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# The President's NDU Speech and the Pivot from the First Term to the Second

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## CHAPTER 3

### **The President's NDU Speech and the Pivot from the First Term to the Second**

*by Kenneth Anderson and Benjamin Wittes*

On May 23, 2013, President Obama delivered a major address on counterterrorism policy at the National Defense University in Washington, D.C.—the first major national security speech of his second term. Billed as a comprehensive statement of policy, it represented a crucial pivot in the Obama administration's understanding of long-term counterterrorism policy. The first-term speeches, as we have seen, mostly involved efforts to explain—and thereby shore up—the public legitimacy of existing counterterrorism policies. The stance of the speeches was chiefly explanatory and thus inevitably somewhat defensive. The first-term speeches put on the record a great deal more than critics have been willing to grant. But the appetite grows with the eating, and the clamor for the administration to say more about what it was doing—and under what legal authorities—had only expanded.

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This speech was different. With it, the administration pivoted sharply away from simply seeking to declare and justify existing policy and moved to describing the future direction of counterterrorism—and the law and policy that, in the president’s view, should govern it in the long term. The speech was ambitious in scope and, in some areas at least, marked a significant departure from the framework laid out during the first term.

We turn, therefore, to a close analysis of the president’s NDU speech, examining it for both continuity and change from the first term with respect to the categories we have set out in chapters 1 and 2. We look here both at the speech itself and at its accompanying documents, and try to address the good, the bad, and the unanswered in the president’s words.

In broad strokes, the NDU speech was a work of both significant virtues and significant vices—and significant contradictions. It defended robust actions under the Authorization for the Use of Military Force (AUMF) even as the president emphatically insisted that they must end. It defended drone strikes—and promised new limits on them. It promised, once again, the closure of Guantánamo and the end of non-criminal detention—without giving any sense of what would happen to those held at Guantánamo who could not plausibly face trial but for whom release remains unthinkable.

On the positive side of the ledger, the speech elaborated on then-Department of Defense General Counsel Jeh Johnson’s November 30, 2012, Oxford Union address on the end of the conflict (“The Conflict against Al Qaeda and Its Affiliates: How Will It End?”). It tried to imagine a post-AUMF world—one in which some degree of return to normalcy coexists with a maintenance of counterterrorism-on-offense and the capacity

to deny terrorists safe havens in ungoverned spaces in which to regroup and rebuild. This vision represents a potentially important basis for long-term operational flexibility in a post-AUMF world and seeks to propose stages by which to get there. But it also signifies a post-AUMF, post-armed-conflict world that uses the tools of belligerency and conduct of hostilities, and the laws that govern their use, rather more than some of the present war's critics understand in the term "peace."

On the more negative side, however, the president's presentation promised in key areas more end to the conflict than Obama is likely to be able to deliver. In important respects, he both sided with his critics in delegitimizing his own policies and cut off policy options that ought to be on the table for long-term institutional settlement of contested counterterrorism authorities. Whether one sees mostly virtue or mostly vice in the speech largely hinges on how one interprets passages that are legitimately—and probably intentionally—amenable to different readings. It probably also depends on what specific passages of the speech one focuses on. As we look here at the speech in its entirety, our account is necessarily mixed.

Indeed, the positive and the negative aspects of the speech are more than simply the sum of good policy points and bad. The speech ran the risk—not just in its policies, but in its modes of framing and justifying them—of wanting to have everything all ways. It is not obvious at all that the Guantánamo policies can be squared, for example, with the legal implications of the end-of-the-conflict policies. In sliding over glaring contradictions, the speech seemed to want to have its cake and eat it, too. Some of the contradictions might be bridged by time. As we explain below, the speech can be read as proposing one targeting policy for the duration of the AUMF conflict, another

for the post-AUMF peace, and a third during some period of transition between them. But for some areas—particularly those where the president appeared to embrace, even wrap himself in, the arguments of his critics, while nonetheless reaching policies that appear quite inimical under those criticisms—the speech gave a sense of believing that a clever form of words can make the harsh antinomies of the real world disappear. Perhaps clever words can do that—but only for a time. There is much that is praiseworthy in this speech, but we cannot dismiss our fear that it hides the day of reckoning when the profound contradictions of policy must finally end in tears.

As the speech was clearly intended to make varying points to a variety of constituencies, its political background is crucial to understanding the various ways it can be reasonably read.

### **The Political Background to the NDU Speech**

The NDU speech responded to a near-perfect storm of political conditions that came together for the administration in the spring of 2013. That hurricane had several constituent storms, each of which created significant pressure on the president to move the ball forward from what his administration had said during his first term.

The first of these was the need to explain significant developments and policy shifts within the administration with respect to drones and targeted killing. The 2012 election had created new stresses on the permanency of the nation's counterterrorism structures, precipitating a long set of bureaucratic processes toward formalization of certain rules that had been previously more ad hoc. The administration's senior officials, according to news accounts, had become increasingly nervous

about the prospect of Mitt Romney winning the 2012 election and inheriting tools of counterterrorism, such as drone strikes, whose use was essentially discretionary within the very broad legal limits of the AUMF.<sup>1</sup> The Obama administration trusted itself with these authorities, but the prospect of someone else wielding them—particularly someone who might revive some of the executive power enthusiasms of the Bush administration—kept officials up at night.

The result was a confluence of two distinct motivations for seeking a more permanent and legitimate basis for offensive counterterrorism actions into the future: on the one hand, a genuine institutional belief in long-run codification of policy for future presidents, and, on the other hand, a particularly political belief in limiting the discretionary use by Republicans of such things as drones. Mixed motivations notwithstanding, the impulse toward codification of principles of both permission and limitation was a sound one. And by the beginning of its second term, the administration was far along in the creation of a formal set of policies—known as the playbook—which was designed to institutionalize the rules for drone strikes and to enshrine certain policy limitations that go beyond the legal limits on targeting authority. By May 2013, these policies were ready for the president's signature—and the administration wanted to announce them.

Other independent political developments were also coming to a head. One was a mass hunger strike at Guantánamo, which threatened the legitimacy—especially abroad—of the

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1. See, for example, Scott Shane, "Election Spurred a Move to Codify U.S. Drone Policy," *New York Times*, November 24, 2012, available at [http://www.nytimes.com/2012/11/25/world/white-house-presses-for-drone-rule-book.html?pagewanted=all&\\_r=0](http://www.nytimes.com/2012/11/25/world/white-house-presses-for-drone-rule-book.html?pagewanted=all&_r=0).

already uneasy truce between the president and Congress over detention policy at Guantánamo. Obama had never really accepted this truce, anyway—a truce under which Guantánamo remained open, detainees could not be transferred from it, but the government brought no new detainees there either and the administration maintained a public posture of seeking the facility's closure. The hunger strike, and then the forced feeding of detainees, put the question of indefinite detention without charges or trial squarely back on the political table. Though, legally speaking, nothing had changed, activists were talking about a “crisis” at Guantánamo, and the administration was feeling considerable heat.

This problem dovetailed with increasing talk of the end of the conflict—the subject about which Jeh Johnson had spoken the previous December. Johnson's speech had given hope to the nongovernmental organization community, which saw in the end of the conflict, at once, an end to the lawful right to detain terrorists as a legal incident of warfare, a mechanism to bring about the closure of Guantánamo, and an end—or at least a radical constriction—of kinetic military operations overseas. This vision on the part of the activists gelled nicely with aspects of the president's own self-image; Obama, after all, has long seen himself as the man who has sought to bring to a close the American military actions in Iraq and Afghanistan that he inherited from his predecessor. The idea of bringing about an end to the AUMF conflict, and thereby bringing about a true restoration of peace, clearly has internal resonance for him as well.

Also pushing the administration to speak were the effects of the concerted NGO and journalistic efforts to challenge the administration's claims of minimal, occasionally even near-zero, civilian casualties in drone strikes. In one infamous epi-

sode, John Brennan (at the time Obama's top counterterrorism adviser) had made the mistake of advancing the frankly absurd proposition that there had been no—that is to say, zero—civilian collateral deaths from drone strikes in 2011.<sup>2</sup> Activists had responded to the evident absurdity of that claim with questionable estimates of civilian harm of their own, ones that surely overstated civilian deaths.<sup>3</sup> After a period of several years of debate over civilian casualties, the issue had become a potent source of attack on the administration's policies.

Finally, there was the emergence of a new group of critics on the political right: the libertarian wing of the Republican Party, led by Senator Rand Paul (R-KY). In a peculiar merger of the civil libertarian language of the Left and the Right's own opposition to regulatory excess and governmental power, this group brandished the ideological claim that Obama had created an imperial presidency that ruled by decree, administrative rule-making, and executive order both in the domestic sphere and in foreign affairs and national security. It also adopted ACLU-like anxieties about the drone strike against Anwar al-Awlaki, the American citizen, executed—on this view—by the president on his sole say-so following his denunciation as a terrorist solely by the executive and blown up with a missile without a judicial hearing. Leave aside the actual facts of the al-Awlaki case, the man's operational role in some of the

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2. Scott Shane, "C.I.A. is Disputed on Civilian Toll in Drone Strikes," *New York Times*, August 11, 2011, available at <http://www.nytimes.com/2011/08/12/world/asia/12drones.html>.

3. For an excellent overview of civilian deaths in drone strikes and the controversy over it, see Ritika Singh, "A Meta-Study of Drone Strike Casualties," *Lawfare*, July 22, 2013, available at <http://www.lawfareblog.com/2013/07/a-meta-study-of-drone-strike-casualties/>.



worst terrorist near-misses of the previous several years, and the implausibility of his capture. Al-Awlaki was offered purely as an abstraction. From this, the claim broadened to encompass the possibility of drone strikes, as Senator Ted Cruz (R-TX) put it, against “a US citizen on US soil who is not flying a plane into a building, who is not robbing a bank, who is not pointing a bazooka at the Pentagon, but who is simply sitting quietly at a cafe, peaceably enjoying breakfast.”<sup>4</sup> What law, in other words, stops the imperial president from secretly naming some citizen a terrorist and blowing him up with a drone strike on US soil?

This strain of thought exploded onto the public’s radar screen in Senator Paul’s famous thirteen-hour filibuster on the Senate floor on March 6, 2013. Paul’s impassioned rhetoric and demands for simple answers to questions about when and where American citizens could be targeted reached directly to anxieties felt by Americans on the right, as well as many on the left. The anxiety about legitimacy and the absence of judicial process was genuine and real, even if inchoate and not necessarily focused on anything that, in light of the facts, even made much rational sense. Paul’s filibuster came in the context of the confirmation of Brennan to head the CIA in March 2013. Brennan was confirmed, but not without facing a raft of hostile questions and not before he had promised more speeches from the administration on counterterrorism.

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4. Senator Cruz’s statement took place at the outset of the Rand Paul filibuster, a full transcript of which is available at Raffaella Wakeman, “Senator Paul’s Filibuster: Get Yer Transcript and Video Here!” *Lawfare*, March 7, 2013, available at <http://www.lawfareblog.com/2013/03/senator-pauls-filibuster-get-yer-transcript-and-video-here/>.

All of this formed the political backdrop as the president took the podium at NDU. This backdrop collectively amounted to a multifaceted and intensifying argument over the legitimacy of counterterrorism-on-offense, continuing detention, and the fundamental building blocks of the president's light-footprint strategy. The president's speech was accompanied by two written documents, each issued within a day of the speech itself: a Fact Sheet released by the White House under the heading, "U.S. Policy Standards and Procedures for the Use of Force in Counterterrorism Operations Outside the United States and Areas of Active Hostilities"; and a letter from Attorney General Eric Holder to Senator Patrick Leahy, chairman of the Senate Judiciary Committee. The letter principally addressed, in greater detail than had prior statements, the circumstances and intelligence at issue in the al-Awlaki case and declassified information both about the strike itself and about three other Americans (including al-Awlaki's 16-year-old son) who had been killed in drone strikes aimed at others.

Taking the three together, the NDU speech constituted the most comprehensive single statement to date of the US government's present and future policies for counterterrorism. And it laid out a vision that in some ways built upon the vision the speeches described during the first term but that in some ways was dissonant with that vision.

## **The Fundamental Nature of the Conflict and its End**

With respect to the immediate present, the president affirmed in all significant respects the fundamental view of the conflict that has lain at the heart of the legal framework for the Bush

administration and the Obama administration alike: from September 11, 2001, down to today, the United States has been at war. Under both “domestic law, and international law,” the president reiterated, “the United States is at war with Al Qaeda, the Taliban, and their associated forces.” In saying this, he reaffirmed the fundamental view of his administration, laid out in the first-term speeches, that the administration is entitled to lethally target the enemy and, when it captures enemy forces, detain enemy fighters and operatives for the duration of hostilities.

The president’s speech also reaffirmed the fundamental US legal view that armed conflict does not have a predetermined “legal geography.” The United States is legally entitled to pursue and target the enemy wherever it goes, though limited by the legal rights of neutral sovereign states, who also have legal obligations as conditions of their neutrality. The president emphasized that America “cannot take [drone] strikes wherever we choose; our actions are bound by consultations with partners and respect for state sovereignty.” But Obama also reaffirmed the US view that “where foreign governments cannot or will not effectively stop terrorism in their territory,” then the United States reserves the right to act on their soil.

So far, there is no daylight between this speech and the ones that came before it.

But new in the NDU speech was a clear statement that, notwithstanding these legal authorities, as a matter of policy—not law as such, and thus revisable according to circumstances—the United States will now limit its conduct of hostilities in places beyond the existing zones of active conventional combat. Brennan had hinted at this position in his April 30, 2012, Wilson

Center speech (“The Ethics and Efficacy of the President’s Counterterrorism Strategy”) with his suggestion that the United States does not target all of those whom it could hit lawfully. But the president’s NDU speech and, particularly, the Fact Sheet, whose very title suggests different policy choices “Outside [of] Areas of Active Hostilities,” went further. They made it clear that an entirely different set of targeting rules governs US forces outside of theaters in which force protection remains a matter of high salience.

In principle, such policy choices are no different from when the US military limits its combat activities in any place of active hostilities—adopting more restrictive rules of engagement, for example, as part of a campaign to win hearts and minds in a counterinsurgency setting. In the course of a far-flung counterterrorism campaign, policy and strategic considerations may include many factors that might reasonably cause the United States to adopt more restrictive rules than the law would demand. As the president noted, we “cannot use force everywhere.”

But talking about such policy choices in the context of a speech focused on winding down the war gives them a different sheen. Indeed, where the NDU speech really broke new ground was in articulating the architecture of counterterrorism beyond the current AUMF armed conflict—or, at least, in beginning to do so. Apart from Johnson’s Oxford Union speech in November 2012, the NDU speech was the first serious public consideration of when this war will finally be over and how the United States will pursue counterterrorism as a matter of law and policy beyond the AUMF conflict. What’s more, unlike Johnson’s speech, the president’s NDU speech offered a window into the time frame for the conflict’s end.

The window was more a matter of hints and tea leaves than clear signaling. But the president seemed to attach significance to the withdrawal from Afghanistan in 2014, and he talked about the conflict's end as a matter of urgency both in general terms and with respect to detention. The most direct signaling occurred near the speech's end, when he said that he looked "forward to engaging Congress and the American people in efforts to refine, and ultimately repeal, the AUMF's mandate." He added that he would "not sign laws designed to expand this mandate further." If this is so, it appears likely that, under the framework of the NDU speech and the Fact Sheet, the AUMF would be retired in stages.

The president made four fundamental assertions regarding the end of the conflict: first, that America cannot live with permanent war; second, that threats today look increasingly similar to those from before September 11, 2001; third, that it is time to recognize criteria for the end of the AUMF conflict, narrow the AUMF, and put it on a path toward repeal; and, fourth, that we should make a transition to legal policies for drone warfare and other self-defense actions suited to a post-conflict regime. Each of these propositions is controversial and contested, and we examine each in turn.

Obama began with the almost philosophical idea—at once abstract and emotionally suggestive—that the American republic cannot live with "permanent" war. He quoted James Madison's warning: "No nation could preserve its freedom in the midst of continual warfare."<sup>5</sup> After a dozen years of war, he said, America is "at a crossroads" and we must "define the nature and scope of this struggle, or else it will define us."

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5. James Madison, "Political Observations," April 20, 1795.

In framing the issue thus, the president solidly allied himself with the Left's critics of his administration's policies. Having waged the war for four years, the president was now warning about the dangers of continuing to do so. It is hard to quarrel with Obama's aspiration here; nobody wants a perpetual armed conflict. The trouble is that the United States is not the only party to the conflict with a vote on its nature. America can define the struggle however it likes, but the realism of that definition also depends on how its terrorist adversaries frame it and how able they are to make a reality of their understanding. Mere forms of words do not vanquish hard threats, and winning is more than a matter of verbal definition. Put a different way, it is possible that while America may no longer be interested in war, war remains interested in America. And the aspiration does not answer the question of how war powers—whose use may remain necessary—figure into a post-conflict legal framework.

Obama's second point was an effort to respond preemptively to this realist critique. Granted, the president said, our "nation is still threatened by terrorists . . . but we have to recognize that the threat has shifted and evolved from the one that came to our shores on 9/11." After ten years of experience in dealing with heightened security efforts at home and war abroad, this is the "moment to ask ourselves hard questions—about the nature of today's threats and how we should confront them." As a definition of victory in this war, no president can "promise the total defeat of terror," he said. Our enemies are groups and networks of groups, and the meaning of victory and defeat must correspond to what they are. Today, the president continued, the "core of Al Qaeda in Afghanistan and Pakistan is on the path to defeat. Their remaining operatives spend more

time thinking about their own safety than plotting against us.” They did not direct the attacks in either “Benghazi or Boston. They’ve not carried out a successful attack on our homeland since 9/11.” While preserving the caution that the core of Al Qaeda is on the path to defeat, the president emphasized that the threat today is more diffuse in terms of groups, terrorist networks, and affiliates, and in terms of geography.

The NDU speech didn’t soft-pedal the dangers of these diffuse groups. The president singled out Al Qaeda in the Arabian Peninsula—the Al Qaeda affiliate which counted Anwar al-Awlaki as an operational leader—as the most active in plotting against the US homeland. At the same time, he noted, extremists have gained a “foothold in countries like Libya and Syria,” but the ability of these groups to focus and reach beyond those countries and regions where they are based is limited. The result is likely to be more localized threats to Western interests, including to business interests and to allied governments seeking to battle these groups in their own territories. Further, Obama said, there is a “real threat from radicalized individuals here in the United States.” The current, direct threats to the United States and its people, then, according to the president, are “lethal yet less capable Al Qaeda affiliates; threats to diplomatic facilities and businesses abroad; home-grown extremists. This is the future of terrorism.”

And this, the president said, is all but enough to declare victory in the armed conflict. Indeed, the president, in arguing for moving toward the conflict’s formal legal end, declared that the “scale of this threat closely resembles the types of attacks we faced before 9/11.”

Again, it’s hard to fault the aspiration. But the president’s vision of victory—predicated as it is on the threat picture’s

resemblance to the pre-9/11 era—does not obviously support his conclusion. It would be of scant comfort to those who would use the tools of warfare to deal with overseas terrorists to learn that the president would be satisfied with having merely wound back the threats to those of the pre-9/11 era and thus concluded that we can now safely return to the thinking, planning, and responses of the years preceding that day. After all, it was precisely because we did not adequately contemplate, by September 10, the emergence of groups that could carry out a 9/11-like attack that the attack was successful. We failed to anticipate such events and, as a result, we failed to take the kinds of forcible actions in the 1990s that might have rendered much less safe and usable the safe havens where the terrorist groups were able to plan and execute a highly complex, years-long enterprise.

Obama's third proposition was something of a response to this concern. For Obama clearly didn't mean to embrace such an abandonment of military options in confronting emergent, incipient, and ongoing terrorist threats. He appeared to imagine something more intermediate: maintaining key aspects of counterterrorism-on-offense, while yet calling it peace.

This would be a peace of unusual military muscularity, one that may well not satisfy the Left's critics who share the president's vision of the conflict's end, but for whom this military (and CIA paramilitary) muscularity would represent a contradiction, even hypocrisy. One way to imagine this peace is as analogous to the peace of the Cold War, in which a struggle was indeed underway, but only a hot conflict in dribs and drabs over the course of sixty years. More often, it took the form of proxy wars fought on the fringes of the great powers, with military or paramilitary intelligence forces used in small-scale



belligerent actions short of full-on war. Another way to understand it as peace is simply to look to the past 150 years of American history; the number of years in which, even during times generally regarded as “peacetime” by most people, the United States was not engaged in forms of belligerency and the use of hostilities short of full-scale war by its forces abroad is very small.<sup>6</sup> Small-scale military or paramilitary actions using tools of hostilities have been a feature of American peacetime for most of its history, and the same is true of many other great powers. The idea of an absolute binary in international or domestic law, between “armed conflicts” conceived as full-on war and all other extraterritorial situations being necessarily governed by human rights law and law enforcement tools, is by far the historical novelty, not the norm. This figures as part of the deep architecture of the president’s speech, because its conception of a return to normalcy contemplates a return to *this* historical norm; the president clearly did not regard the speech’s repeated references to using drones and other forms of hostilities even in time of peace as inventing anything new but, instead, as part of the ordinary, realistic conditions of peace. He was not wrong about that.

This deep architecture about what normal uses of force are needed even in peacetime informs how Obama framed the

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6. Mary L. Dudziak, in *War Time: An Idea, Its History, Its Consequences* (New York: Oxford University Press, 2012), provides a useful timeline (in its appendix) of US uses of military force over its history, as shown by its award of campaign medals, along with a discussion of how much a continuous part of American history military operations are even in times understood as “peace.” See the book reviews by Samuel Moyn, May 24, 2012, on *Lawfare*, available at <http://www.lawfareblog.com/2012/05/war-time-an-idea-its-history-its-consequences/>, and Kenneth Anderson, “Time Out of Joint,” 91 *Texas Law Review* 859 (May 2013).

conditions for what it means for the conflict to be over—which he framed in terms of a reduction in the general threat level against the homeland and the American people to levels more closely associated with pre-9/11 conditions. But since those responses were lacking in crucial respects, the conditions for the end of the conflict also implicitly include some permanent infrastructure for addressing threats in the form of plots, individuals, groups, and networks of groups—an architecture that is manifestly not just a robust form of law enforcement or the criminal law. We have learned from bitter experience, the president said, that “left unchecked, these threats can grow.” And we have learned that if “dealt with smartly and proportionally, these threats need not rise to the level that we saw on the eve of 9/11.” The president was not talking about just the FBI here.

In other words, even as Obama insisted that “this war, like all wars, must end,” he also declared in the same sentence that “our systematic effort to dismantle terrorist organizations must continue.” Even as he quoted Madison on the dangers of perpetual warfare, he also declared that American policy should aim to “dismantle networks that pose a direct danger and make it less likely for new groups to gain a foothold, all while maintaining the freedoms and ideals that we defend.” Even as he promised to bring combat operations in Afghanistan to an end, he also promised “a series of persistent, targeted efforts to dismantle specific networks of violent extremists that threaten America.”

To put it simply, the conditions of the “end of the conflict,” in Obama’s formulation, seem to mean the reduction of threat to levels that can be managed without large-scale warfare and, crucially, without need for the legal appellation of “armed conflict.” They do not appear to involve the abandonment of

instrumentalities of military action. Rather, the president appeared to be describing ongoing belligerent actions—using military or paramilitary forces—conducted under the laws of armed conflict, in national self-defense, whether as a continuing response to a continuing terrorist threat or as a response to newly arising threats.

But this formulation, and the long-run paradigm for the peacetime use of belligerent or covert intelligence forces that it proposes, raises issues of its own. The critic will instantly object, and with no small justice, that giving up the legal framework of armed conflict has genuine legal consequences. For example, it is quite unclear, as we discuss below, how the United States can continue to detain people under the laws of war whom it cannot easily set free in practice to the extent it considers itself at peace. More fundamentally, giving up the legal claim to armed conflict also makes much less clear the basis on which the United States can conduct even limited hostilities, such as drone strikes or Joint Special Operations Command raids, against the various groups that the president insists on dismantling or against new groups that arise and count themselves the children or grandchildren of Al Qaeda. Against some of these groups, at least, it seems neither legally required nor factually supported to believe that the conditions of victory have been met in the ordinary sense of destroying and dismantling the enemy and its ability to conduct hostile terrorist acts against the United States. Why give up legal authorities, in both international law and domestic law, that continue to be legally and factually warranted?

The NDU speech didn't straightforwardly address this question. It rested, rather, on the factual characterization of a threat reduced to manageable levels combined with the norma-

tive claim that a republic's moral nature is threatened by permanent warfare. Together, these yield the conclusion that, where the reduced threat permits, a state of war should end even if that means giving up certain legal privileges associated with war. Conservative critics will tend to question the factual and normative premise. But the criticism from the president's left may end up being just as sharp. What's the difference between war and peace, anyway, if peacetime entails something that looks remarkably like the conduct of hostilities? In one sense, critics on both the left and the right will be asking the same question of the Obama administration: what is the cash-out in real terms for giving up the legal framework of an armed conflict under the AUMF? The Right fears it gives up too much; the Left fears it gives up too little.

The president had an answer to this critique, but he laid it out only very elliptically in his speech. The answer is that the sort of ongoing but occasional use of force he described can be justified legally as a matter of self-defense—and that this authority is actually robust enough to keep enemy groups at bay and incapable of projecting force against the United States. Military or paramilitary means can be small scale, discrete, and limited and can be conducted according to the terms of the laws of armed conflict. The United States has done so since the beginning of the age of international terrorism. It has a long-developed international law jurisprudence that provides the framework for doing this sort of thing, even outside of the AUMF armed conflict. There might be many issues to be worked out as to the proper standards for invoking rights of national self-defense, not to mention issues related to when it is appropriate to look to Congress or to the president's own authorities in domestic law for such operations. But the basic

proposition of forcible belligerent responses to international terrorism in particular, outside of and beyond those of the human rights and law enforcement paradigms, has not been an issue legally for the United States at least since the 1980s. Hostilities with an intensity short of armed conflict in the legal sense might still be very intense—intense enough, Obama seemed to be saying, to stay on offense against the groups he wants the latitude to dismantle.

At the same time, however, the NDU speech recognized that there exists a meaningful difference between wartime under the AUMF and peacetime. The return to peace thus imposes greater restrictions on when, where, and against whom the tools of war—drone strikes, most obviously—may be deployed. These specific policies, mostly related to targeted killing and drone strikes, constituted the fourth point made by the president in describing the end of the conflict: specific new rules and policies for the use of force as the AUMF conflict winds down.

We turn then to consider the new policies that the NDU speech and the accompanying White House Fact Sheet announced.

### **Targeted Killings and Drone Strikes: A Strong Defense—and New Restrictions**

Although the NDU speech was billed as comprehensive, its central core addressed targeted killing and drone warfare—particularly in light of the accompanying White House Fact Sheet and Attorney General Holder’s letter to Senator Leahy on the targeting of US citizens abroad.

The speech is noteworthy on this score first for the president's strong defense of drone strikes as ethical, effective, and legal. To some degree, this aspect of the speech simply rehashed ground that Brennan had covered earlier in his Wilson Center speech. But it was notable this time for coming from the president's own lips. After describing sometimes alternative, sometimes complementary, means of achieving counterterrorism aims, Obama acknowledged candidly that despite a "strong preference for the detention and prosecution of terrorists, sometimes this approach is foreclosed." The terrorists flee to "some of the most distant and unforgiving places on earth. . . . In some of these places—such as parts of Somalia and Yemen—the state lacks the capacity or will to take action." Moreover, he said, it is also "not possible for America to simply deploy a team of Special Forces to capture every terrorist. . . . [T]here are places where it would pose profound risks to our troops and local civilians—where a terrorist compound cannot be breached without triggering a firefight with surrounding tribal communities." In these cases, the local communities pose no threat to the United States; in other cases, putting "US boots on the ground may trigger a major international crisis," the president said, and he offered the Osama bin Laden raid in Pakistan as an example. The "fact that we did not find ourselves confronted with civilian casualties, or embroiled in an extended firefight, was a testament to the meticulous planning and professionalism of our Special Forces, but it also depended on some luck," he noted.

It is in this context, Obama said, that the United States has adopted the methods of drone warfare. And while he acknowledged that this form of warfare raises profound questions, he

didn't apologize for it. As to effectiveness, the president pointed to terrorist communications found in the bin Laden compound lamenting the effectiveness of the drones. As a matter of legality, he invoked armed conflict under the AUMF and later referred to self-defense.

The president then offered a defense of the ethics of drone strikes, describing them as the tool of war least harmful to civilians in many circumstances. There is a "wide gap," he said, between "US assessments of such casualties and nongovernmental reports." He acknowledged as a "hard fact that US strikes have resulted in civilian casualties, a risk that exists in every war. And for the families of those civilians, no words or legal construct"—like lawful collateral damage, for example—"can justify their loss." But he then asked what the ethical point of comparison should be; heartbreaking tragedies must be weighed "against the alternatives. To do nothing in the face of terrorist networks would invite far more civilian casualties," not just among Americans, but in the "very places like Sana'a and Kabul and Mogadishu where terrorists seek a foothold. . . . [T]he terrorists we are after target civilians, and the death toll from their acts of terrorism against Muslims dwarfs any estimate of civilian casualties from drone strikes. So doing nothing is not an option."

This is an important moral assertion by the president. The unstated premise of many critics of drone strikes is that the proper moral comparison for drone strikes is against the policy of no use of military force at all. The speech insisted that this is a red herring. The real alternative is the use of other weapons systems or forms of kinetic military activity. Conventional airpower or missiles, Obama said, "are far less precise than drones, and are likely to cause more civilian casualties and more local

outrage. And invasions of those territories lead us to be viewed as occupying armies.” In other words, the value of drones requires not merely understanding their tactical value in a particular attack, but an assessment of their strategic value compared to other means that might have worse geopolitical consequences.

Obama acknowledged the limits of what drones can do and the problems of the global resentment and blowback they can induce. But he nonetheless declared that they frequently provide the most ethical and effective tool of war. Neither “conventional military action nor waiting for attacks to occur offers moral safe harbor,” he concluded. And “neither does a sole reliance on law enforcement in territories that have no functioning police or security services—and indeed have no functioning law.”<sup>7</sup> It was the strongest defense of the administration’s

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7. In this part of the speech, President Obama—probably coincidentally—channeled themes that the present two authors developed the previous month in a debate at the Oxford Union. Compare the president’s comments, quoted above, to the arguments on the subject delivered by both of the present authors at the April 25, 2013, Oxford Union debate over the following resolution: “This House Believes Drone Warfare is Ethical and Effective.” Wittes concluded:

Now from the other side you’re going to hear a lot of talk about civilian casualties, and I want to be candid about this up front. Any weapons system that you use—weapons are dangerous things. And when you target people, people make mistakes, and that produces civilian deaths. And drones are not different from other weapons in that regard—except in one sense, which is that they give you more opportunity to do less of that. That’s not to say there are not civilian casualties. There are.

Now one thing you will *not* hear the other side talk about, I suspect, with respect to the civilian casualties is the question of the null hypothesis—that is to say, what the alternatives are. What if you didn’t use a drone in this situation? What would you do instead? Now often, drone operations



posture on drones given yet—and all the more important coming from the president himself.

But having defended drone strikes energetically, the president also announced that he was reining them in. Obama did not immediately alter the hard legal framework and authorities under which drone strikes take place. But he did, in promising an end to the AUMF conflict, suggest that a change in legal framework was inevitably coming down the pike. And he also adopted new policies for strikes—at least outside of active combat theaters—that anticipate these changes. These policies for targeted drone strikes, applied in the *current* AUMF conflict, represent a significant policy determination not to have recourse to the more capacious existing legal authority to hit lawful targets beyond zones of active hostilities.

The United States recognizes the legitimate concerns that many people have regarding a perceived ability to strike with drones across borders at discrete targets with potentially little attribution, transparency, or risk. It recognizes this both in the legal context of the existing AUMF armed conflict, on the one

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operate with a sort of assumption—I think it's a lazy assumption—that the null hypothesis is some lesser use of violence or maybe no use of violence at all. Maybe it would be law enforcement. Maybe if you didn't use a drone in a particular situation, we'd have peace. We'd have nothing. I think this is very, very rarely the case. And I want to be very candid with you about what I think the null hypothesis is, which is often greater uses of violence. The alternative to drone use in many instances is air strikes, on-the-ground human interventions, and Tomahawk cruise missiles—all of which have less capacity for discrimination, for proportionality, and more capacity for civilian deaths than do drones.

Video of the debate is available at Benjamin Wittes, "Oxford Union Debate on Drone Warfare," *Lawfare*, May 3, 2013, available at <http://www.lawfareblog.com/2013/05/oxford-union-debate-on-drone-warfare/>.

hand, and in the post-AUMF conflict setting, on the other. It has therefore announced policies to govern its targeting with drones, both those attacks undertaken beyond areas of active hostilities in the current AUMF armed conflict and attacks in the future, post-AUMF conflict—thus merging to some degree the AUMF conflict with whatever will succeed it.

These policies were described in the NDU speech, but were laid out with greater specificity and organization in the Fact Sheet. The Fact Sheet stated that these are “counterterrorism policy standards and procedures that are either already in place or will be transitioned into place over time.”

These policies are something less than law; the law remains, at least for now, the targeting rules of the law of armed conflict. The policies are subject to change; the Fact Sheet added that officials are “continually working to refine, clarify, and strengthen our standards and processes for using force.” They are also subject to waiver; the Fact Sheet noted that they do “not limit the president’s authority to take action in extraordinary circumstances when doing so is both lawful and necessary to protect the United States or its allies.” That said, they are clearly more than just a discretionary policy declaration. They are intended to establish a basic framework grounded in law and policy together, one that can and will evolve over time, within a basic legal paradigm of both international and domestic law. They are a framework meant to create a bridge between targeting under the AUMF and targeting under the self-defense framework of the regime to which Obama aspires to move.

One important implication of designing policy in this fashion is that the passage from “wartime” to “peacetime” is a transitional and gradual one, legally and in fact. The policies for drone strikes are now largely the same for the AUMF armed

conflict—outside of Afghanistan and Pakistan—as they will be for addressing the “transitional” threats that remain and the same as they will be for self-defense actions even once the “conflict” as such is deemed over. This is, we suspect, how the administration squares the circle between the assertion that “this war, like all wars, must end” and the promise that our “systematic efforts to dismantle terrorist organizations must continue”—including with drone strikes. Analytically, the NDU speech and the Fact Sheet preserved a transitional period under the AUMF conflict in which recourse to the legal authorities of the current armed conflict are still available, though in gradually diminishing ways, as existing, ongoing enemy terrorist groups presumably lose their capacities to confront America as a result of the continuing degradation caused by drone strikes and other American measures.

Eventually, this will give way to actions taken entirely under what the US government understands to be its inherent sovereign right of self-defense in international law. Those rights of inherent self-defense include, in the US view, the lawfulness in some circumstances of using military and paramilitary force against non-state adversaries.

The NDU speech and Fact Sheet thus appeared to address three conceptually distinct legal periods: the current AUMF conflict prior to the end of combat operations in Afghanistan; the post-AUMF conflict of peacetime (but which will continue to have ongoing and new threats); and a transitional period between withdrawal from Afghanistan and the full lapsing or repeal of the AUMF—in which the government might use force, depending on the facts of the situation, based on the AUMF, self-defense, or both.

## Targeting in Transition: “Continuing, Imminent” Threats

At least as far as drone targeting outside of areas of active hostilities is concerned, the NDU speech announced a simple device for harmonizing the rules of targeting as a matter of policy through this transition from war to self-defense in peacetime. That is to say, the rules will be the *same* for all three periods, whether the legal authority is the current armed conflict, any transitional period, or post-conflict self-defense. Since the rules for the post-conflict period of formal peace are, legally speaking, the most restrictive, the device works by applying those rules as a policy matter to restrict conduct in the earlier periods.

As a matter of both international and domestic constitutional law, inherent national self-defense entitles the president to target people with lethal force, including with drones, in situations of imminent attack. So the speech limited targeting outside of active combat theaters to situations of “continuing, imminent threats”; the speech and the Fact Sheet also used the phrases “continuing, imminent,” as well as “continuing and imminent.” This appears to tighten up the criteria for using force in any given situation as long as the armed conflict continues. Remember, the administration’s earlier statements—in the first-term speeches—had reserved the right to act in the face of continuing and *significant* threats. But while Brennan had mentioned in his September 16, 2011, Harvard speech (“Strengthening Our Security by Adhering to Our Values and Laws”) that there was a convergence between the US view and an increasingly flexible allied notion of imminence, he

had acknowledged that a gap remained. And the United States had not previously restricted itself to drone strikes only in situations of *imminent* attack—except, notably, with regard to US citizens. Now, however, imminence has become part of the formula—albeit as a matter of policy, not yet law. As Obama put it, “not every collection of thugs that labels themselves Al Qaeda will pose a credible threat to the United States.” The Fact Sheet adds that it is “simply not the case that all terrorists pose a continuing, imminent threat to US persons; if a terrorist does not pose such a threat, the United States will not use lethal force.”

How big a change this is depends on how one reads the phrases “continuing, imminent” threat and “continuing and imminent” threat—particularly in relation to the earlier standard of “continuing and significant” threat. The correct reading of this language remains a matter of considerable opacity both in the speech and in the Fact Sheet. Do these phrases mean that a threat must be *both* continuing *and* imminent—with imminence further restricted by a requirement that the imminent threat be continuing, not evanescent? Or do these two words denote distinct categories, with lethal force lawful against both continuing threats and imminent threats? Or, in a third alternative, is this a way of saying that an “imminent” threat can also be a “continuing” one, in which the concept of “continuing” broadens the notion of imminence such that a threat is imminent in a continuous fashion? Or, finally, is “continuing and imminent” some kind of collective term of art?

In our view, the position most plausibly intended by the administration here is that targeting is lawful *against a threat that is continuing on the part of some actor, and could result in*

*an attack at any particular point in time—and therefore is continuously imminent with respect to that actor, whether that actor is a group, network, individual, or, for that matter, a state.* We believe this in part because the NDU speech and the Fact Sheet referred not just to plots or even to individuals, but instead to groups and networks. The president said that the United States would target, with persistence, networks over time; in that case, the imminent threat is posed over time by the group, given evidence of its nature, aims, and past behaviors. Moreover, as we discussed in the prior two chapters, earlier statements by the administration with respect to drone strikes in general and to al-Awlaki in particular describe a flexible, non-temporal sense of the word “imminent.” In particular, they describe a sense of imminence that permits the United States to go on offense and pick its own moments to strike—certainly not being confined, as many of the speeches have said, to a reactive posture of having to wait for threats to ripen before striking. As the president further declared in the NDU speech, merely waiting for attacks to occur, or holding off a response until the perceived last moment in order to demonstrate a threat’s imminence before responding to it with force, offers “no moral safe harbor.”

In other words, the current language likely reflects an incremental narrowing of the previous “continuing and significant” threat language used by Brennan at Harvard, something that brings the United States still closer to allied countries’ increasingly flexible conceptions of imminence. The exact contours of the shift, however, remain unclear. And this analytic gloss on the administration’s view may not be correct. This is an area that cries out for greater clarification from the administration in the wake of the NDU speech.

The speech and its accompanying documents laid out other limits on drone strikes as well. The Fact Sheet said, as an initial matter, that it is the “policy of the United States” not to use “lethal force when it is feasible to capture a terrorist suspect.” This seems to go further than previous statements that it is the unqualified preference of the United States to capture, rather than kill. Rather, the language sounds increasingly like the feasibility language that Holder used in his March 5, 2012, speech at Northwestern University and that the Department of Justice’s 2011 white paper used with respect to the targeting of US citizens: that force would only be authorized when capture was not feasible. Indeed, Obama made it clear at NDU that under the new playbook, “the high threshold that we have set for taking lethal action applies to all potential terrorist targets, regardless of whether or not they are American citizens.”

Yet the president also made it clear that “feasible” is not a standard easily or frequently met, and that the feasibility analysis includes both the risk to US forces and the risk to civilians of attempting to capture the target. It also includes broader strategic concerns such as those raised by the president about putting US forces on the ground in countries like Pakistan and thereby risking a “major international crisis.” In other words, feasible does not mean feasible in the technical sense of accomplishable. It means, rather, accomplishable without undue harm to other interests—tactical, strategic, and political.

The Fact Sheet outlined a set of other preconditions for undertaking a drone strike:

- Near certainty that the terrorist target is present
- Near certainty that non-combatants will not be injured or killed

- An assessment that the relevant governmental authorities in the country where action is contemplated cannot or will not effectively address the threat to US persons
- An assessment that no other reasonable alternatives exist to effectively address the threat to US persons

These conditions are striking in that they appear to contemplate the evolution from the full availability of armed conflict targeting rules to something much more restricted. That said, it is hard to believe that the second “near certainty”—that non-combatants will not be injured or killed—can be a workable formula, even in the context of peacetime self-defense operations. Kinetic military operations always carry risks to civilians. And setting the bar for actions unrealistically high runs the risk of raising expectations of perfection in targeting that simply cannot be achieved. This risks, in turn, undermining the credibility of an otherwise ethically and legally defensible structure when the reality inevitably falls short of the stated policy.

Finally, the president made a brief, passing reference to what are called in the press “signature strikes”—the practice of targeting groups of people based not on individual identification but on broader patterns of behavior indicative of belligerency. He referred to the gradual transition out of the Afghanistan war and the need to protect US and coalition forces in that transition from attacks in their counterinsurgency war. In the “Afghan war theater,” he said, we “must . . . and will continue to support our troops.” (It is likely that the phrase “Afghan war theater” in this phraseology is intended to include border areas of Pakistan and targets engaged in counterinsurgency operations operating over the Pakistani border.) This means, continued the president, that US forces “will continue to take strikes



against high value Al Qaeda targets, *but also against forces that are massing to support attacks on coalition forces.*” These strikes are, he added, intended to wind down as the counterinsurgency war winds down.

This passage did not address, however, the use of signature strikes in places such as Yemen, that is, outside of what the Obama administration has acknowledged as active combat theaters. So it is not clear whether the same criteria that apply to individuated strikes outside of hot battlefields also apply to signature strikes, although that seems to us unlikely. This question is important because while the United States has not admitted as much, it appears to have been all but acting as a cobelligerent of the Yemen government in its civil war against a common enemy—using mostly airpower and, in a conventional way, targeting groups of hostile enemy forces. The president came closer to stating this directly than has any other official on the record, saying in this speech that in “Yemen, we are supporting security forces that have reclaimed territory from AQAP”—reclaimed, that is, an area the size of Maryland with 1.2 million people held and governed by the insurgent forces for nearly a year. The president went on to note this same role in assisting a coalition of African nations pushing the group al-Shabaab out of its strongholds and, even more notably, using drones and other assets to assist France in driving Al Qaeda groups out of their strongholds in Mali.

It is not clear from the speech and its accompanying materials how the president means to continue using drone strikes in such settings. It is plausible to believe, however, that in circumstances where the purpose of the strike is part of—in military support of—an allied government’s counterinsurgency campaign against terrorist and insurgent forces, the adminis-

tration will regard it as outside the framework the president articulated altogether and simply view it as conventional warfare. On the other hand, it's plausible also to believe that the new criteria are centrally about Yemen and Africa. This is also an area that is critical for the administration to flesh out further in the future.

### **Targeting of US Nationals: Defending the al-Awlaki Killing**

As we noted above, the claim that Obama played judge, jury, and executioner in killing the radical cleric Anwar al-Awlaki in a drone strike has been a potent driver of anger and angst on both the political right and the political left. Targeted killing has been at the center of a well-organized and increasingly vocal advocacy campaign against drone warfare. The strength and persistence of this campaign—and an awareness of its potential to reshape public perception over time—led Obama to address the al-Awlaki strike directly in his NDU speech and led Holder to do so in his letter to Leahy the day before.

The president actually said nothing that went beyond what Holder had earlier said in his Northwestern University speech as far as legal standards were concerned. What the president did at NDU, however, was to announce that he was declassifying the fact of the drone strike against al-Awlaki, as well as the fact of the deaths of three other Americans in drone strikes, in order to “facilitate transparency and debate.” And the president and Holder robustly set out the practical, and quite damning, facts of al-Awlaki’s “actively plotting to kill US citizens,” including with respect to the 2009 Detroit plot and the 2010 plot to bring down US-bound cargo planes—

thus moving the discussion off the purely abstract question of due process for an American citizen. Holder's letter contained more details about al-Awlaki's role and reiterated the legal standard the attorney general laid out in his Northwestern speech. The letter also noted—adding to the president's speech—that of the four US citizens known to have been killed during the Obama administration by drone strikes in targeted killing operations outside of “areas of active hostilities,” only al-Awlaki was specifically targeted. Holder said the other three, including al-Awlaki's son, were not “specifically targeted by the United States.”

Yet even as Obama strongly defended the al-Awlaki killing, he simultaneously and quite paradoxically sought to ally himself with his critics. So while he defended his actions, he also acknowledged different ways in which oversight might be made more robust, including more detailed congressional briefings, an independent review board for drone strikes, or even judicial review. On the latter two, the president was gently skeptical, raising both constitutional and practical concerns:

Going forward, I've asked my administration to review proposals to extend oversight of lethal actions outside of war-zones that go beyond our reporting to Congress. Each option has virtues in theory, but poses difficulties in practice. For example, the establishment of a special court to evaluate and authorize lethal action has the benefit of bringing a third branch of government into the process, but raises serious constitutional issues about presidential and judicial authority. Another idea that's been suggested—the establishment of an independent oversight board in the executive branch—

avoids those problems, but may introduce a layer of bureaucracy into national security decision-making without inspiring additional public confidence in the process. But despite these challenges, I look forward to actively engaging Congress to explore these and other options for increased oversight.

The president here—as with his discussion of the end of the conflict—was trying at once to represent his own policies and to align himself with his critics. The trouble is that Obama has not at all changed his substantive views—that al-Awlaki was a lawful target and that it required no court order to kill him—and he is not, in fact, friendly to proposals to judicialize or bureaucratize targeting decisions. He is willing to “engage” such ideas and “review” them, but probably not to embrace them or, were Congress to pass them, sign them into law. So at the end of the day, he is signaling openness—sort of—to something to which he is not, in fact, open so as to emphasize a values affinity with a political base alienated from him on targeting questions. But the dance is unpersuasive. And by and large, the Left is unpersuaded.

Also in the fear-alleviating vein, the president addressed, almost in passing, another point of increasing angst on both the left and the right: the targeting of US citizens on US soil. This was the subject of the Paul filibuster, after all. And the president attempted to dispense with it once and for all. “For the record,” he said, and to “dismiss some of the more outlandish claims that have been made” concerning drone strikes on US territory, “I do not believe it would be constitutional for the government to target and kill any US citizen—with a drone, or

with a shotgun—without due process, nor should any president deploy armed drones over US soil.”

The central aim of this statement is clear, although—as we noted in chapter 2—in many situations of ordinary law enforcement, US citizens are targeted and killed without *judicial* due process. Moreover, the president’s “should” was less than an ironclad commitment *never* to deploy armed drones over US soil on behalf of himself and future presidents. Just as no president would ever forswear the possibility of using tanks on American soil, Obama was rightly careful not to preclude the possibility, senators Paul and Cruz notwithstanding.<sup>8</sup>

### Denial of Territory to Terrorist Groups

Occupying a considerable space in the NDU speech was a discussion by the president of strategies for working with allied governments in Africa and elsewhere to ensure that radical Islamist insurgents do not take control of entire political spaces. Almost entirely ignored by the commentary on the speech, this “territorial denial” aspect of counterterrorism is emerging as among the new centerpieces of US counterterrorism-on-offense. Drone warfare must be understood as part of a series

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8. For an explanation of why no president can entirely exclude the possibility of drone use on US soil, see Jack Goldsmith, “Of Course President Obama Has Authority, Under Some Circumstances, to Order Lethal Force Against a U.S. Citizen on U.S. Soil (and a Free Draft Response to Senator Paul for John Brennan),” *Lawfare*, February 23, 2013, available at <http://www.lawfareblog.com/2013/02/of-course-president-obama-has-authority-under-some-circumstances-to-order-lethal-force-against-a-u-s-citizen-on-u-s-soil-and-a-free-draft-response-to-senator-paul-for-john-brennan/>.

of activities aimed at denying radical Islamist terrorist groups territory from which to operate. The president's speech contained many statements pointing to the need to deny these groups safe haven. The president spent considerable time describing the strategies by which the United States and other Western allies are working with governments in Africa and elsewhere, embracing them as allies in a common fight against these terrorist groups.

Some emerging threats arise, said the president, from groups that are "collections of local militias interested in seizing territory." Some of them might be content with that—though the destabilizing effects of radical Islamist groups seizing territory within already fragile and lightly governed spaces cannot be written off as a geopolitical matter independent of anything else. While "we are vigilant for signs that these groups may pose a transnational threat, most are focused on operating in the countries and regions where they are based." In that case, the US response will be partly one of assessing the conventional geopolitical risks of instability. The United States might subsequently provide aid ranging from security assistance to economic and development help to prevent these groups from growing stronger.

Obama also talked about addressing "underlying grievances and conflicts that feed extremism—from North Africa to South Asia." Many critics will see this as a reflexive invocation of the "root causes" thesis about terrorist groups—presumably a debate that ended on 9/11—that served as something between a justification for terrorist violence and a reason not to undertake robust counterterrorism. The criticism is not unreasonable. But in context, the best way to understand the president's comments

probably relates closely to this idea of territorial denial. Obama referred to the fact that the revolts in Arab countries have created openings for both political and social reform, but also openings for radical Islamist groups. These changes in the Arab world touch on every aspect of US interests, from geopolitics to counterterrorism, and policymakers will have to take all of those into account. Some places will “undergo chaotic change before things get better.” In all these places, however, the geopolitical interests of the United States are intertwined with the counterterrorism strategies, and they intertwine with “all the elements of national power to win a battle of wills, a battle of ideas,” including economic and development aid and efforts to assist countries and societies in transition.

Obama in the NDU speech used the word “territory” in two subtly distinct ways. First, the president referred to “remote” parts of Yemen, Somalia, and Afghanistan after the end of the US combat mission there, among other places, and said that America has an interest in ensuring that “Al Qaeda can never again establish a safe haven to launch attacks” in these nearly unreachable places—remote places where terrorists are able to train, regroup, and plot. Territory in this sense means small bits of land, often inaccessible to the United States and even to the notional sovereign states, where transnational terrorists hide. Often, as the president explained, drones are the only feasible tool for reaching them. Terrorist groups must be denied haven in this sense—whether by using drones or, preferably, by using drones and simultaneously strengthening the sovereign state and its ability and will to control its own territory.

But a second strategic meaning of “territory” has emerged in counterterrorism and has taken center stage in recent years.

This is the case in which a sovereign government faces an insurgency by an extremist group that has aspirations not just to control a tiny bit of territory for terrorist camps, but instead to take political control of whole territories, perhaps even an entire country. These groups form internal insurgencies with regional or larger sympathies. They might have terrorist wings of their own, or might be hospitable to foreign terrorist groups joining them with transnational aims. The president said that the United States acts, and will continue to act, in “partnerships with other countries” on this front—pushing back against Islamist insurgencies seeking to control territory and play host to terrorists. The president specifically framed this as territory—as “reclaimed territory from AQAP” in Yemen, for example. The United States is helping a coalition of African nations “push al-Shabaab out of its strongholds,” he said; US military aid, including drones, helped “French-led intervention to push back Al Qaeda in the Maghreb, and help[ed] the people of Mali reclaim their future.”

The strategic aim here is clear, and it is the most important area of growth in US counterterrorism-on-offense: locating drones as part of a unified geopolitical strategy that puts emphasis on ensuring that terrorist groups and Islamist insurgencies do not seize whole political territories, put entire populations under their brutal rule, and create country-size safe havens for transnational terrorist groups.

### **Detention Policy and the Future of Guantánamo**

Obama’s discussions of drones and targeting, and the future of the conflict and its end, all had much to recommend them—



though they had weaknesses too and raised plenty of questions, as we have seen. But there were parts of the speech that were just plain bad—political, naïve, and counterproductive.

Obama indulged most flamboyantly his broader tendency in the speech to align himself with critics of his own administration's policies when he spoke about detentions at Guantánamo Bay—a subject on which the NDU speech simply lacked candor and seriousness. This subject represented the speech's low point. Obama's justified frustration with congressional interference in his efforts to close the detention facility has led him in this direction before. Only a few weeks before the NDU speech, he had vented at a press conference that:

... the notion that we're going to continue to keep over one hundred individuals in a no-man's land in perpetuity, even at a time when we've wound down the war in Iraq, we're winding down the war in Afghanistan, and we're having success defeating Al Qaeda's core, we've kept the pressure up on all these transnational terrorist networks. When we transfer detention authority in Afghanistan, the idea that we would still maintain forever a group of individuals who have not been tried, that is contrary to who we are. It is contrary to our interests and it needs to stop.

...

I think all of us should reflect on why exactly are we doing this. Why are we doing this? I mean, we've got a whole bunch of individuals who have been tried who are currently in maximum security prisons around the country. Nothing's happened to them. Justice has been served. It's been done in a way that's consistent with our Constitution; consistent

with due process; consistent with rule of law; consistent with our traditions.<sup>9</sup>

The president's comments here were bewildering, because his own policies had given rise to the vast majority of the concerns about which he so earnestly spoke. Remember that Obama himself had imposed the moratorium on repatriating people to Yemen. And Obama himself had insisted that nearly fifty detainees at Guantánamo could neither be tried nor transferred. To be sure, Obama would hold such people in a domestic facility, rather than at Guantánamo Bay. But that does not seem like a difference that makes detention at Guantánamo inconsistent with our Constitution, due process, the rule of law, or our traditions.

In the NDU speech, Obama once again draped himself in the rhetoric of his left-wing critics while neither facing his own role in perpetuating non-criminal detention nor proposing a viable means of ending it. After offering legal, diplomatic, and budgetary arguments against the facility, he declared that "I have tried to close GTMO. I transferred sixty-seven detainees to other countries before Congress imposed restrictions to effectively prevent us from either transferring detainees to other countries, or imprisoning them in the United States." He complained—rightly—about the transfer restrictions and he then thumped his bin Laden-killing chest a bit: "Given my administration's relentless pursuit of Al Qaeda's leadership, there is no

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9. Barack Obama, "News Conference by the President," April 30, 2013, <http://www.whitehouse.gov/the-press-office/2013/04/30/news-conference-president>.

justification beyond politics for Congress to prevent us from closing a facility that should never have been opened.” He then announced that he was lifting the moratorium on transfers to Yemen and that he was reappointing envoys to facilitate detainee transfers.

Had he stopped there, Obama would merely have reiterated his long-standing case for doing detention somewhere other than Guantánamo—a position with which reasonable people might disagree but which surely represents a matter of long-standing administration (and campaign) commitment. But Obama then went further to make an in-principle case against the sort of detention his administration has never, in fact, promised to end:

. . . history will cast a harsh judgment on this aspect of our fight against terrorism and those of us who fail to end it. Imagine a future—ten years from now or twenty years from now—when the United States of America is still holding people who have been charged with no crime on a piece of land that is not part of our country. Look at the current situation, where we are force-feeding detainees who are being held on a hunger strike. . . . Is this who we are? Is that something our Founders foresaw? Is that the America we want to leave our children?

Our sense of justice is stronger than that.

Obama here was not-so-subtly linking the closure of Guantánamo to the speech’s broader theme, the end of the conflict:

During the past decade, the vast majority of those detained by our military were captured on the battlefield. In Iraq, we

turned over thousands of prisoners as we ended the war. In Afghanistan, we have transitioned detention facilities to the Afghans, as part of the process of restoring Afghan sovereignty. So we bring law-of-war detention to an end, and we are committed to prosecuting terrorists wherever we can.

The “glaring exception to this time-tested approach,” he said, is Guantánamo. In other words, even as his administration has defended the legality of virtually every detention ongoing at the facility, even as it contends that all of these detentions are authorized by the AUMF, Obama wags his finger at the public regarding the judgment of history and the sort of America we are going to leave our children. Yet he does so with no coherent plan to end the detentions that are taking place at the facility. The finger-wagging, after all, took place the very same day that Obama lifted his own self-imposed moratorium on Yemeni repatriations. So the finger-wagging might properly have been self-directed.

What’s more, as Obama himself recognized, “even after we take [all the] steps [he proposed] one issue will remain—just how to deal with those GTMO detainees who we know have participated in dangerous plots or attacks but who cannot be prosecuted, for example, because the evidence against them has been compromised or is inadmissible in a court of law.”

Yet for this group, Obama proposed nothing, saying only that “once we commit to a process of closing GTMO, I am confident that this legacy problem can be resolved, consistent with our commitment to the rule of law.” Obama, in other words, offered no window into the basis for this confidence. And it’s not as though these cases have never been reviewed before. The president’s own task force, set up at the outset of

the administration, identified forty-eight detainees (two of whom have since died) who meet “three core criteria”:

First, the totality of available information—including credible information that might not be admissible in a criminal prosecution—indicated that the detainee poses a high level of threat that cannot be mitigated sufficiently except through continued detention; second, prosecution of the detainee in a federal criminal court or a military commission did not appear feasible; and third, notwithstanding the infeasibility of criminal prosecution, there is a lawful basis for the detainee’s detention under the AUMF.<sup>10</sup>

That number has surely risen in the years since, as the willingness to repatriate Yemenis has waned and legal rulings have reduced the number of detainees who might plausibly face criminal trials. Whatever the real number is today, there is only one way to resolve the problem other than maintaining this group of people in custody. And that is *not* maintaining this group of people in custody. Is Obama really going to free Abu Zubaydah—against whom a criminal case has not yet materialized? What about Mohammed Qatani, the would-be September 11 hijacker who was turned away from this country’s borders in Orlando, Florida, with Mohammed Atta waiting for him on the other side of customs? Until the president is willing to say that he means to set these people free, pieties about what sort of country we are, however earnestly felt, ring hollow and are beneath the rest of the speech. Because whether

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10. Guantánamo Review Task Force, *Final Report*, January 22, 2010, available at <http://www.justice.gov/ag/guantanamo-review-final-report.pdf>.

Obama faces it squarely or not, we are, in fact, the sort of country that detains people under the law of war, rather than letting them commit acts of terrorism against us.

And more to the point, he is the kind of president who does so.

Detention is another reason it might be very difficult to declare the end of the conflict to which the speech aspires. For once again, the detainees get a vote as to whether they are still at war with the United States. And some of them manifestly still are. Obama's unwillingness, even as he insists on a return to the normalcy of peacetime, to begin articulating the steps that true peace would compel—not just the closure of the facility but the freeing of its detainees—suggests once again that at least part of him imagines something less than real peace is at hand.

## Conclusion

Obama had words on other subjects, too. On the cluster of closely linked issues that include secrecy and transparency, surveillance and privacy, reporting and journalism, classified information, leaks and leak prosecutions, he once again tried to straddle a line between defending an administration that has, in fact, been aggressive and sharing values with a base that objects to that aggressiveness. The dance, once again, left a lot of people cold—and rightly so. For Obama consistently put himself on both sides of the issues. We must, he said,

... keep information secret that protects our operations and our people in the field. To do so, we must enforce consequences for those who break the law and breach their com-

mitment to protect classified information. But a free press is also essential for our democracy. . . . I'm troubled by the possibility that leak investigations may chill the investigative journalism that holds government accountable.

Inhibiting investigative journalism that holds government accountable—or, at least, the sources on which that journalism relies—is precisely the point of prosecuting leakers of classified information. And troubled though the president might be, the briefs filed by his administration express no sense of doubt or qualification when it comes either to the prosecution of leakers or to the demands that reporters provide information to investigators. Yet the president also called for a “media shield law” and for the attorney general to review guidelines for “investigations that involve reporters.” It was largely a continuation of a pattern in the speeches of self-congratulation for openness from an administration that is not, in fact, especially open.

In this case, it also reflected a broad pattern within this one speech of trying to straddle lines. Defending secrecy while allying himself with the reporters who erode it is of a piece with defending detention while decrying it and insisting that we're not the sort of country that does it. It is also of a piece with promising to end a war even as he also promises to continue its prosecution. At its best, the speech promised a plausible bridge across these apparent antinomies—as when the president seemed to describe a transitional period between war and peace with targeting standards that would be lawful across that transition. At its worst, however, the speech sought to ally the president with his critics at the risk of delegitimizing his own

policies and the men and women who have to implement them. Whether it will be remembered principally for the virtues or principally for the vices will largely depend on whether the transition he described materializes in fact and how the government manages it, if and when it does.

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