shall be subjected without his free consent to medical or scientific experimentation.”

<sup>191</sup> The United States issued reservations, understandings, and declarations upon its ratification of the ICCPR, which are available at [https://treaties.un.org/pages/ViewDetails.aspx?src=TREATY&mtdsg\\_no=IV-4&chapter=4&clang=\\_en](https://treaties.un.org/pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IV-4&chapter=4&clang=_en). The United States’ long-held position is that the ICCPR applies only to individuals who are *both* within the territory of a state *and* within that State Party’s jurisdiction. This position is based on the best reading of the text of the Covenant, an application of longstanding international principles of treaty interpretation, and the treaty’s negotiating history.

<sup>192</sup> Convention Against Torture and Other Cruel, Inhuman, or Degrading Treatment or Punishment, Dec. 10, 1984, 1465 U.N.T.S. 85 (“UNCAT”). The United States issued reservations, understandings, and declarations upon its

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ratification of the UNCAT, which are available at

[https://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg\\_no=IV-9&chapter=4&clang=\\_en#23](https://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IV-9&chapter=4&clang=_en#23).

<sup>193</sup> Article 2.1 of the UNCAT states: “Each State Party shall take effective legislative, administrative, judicial or other measures to prevent acts of torture in any territory under its jurisdiction.”

<sup>194</sup> Article 4 of the UNCAT states: “1. Each State Party shall ensure that all acts of torture are offences under its criminal law. The same shall apply to an attempt to commit torture and to an act by any person which constitutes complicity or participation in torture. 2. Each State Party shall make these offences punishable by appropriate penalties which take into account their grave nature.”

<sup>195</sup> Article 12 of the UNCAT states: “Each State Party shall ensure that its competent authorities proceed to a prompt and impartial investigation, wherever there is reasonable ground to believe that an act of torture has been committed in any territory under its jurisdiction.”

<sup>196</sup> 18 U.S.C § 2340 *et seq.*

<sup>197</sup> Article 2.2 of the UNCAT specifically provides that neither “a state of war [n]or a threat of war . . . may be invoked as a justification for torture.”

<sup>198</sup> For example, although Article 14 of the Convention contemplates an enforceable right to fair and adequate compensation for victims of torture, it would be anomalous under the law of armed conflict to provide individuals detained as enemy belligerents with a judicially enforceable individual right to a claim for monetary compensation against the Detaining Power for alleged unlawful conduct. The Geneva Conventions contemplate that claims related to the treatment of POWs and Protected Persons are to be resolved on a state-to-state level, and war reparations claims have traditionally been, and as a matter of customary international law are, the subject of government-to-government negotiations as opposed to private lawsuits.

<sup>199</sup> Besides these areas, whether the Convention applies with respect to particular territory is context-specific and would vary depending on the facts and circumstances. For example, occupied territory would likely be considered “territory under (a state’s) jurisdiction” for the purposes of the Convention if the occupying power exercises the requisite control as a governmental authority in the occupied territory.

<sup>200</sup> 2016 NDAA, *supra* note 27, § 1045(a)(1-2). E.O. 13491, *supra* note 173, § 3(b).

<sup>201</sup> 2016 NDAA, *supra* note 27, § 1045(a)(5). E.O. 13491, *supra* note 173, § 3(b). After extensive consultation with representatives of the U.S. Armed Forces, the Intelligence Community, and some of the United States’ most experienced and skilled interrogators, a Special Task Force appointed by the President concluded that the Army Field Manual provides appropriate guidance for military interrogators and that no additional or different guidance was necessary for other agencies. These conclusions rested on the Special Task Force’s unanimous assessment that the practices and techniques identified by the Army Field Manual or currently used by law enforcement provide adequate and effective means of conducting interrogations. The Special Task Force identified a need for further research on interrogation methods, and the High-Value Detainee Interrogation Group was subsequently charged with sponsoring and coordinating that research.

<sup>202</sup> With respect to intelligence interrogations, the specifically prohibited actions include, among other things: forcing the detainee to be naked, perform sexual acts, or pose in a sexual manner; placing hoods or sacks over the head of a detainee or using duct tape over the eyes; applying beatings, electronic shock, burns, or other forms of physical pain; “waterboarding”; using military working dogs; inducing hypothermia or heat injury; conducting mock executions; and depriving the detainee of necessary food, water, or medical care. *See* Army Field Manual 2-22.3, *supra* note 183, § 5-75.

<sup>203</sup> 2016 NDAA, *supra* note 27, §1045(a)(6)(ii).

<sup>204</sup> The 18 techniques are (1) Direct Approach; (2) Incentive Approach; (3) Emotional Love Approach; (4) Emotional Hate Approach; (5) Emotional Fear-Up Approach; (6) Emotional Fear-Down Approach; (7) Emotional Pride and Ego-Up Approach; (8) Emotional Pride and Ego-Down Approach; (9) Emotional Futility; (10) We Know All; (11) File and Dossier; (12) Establish Your Identity; (13) Repetition; (14) Rapid Fire; (15) Silent; (16) Change of Scenery; (17) Mutt and Jeff; and (18) False Flag. *See* Army Field Manual 2-22.3, *supra* note 183.

<sup>205</sup> Army Field Manual 2-22.3, *supra* note 183, Appendix M, ¶ M-7. Section M-30 of the Manual requires that “use of separation must not preclude the detainee getting four hours of continuous sleep every 24 hours.” This four-hour standard is a minimum standard, and it would not allow, for example, 40 continuous hours of interrogation with only four hours of sleep on either end. Nothing in the Army Field Manual, including Appendix M, authorizes or condones the use of sleep manipulation or sensory deprivation, and all techniques, including separation, must be applied in a manner consistent with the prohibition on torture and CIDTP.

<sup>206</sup> E.O. 13491 prohibits the CIA from operating any detention facilities, and it required the CIA to close as expeditiously as possible any detention facilities that it may have operated at the time. E.O. 13491, *supra* note 173, § 4(a).

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<sup>207</sup> Department of Defense Directive 3115.09, *DoD Intelligence Interrogations, Detainee Debriefings, and Tactical Questioning*, Nov. 15, 2013, available at [www.dtic.mil/whs/directives/corres/pdf/311509p.pdf](http://www.dtic.mil/whs/directives/corres/pdf/311509p.pdf).

<sup>208</sup> DoD Directive 2310.01E, *DoD Detainee Program*, Aug. 19, 2014 (“DoD Directive 2310.01E”), available at [www.jag.navy.mil/distrib/instructions/DoDD2310.01E\\_Detainee\\_Program.pdf](http://www.jag.navy.mil/distrib/instructions/DoDD2310.01E_Detainee_Program.pdf).

<sup>209</sup> For example, the National Defense Authorization Act for Fiscal Year 2010 prohibited contractor personnel from interrogating any individual “under the effective control of DOD or otherwise under detention in a DOD facility in connection with hostilities” unless the Secretary of Defense determines that a waiver to this provision is vital to U.S. national security interests. Pub. L. 111-84, 123 Stat. 2190 (2009). DoD Directive 3115.09 implements that provision and further provides that, in cases in which the Secretary of Defense does waive the prohibition, any contract interrogators must be trained and certified, must be monitored in real time by DoD military or civilian personnel, must submit interrogation plans for approval, and may not be placed in charge of interrogation operations or facilities.

<sup>210</sup> PERIODIC REPORT OF THE UNITED STATES OF AMERICA TO THE U.N. COMMITTEE AGAINST TORTURE, Third-Fifth Reports, ¶ 32, Aug. 12, 2013, available at [www.state.gov/documents/organization/213267.pdf](http://www.state.gov/documents/organization/213267.pdf); U.S. Department of Defense, *Medical Program Support for Detainee Operations*, Instruction 2310.08E, June 6, 2006, available at <http://www.dtic.mil/whs/directives/corres/pdf/231008p.pdf>. DoD Instruction 2310.08E also “[r]eaffirms the responsibility of health care personnel to protect and treat, in the context of a professional treatment relationship and established principles of medical practice, all detainees in the control of the Armed Forces during military operations. This includes enemy prisoners of war, retained personnel, civilian internees, and other detainees.” And it establishes reportable incident requirements related to observed or suspected violation of applicable standards for treatment of detainees. In addition, Department of Defense policy supports the preservation of life by appropriate clinical means, in a humane manner, and in accordance with all applicable laws. To that end, the Department of Defense has established clinically appropriate procedures to address the medical care and treatment of individual detainees experiencing the adverse health effects of clinically significant weight loss, including those individuals who are engaged in hunger strikes. Involuntary feeding is used only as a last resort if necessary to address significant health issues caused by malnutrition and/or dehydration, and it is never used as a form of punishment. These procedures are administered in accordance with all applicable domestic and international laws pertaining to humane treatment.

<sup>211</sup> 2016 NDAA, *supra* note 27, § 1045(b)(1). Because this provision is applicable where individuals are detained in any “armed conflict,” it does not apply in routine criminal cases.

<sup>212</sup> The Executive Order requires that all agencies of the U.S. Government provide the ICRC with such notification of and access to any individual detained in any armed conflict in the custody or under the effective control of an officer, employee, or other agent of the U.S. Government or detained within a facility owned, operated, or controlled by a department or agency of the U.S. Government, consistent with Department of Defense regulations and policies.

<sup>213</sup> DoD Directive 2310.01E, *supra* note 208.

<sup>214</sup> The Principles were concluded in 2012. The Copenhagen Principles are non-legally binding principles developed over a five-year process by 24 governments and are intended to lay out good practices for States and international organizations that detain persons in the course of international military operations and in situations of non-international armed conflict. The Principles are available at [www.um.dk/en](http://www.um.dk/en).

<sup>215</sup> Additionally, law-of-armed-conflict detention authority pursuant to the 2001 AUMF may not be an available legal option if a suspected terrorist is not part of an organization determined to be covered by the 2001 AUMF.

<sup>216</sup> *See, e.g.*, PPG, *supra* note 123, § 2.D.

<sup>217</sup> *United States v. Hamidullin*, No. 3:14-cr-140 (E.D. Va.) (sentenced to life imprisonment, Dec. 3, 2015), *appeal pending*, No. 15-4788 (4th Cir.).

<sup>218</sup> *United States v. Ghailani*, No. 98-cr-1023 (S.D.N.Y.) (sentenced to life imprisonment, Jan. 25, 2011), *conviction and sentence aff’d*, 733 F.3d 29 (2d Cir. 2013).

<sup>219</sup> *United States v. Warsame*, No. 11-cr-559 (S.D.N.Y.) (notice of plea agreement filed with the court on Mar. 26, 2013).

<sup>220</sup> *See, e.g.*, 18 U.S.C. § 2332a, b, f (prohibiting uses of weapons of mass destruction, terrorism offenses, and bombings of certain facilities).

<sup>221</sup> *Id.* § 2339a-b.

<sup>222</sup> *Id.* § 373 (prohibiting solicitation of certain violent offenses).

<sup>223</sup> *Id.* § 371 (prohibiting conspiracies to commit Federal offenses); *id.* § 956 (prohibiting conspiracies to commit certain violent offenses overseas).

<sup>224</sup> *See, e.g.*, Intelligence Reform and Terrorism Prevention Act of 2004, § 6603(c)-(d), Pub. L. No. 108-458 (amending the material support statute to include jurisdiction for offenses committed extraterritorially); USA



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FREEDOM Act § 704, Pub. L. No. 114-23 (2015) (enhancing the maximum penalty under 18 U.S.C. § 2339b from 15 years to 20 years).

<sup>225</sup> See, e.g., 18 U.S.C. § 924(b) (prohibiting the transport or receipt of firearms in interstate commerce where the firearm would be used to commit a felony); *id.* § 1001(a) (prohibiting material misrepresentations to Federal investigators and providing an enhanced penalty if the offense under investigation involves international or domestic terrorism).

<sup>226</sup> See Classified Information Procedures Act, Pub. L. No. 96-456 (1980), codified at 18 U.S.C. App. 3.

<sup>227</sup> See *New York v. Quarles*, 467 U.S. 649 (1984).

<sup>228</sup> The Attorney General has also issued related guidance for prosecutors, which has been released in response to a FOIA request and is available at [www.justice.gov/sites/default/files/oip/legacy/2014/07/23/ag-memo-miranda-rights.pdf](http://www.justice.gov/sites/default/files/oip/legacy/2014/07/23/ag-memo-miranda-rights.pdf).

<sup>229</sup> See, e.g., *United States v. Abdulmutallab*, 2011 WL 4345243 (E.D. Mich. Sept. 16, 2011) (holding that the *Quarles* public safety exception applied to statements made by Umar Farouk Abdulmutallab when he was questioned by officers at a hospital on the day he was taken into custody for attempting to detonate a bomb on an airliner). Abdulmutallab subsequently pleaded guilty to all charges against him.

<sup>230</sup> A provision of the 2012 NDAA, *supra* note 18, § 1022, sets forth a requirement that certain individuals captured in the course of hostilities be held in military custody pending disposition under the laws of armed conflict. The provision applies to individuals who would be eligible for detention under the 2001 AUMF and who are determined to be (1) part of al-Qa'ida or an associated force and (2) to have participated in planning or carrying out an attack or attempted attack against the United States or its coalition partners. U.S. citizens are exempt from this provision, *see id.* § 1022(b)(1), and the President has been given authority to issue waivers on the basis of national security and to design implementing procedures, *id.* § 1022(a)(4), (c). Presidential Policy Directive 14, issued publicly by the President on February 28, 2012, sets forth the procedures for determining whether military custody is required for non-citizens detained by U.S. authorities. It contains several categorical national security waivers, including where the placement of another country's nationals in U.S. military custody would impede counterterrorism cooperation with that country or would interfere with efforts to secure that individual's cooperation. The military custody requirement is also waived for lawful permanent residents of the United States who are arrested in the United States or by U.S. authorities overseas based on conduct taking place in the United States. Where an individual is arrested by law enforcement authorities, the Attorney General, with the concurrence of other cabinet-level officials, is responsible for making a final determination as to whether he or she is covered by the provision. The Attorney General may also issue individualized waivers on a case-by-case basis. (Where an individual is captured or detained by the U.S. military, the requirements of § 1022 are deemed satisfied.)

<sup>231</sup> Pub. L. No. 111-84 §§1801-07 (2009), codified at 10 U.S.C. §§ 948a-950t ("2009 MCA").

<sup>232</sup> 10 U.S.C. § 948(r).

<sup>233</sup> *Id.* § 949l(c).

<sup>234</sup> *Id.* § 948k.

<sup>235</sup> *Id.* § 949c(b)(6).

<sup>236</sup> *Id.* § 949j(a).

<sup>237</sup> *Id.* § 949j(b).

<sup>238</sup> *Id.* § 950(g).

<sup>239</sup> Common Article 3, *supra* note 176.

<sup>240</sup> 2009 MCA, *supra* note 231, §§ 948d, 950t.

<sup>241</sup> 10 U.S.C. § 948a, c.

<sup>242</sup> Unlike the alleged plotters of the September 11th attacks and Al-Nashiri, the charges against Al-Iraqi were referred to a military commission not authorized to issue a capital sentence.

<sup>243</sup> *Hamdan v. United States*, 696 F.3d 1238 (D.C. Cir. 2012), *overruled in part*, *Al Bahlul v. United States*, 767 F.3d 1, 11-17 (D.C. Cir. 2014) (en banc).

<sup>244</sup> *Bahlul v. United States*, 2016 WL 6122778 (D.C. Cir. Oct. 20, 2016) (en banc) (per curiam). As of this writing, it is unknown whether Bahlul will seek further review before the Supreme Court.

<sup>245</sup> See *In re Khadr*, 823 F.3d 92 (D.C. Cir. 2016) (denying petition for writ of mandamus to the U.S. Court of Military Commission Review).

<sup>246</sup> See Office of Military Commissions (2016), [www.mc.mil](http://www.mc.mil).

<sup>247</sup> Foreign Affairs Reform and Restructuring Act of 1998 (FARRA), §2242(a) (8 U.S.C. § 1231 note); *see also Omar v. McHugh*, 646 F.3d 13, 18 (D.C. Cir. 2011); *Kiyemba v. Obama*, 561 F.3d 509, 513-15 (D.C. Cir. 2009); Reply Brief for the Federal Parties on Writ of Certiorari to the U.S. Court of Appeals for the D.C. Circuit, *Geren v. Omar*, 2008 WL 727815, at 24-25 (U.S. 2008) (Nos. 07-394, 06-1666).

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<sup>248</sup> Plan for Closing Guantanamo, *supra* note 175 .

<sup>249</sup> 8 U.S.C. § 1231 note.

<sup>250</sup> As discussed in Part Two, Section V-D, Article 3.1 of the UNCAT states that “[n]o State Party shall expel, return (‘refouler’) or extradite a person to another State where there are substantial grounds for believing that he would be in danger of being subjected to torture.”

<sup>251</sup> E.O. 13491, *supra* note 173, §5.

<sup>252</sup> Office of Public Affairs, U.S. Department of Justice, *Special Task Force on Interrogations and Transfer Policies Issues Its Recommendations to the President*, Aug. 24, 2009, available at <https://www.justice.gov/opa/pr/special-task-force-interrogations-and-transfer-policies-issues-its-recommendations-president>.

<sup>253</sup> 2016 NDAA, *supra* note 27, § 1034(b)(1), (b)(2)(C).

<sup>254</sup> Plan for Closing Guantanamo, *supra* note 175 .

<sup>255</sup> See sources cited in *supra* note 192. The United States issued reservations, understandings, and declarations upon its ratification of the UNCAT, which are available at [https://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg\\_no=IV-9&chapter=4&clang=\\_en#23](https://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IV-9&chapter=4&clang=_en#23).

<sup>256</sup> The United States is not a party to the 1951 Convention Relating to the Status of Refugees. But in 1968, it became a party to the 1967 Protocol Relating to the Status of Refugees, which incorporates Articles 2-34 of the Convention. See Convention relating to the Status of Refugees, July 28, 1951, 189 U.N.T.S. 137; Protocol to the Convention relating to the Status of Refugees, Jan. 31, 1967, 606 U.N.T.S. 267.

<sup>257</sup> See, e.g., *INS v. Cardoza-Fonseca*, 480 U.S. 421 (1987); *INS v. Stevic*, 467 U.S. 407 (1984).

<sup>258</sup> See 8 C.F.R. §§ 208.16-208.18, 1208.16-18 (related to immigration removal proceedings); 22 C.F.R. § 95.1-95.4 (related to extradition proceedings).

<sup>259</sup> John Bellinger, Legal Adviser to the Department of State, Testimony Before the House Foreign Affairs Subcommittee on International Organizations, Human Rights, and Oversight, June 10, 2008; Reply Brief for the Federal Parties on Writ of Certiorari to the U.S. Court of Appeals for the D.C. Circuit, *Geran v. Omar*, 2008 WL 727815, at 24-25 (U.S. 2008) (Nos. 07-394, 06-1666).