# 15-2956

IN THE

United States Court of Appeals

FOR THE

Second Circuit

AMERICAN CIVIL LIBERTIES UNION and AMERICAN CIVIL LIBERTIES UNION FOUNDATION,

*Plaintiffs–Appellants*,

– v. –

UNITED STATES DEPARTMENT OF JUSTICE, including its component OFFICE OF LEGAL COUNSEL, UNITED STATES DEPARTMENT OF DEFENSE, and CENTRAL INTELLIGENCE AGENCY,

*Defendants–Appellees*.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

**JOINT APPENDIX: VOLUME 2 OF 3 (JA261-JA552)**

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***ACLU v. DOJ*, No. 15-2956 (2d Cir.)**

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## To the Declaration of Colin Wicker

1 **SENATOR LEVIN:** Next, Michael Hayden, former CIA Director, on May
2 3, 2011, said that "What we got, the original lead information, began with
3 information from CIA detainees at black sites."
4 The Chairman and I issued, in the same statement, the following -- that
5 the statement of the former attorney general, Michael Mukasey, was wrong.
6 Do you have any information to disagree with our statement?
7 **MR. BRENNAN:** I do not.
8 **SENATOR LEVIN:** The third statement that we quoted in our report --
9 out of Michael Hayden, former CIA Director: "What we got, the original lead
10 information, began with" -- excuse me; that was Mr. *Hayden* that I was
11 asking you about, not Mr. Mukasey. Your answer is the same, I assume?
12 **MR. BRENNAN:** Yeah, I do not know. I'm unaware.
13 **SENATOR LEVIN:** You don't have any information to the contrary?
14 **MR. BRENNAN:** Right.
15 **SENATOR LEVIN:** *Now,* Michael Mukasey, former attorney general, Wall
16 Street Journal: "Consider how the intelligence that led to Bin Laden came to
17 hand; it began with a disclosure from Khalid Sheikh Mohammed, who broke
18 like a dam under pressure of harsh interrogation techniques that included
19 waterboarding. He released a torrent of information, including eventually
20 the name -- the *name* -- of a trusted courier of bin Laden."
21 Our statement -- that of the Chairman and myself -- is that that

1 statement is wrong. Do you have any information to the contrary?

2 **MR. BRENNAN:** Senator, my impression earlier on was that there was
3 information that was provided that was useful and valuable, but, as I said,
4 I've read now the first volume of your report, which raises questions about
5 whether any of that information was accurate.

6 **SENATOR LEVIN:** But I'm now referring not to the report, but to the
7 statement that Chairman Feinstein and I issued on April 27, 2012. We flat-
8 out say that those statements are wrong.

9 **MR. BRENNAN:** Right.

10 **SENATOR LEVIN:** Do you have any basis to disagree with us?

11 **MR. BRENNAN:** I do not.

12 **SENATOR LEVIN:** Will you, when you become the CIA Director,
13 assuming you are confirmed, take the statement that we have issued, and
14 tell us whether or not you disagree with any of these statements that we
15 have made about those statements of those three men; will you do that if
16 you are confirmed?

17 **MR. BRENNAN:** I will look and consider that request, Senator. As I
18 said, the report that this Committee has put together, I need to take a look
19 at what CIA's response is to it, and that report raises serious questions about
20 whether any worthwhile intelligence came from these individuals.

21 **SENATOR LEVIN:** Will you include, in your review, a review of our joint

1 statement and tell us whether, after your review, you disagree with anything

2 that we've said; will you do that?

3 **MR. BRENNAN:** I would be happy to.

4 **SENATOR LEVIN:** Now, there's one final point, and that has to do with

5 a very famous document. And that has to do with a cable that came in that

6 relates to the so-called "Atta" matter. Are you familiar with that issue?

7 **MR. BRENNAN:** Yes, I am, Senator.

8 **SENATOR LEVIN:** The issue here is whether or not there ever was a

9 meeting in Prague between Mohammed Atta, who is one of the people who

10 attacked the Trade Center, and the Iraqi Intelligence.

11 The cable that came in has been classified by the CIA, even though the

12 report of -- this is what the CIA did to the cable. *(Holds up a piece of paper*

13 *containing text that has been mostly redacted.)*

14 Now, will you check with the Czechs for the source of this cable and

15 see if they have any objection to the release of this cable relative to the

16 report of that meeting?

17 **MR. BRENNAN:** Yes, Senator. And since our courtesy call, I have

18 looked into this issue, and I know that you and Director Petraeus were

19 involved in a discussion on this. And I would be happy to follow up on it.

20 But there does seem to be some concerns about release of the cable.

21 **SENATOR LEVIN:** The unclassified report of the Intelligence Committee

1 -- which was not classified; was not redacted by the CIA -- made at least four
2 references to the Czech Intelligence Service providing the CIA with reporting,
3 based on a single source, about this alleged meeting, which never took
4 place. We *knew* it never took place. And yet, repeatedly -- particularly, the
5 Vice President -- made reference that there was a report of a meeting
6 between these two.

7 Now, it's very significant for the historical record here. We went to war
8 based on allegations that there was a relationship between Iraq and the
9 attackers -- the 9/11 attackers. It's very important that this cable be
10 declassified. The only reason to keep it redacted and classified, frankly, is to
11 protect an administration, not to protect sources and methods, because the
12 sources and methods -- if you will check with the Czechs, I'm sure they will
13 tell you they have no objection to the release of that cable.

14 My question to you is will you check with the Czechs, if you are
15 confirmed, and determine whether they have any objection to the release of
16 the cable, which makes reference to them?

17 **MR. BRENNAN:** Absolutely, Senator; I will.

18 **SENATOR LEVIN:** Thank you. My time is up.

19 **VICE CHAIRMAN CHAMBLISS:** Thank you, Senator.

20 Senator Coats?

21 **SENATOR COATS:** Thank you, Mr. Chairman.

1 Mr. Brennan, we acknowledge your experience, and I think that
2 experience is important to have for the position that, if confirmed, you will
3 occupy. I acknowledge your service to the country and your experience in
4 this field. I think the President used that as one of the criteria, of course.
5 You and I, when we talked earlier in a private talk, talked about the
6 relationship that you want to have with this Committee -- not just with the
7 Chairman and the Vice Chairman, but with all the Committee Members. And
8 I appreciate your answers on that, and you addressed it again today, in
9 terms of a potential trust deficit or -- you said that that's "wholly
10 unacceptable" and that you would give straight answers and be blunt and
11 candid.
12 And you've been that today. It's not a prerequisite to be Mr.
13 Congeniality to occupy the position of Director of CIA, so I don't hold that as
14 -- in fact, it would be probably a red flag for me if somebody *did* have that
15 award and wanted your position.
16 The kind of issues that you have to deal with require straight talk,
17 straight answers, and getting to the chase real quick. You said it's the "New
18 Jersey" way. I'll accept that; it's bipartisan. Governor Christie exhibits the
19 same kind of responses and has a pretty high approval rating.
20 So, we will go forward with taking you at your word that we'll have the
21 kind of relationship that we can have a blunt, straightforward, fully

1 disclosed, working relationship. I think it's critical to our ability to provide
2 oversight, our ability to have the right kind of relationship with the Agency
3 so we know where each other is and can move forward together in terms of
4 what needs to be done to provide the intelligence necessary to protect the
5 American people.

6 So, I wanted to say that. I'd like to follow up a little bit more on the
7 leaks question because I have a few more questions. I was going to delve
8 into that in more detail, but it's already been discussed by Senator Risch and
9 others. But let me just ask a couple of other questions to clear some things
10 up in my mind.

11 My understanding is that the Associated Press had information relative
12 to the intercept of a planned operation that perhaps had something to do
13 with airlines and explosive devices; that apparently they had that for a few
14 days and then either were about to or had gone ahead and released it. I'm
15 assuming that your *then* calling the conference call was in response to what
16 they had just released; is that correct?

17 **MR. BRENNAN:** Yes. A number of news networks have put out
18 information about this. Yes.

19 **SENATOR COATS:** And you expressly arranged this teleconference for
20 what exact purpose?

21 **MR. BRENNAN:** There were a number of people who were going to be

1 going out on the news shows that night who were asking about the reports
2 about this intercepted IED and wanted to get some context, as far as the
3 nature of the threat, and also were asking questions about -- "Well, you said,
4 and the U.S. Government said, that there was no threat during the
5 anniversary of the bin Laden take-down, so how could there not have been a
6 threat if, in fact, this IED was out there?"
7 **SENATOR COATS:** The question I have is this -- because based on what
8 you said and what we have learned, you then, in that teleconference, talked
9 about the fact that, in answering the question, "How do we know this?" -- I
10 think the quote that came across from Richard Clarke was, "never came
11 close, because they had insider information, insider control." And you had
12 referenced that you had said that to the group.
13 **MR. BRENNAN:** No, what I said was inside control of the plot, and that
14 the device was never a threat.
15 **SENATOR COATS:** Okay, "insider control."
16 **MR. BRENNAN:** No, I said "*inside* control" -- not "insider."
17 **SENATOR COATS:** Okay, "inside control." The Associated Press never
18 made any mention about inside control. Why was it necessary, then, to add
19 that? Why couldn't you have just simply said, "We've intercepted a plot -- it's
20 been a successful interception"? Because once the word "inside control" got
21 out, then all the speculation -- and correct -- was that that "inside control"

1 was interpreted as meaning "we've got somebody inside."

2 And the result of that was the covert action operation had to be

3 dissolved because the control agent, the inside person, was -- well,

4 essentially, the plot was exposed, and therefore, the whole operation had to

5 be dissolved.

6 **MR. BRENNAN:** Well, Senator, I must caution that there are still

7 elements of this event that remain classified and that we cannot talk about

8 in public. There was a lot of information that came out immediately after AP

9 broke that story. Unfortunately, there was a hemorrhaging of information

10 and leaks.

11 Again, what I said was that there was inside control, because what I

12 needed to do, and what I said to the American public in open networks the

13 following morning, is that during the anniversary period of the bin Laden

14 take-down, when we said to the American public that there were no active

15 plots, no threat to the American public, that we were aware of, that was

16 specific and credible.

17 Well, why was not this IED that we had intercepted -- why wasn't that a

18 threat? Well, because we had inside control of the plot, which means any

19 number of things -- in terms of environmentally, working with partners,

20 whatever else. It did not reveal any classified information. And as I said, we

21 have to be careful here because there are still operational elements of this

1 that remain classified.

2 **SENATOR COATS:** And that's appropriate, but, you know, it was just a
3 couple weeks later when Reuters reported publicly, and I quote, "As a result
4 of the news leaks, U.S. and allied officials told Reuters that they were forced
5 to end an operation which they had hoped could have continued for weeks
6 or longer."

7 **MR. BRENNAN:** There were a lot of things that were reported by the
8 press -- accurate, inaccurate -- a whole bunch of stuff, Senator. So I would
9 not put stock in the types of things that you might be reading there. I know
10 that I engaged for an extended period of time both before that leak and
11 afterward to make sure we were able to mitigate any damage from that
12 initial leak, and the subsequent leaks, of classified information.

13 **SENATOR COATS:** So, you're essentially saying that this Reuters report
14 may or may not be accurate, but had no link to what was disclosed to Mr.
15 Clarke and then what he said shortly thereafter on ABC News?

16 **MR. BRENNAN:** What I'm saying, Senator, is that I'm very comfortable
17 with what I did and what I said at that time to make sure that we were able
18 to deal with the unfortunate leak of classified information.

19 **SENATOR COATS:** How frequently did you have to pull groups like this
20 together in order to, in a sense, put out authorized, or at least what you
21 think is appropriate, news for the correct purposes?

1 **MR. BRENNAN:** Senator, frequently, if there is some type of event, or if
2 there's a disrupted terrorist attack, whether it's some "underwear bomber" or
3 a disrupted IED, or a printer bomb, or whatever else, we will engage with the
4 American public. We'll engage with the press. We'll engage with individuals
5 who are experienced professional counterterrorism experts who will go out
6 and talk to the American public.

7 We want to make sure that there are not misrepresentations, in fact, of
8 the facts, but at the same time, do it in a way that we're able to maintain
9 control over classified material.

10 **SENATOR COATS:** Now, it does occur, I assume, or it is possible, to
11 put out an authorized leak; is that correct?

12 **MR. BRENNAN:** No. Those are oxymorons: "*authorized leak*." It is
13 something that would have to be declassified, disclosed, and done in a
14 proper manner.

15 **SENATOR COATS:** And this, in no way, fell into that category?

16 **MR. BRENNAN:** Absolutely not. I was asked to engage with these
17 individuals by the White House Press Office. I talked with them about the
18 interception. No, it was not.

19 **SENATOR COATS:** There is a provision in last year's Intelligence
20 Authorization Bill that requires a report to this Committee of any authorized
21 leak; so, you are aware of that?

1 **MR. BRENNAN:** I'm aware of the provision, yes, that's been put
2 forward.
3 **SENATOR COATS:** And no report has come forward, so I assume there
4 haven't been any authorized leaks in the past year?
5 **MR. BRENNAN:** I think, you know, what we want to do is to make sure
6 if there's going to be any disclosures of classified information, that this
7 Committee is going to be informed about that. So we will adhere to the
8 provision that was in that Intel Authorization Bill.
9 **SENATOR COATS:** Thank you.
10 Mr. Chairman, my time is expired.
11 **VICE CHAIRMAN CHAMBLISS:** Senator Udall?
12 **SENATOR UDALL:** Thank you, Mr. Vice Chairman.
13 Good afternoon, Mr. Brennan. I can't help but -- observing that Senator
14 Coats talked about being governor of New Jersey, I think being governor of
15 Jersey is a piece of cake compared to being the Director of the CIA.
16 I hope Governor Christie won't take that in the wrong way, by the way,
17 because I have great respect for him.
18 **MR. BRENNAN:** I have no plans to run against Governor Christie.
19 *(LAUGHTER.)*
20 **SENATOR UDALL:** Thank you for your service. Thank you for your
21 willingness to continue serving as the head of the CIA. I have some

1 comments I'd like to share with you, and then of course I'll direct some
2 questions your way.
3 You've said that President Obama believes that, done carefully,
4 deliberately, and responsibly, we can be more transparent and still ensure
5 our nation's security. I absolutely agree. The American people have the
6 right to know what their government does on their behalf.
7 Consistent with our national security, the presumption of transparency
8 should be the rule, not the exception, and the government should make as
9 much information available to the American public as possible.
10 So when we, on the Committee, and we, as Members of Congress, push
11 hard for access to the legal analysis justifying the authority of the Executive
12 Branch to lethally target Americans using drones, for instance, it erodes the
13 government's credibility of the American people.
14 I want to tell you I'm grateful to the President for allowing Members of
15 this Committee to briefly use some of the legal opinions on targeting
16 American citizens. This is an important first step. But I want to tell you, I
17 think there's much more to be done in that regard. And you've heard that
18 from my colleagues here today.
19 I've long believed that our government also has an obligation to the
20 American people to face its mistakes transparently, help the public
21 understand the nature of those mistakes, and correct them. The next

1 Director to the CIA has an important task ahead in this regard.

2 Mr. Brennan, I know you're familiar with the mistakes that I'm referring

3 to. We've already discussed those here today to some extent. They're

4 outlined in the Committee's 6,000-page report on the CIA's detention and

5 interrogation program, based on a documentary view of over 6 million pages

6 of CIA and other records, and including 35,000 footnotes.

7 I believe that this program was severely flawed. It was mismanaged.

8 The enhanced interrogation techniques were brutal, and, perhaps most

9 importantly, it did not work. Nonetheless, it was portrayed to the White

10 House, the Department of Justice, the Congress, and the media as a program

11 that resulted in unique information that saved lives.

12 And I appreciate the comments you made earlier about the

13 misinformation that may have flowed from those who were in charge of this

14 program to people like yourself. Acknowledging the flaws of this program is

15 essential for the CIA's long-term institutional integrity, as well as for the

16 legitimacy of ongoing sensitive programs. The findings of this report

17 directly relate to how other CIA programs are managed today.

18 As you said in your opening remarks, and you so powerfully referenced

19 the Memorial Wall, all CIA employees should be proud of where they work,

20 and of all the CIA's activities. I think the best way to ensure that they're

21 proud is for you to lead in correcting the false record, and instituting the

1 necessary reforms that will restore the CIA's reputation for integrity and
2 analytical rigor. The CIA cannot be its best until the leadership faces the
3 serious and grievous mistakes of this program.

4 So, if I might, let me turn to my first question. Inaccurate information
5 on the management operation effectiveness of the CIA's detention and
6 interrogation program was provided by the CIA to the White House, the DoJ,
7 Congress, and the public. Some of this information is regularly and publicly
8 repeated today by former CIA officials, either knowingly or unknowingly.

9 And although we now know this information is incorrect, the accurate
10 information remains classified, while inaccurate information has been
11 declassified and regularly repeated.

12 And the Committee will take up the matter of this report's
13 declassification separately. But there's an important role I think the CIA can
14 play in the interim: CIA has a responsibility to correct any inaccurate
15 information that was provided to the previous White House, Department of
16 Justice, Congress, and the public, regarding the detention and interrogation
17 program.

18 So, here's my question: do you agree that the CIA has this
19 responsibility? And I'd appreciate a yes or no answer.

20 **MR. BRENNAN:** Yes, Senator.

21 **SENATOR UDALL:** Thank you for that. Again, yes or no -- will you

1 commit to working with the Committee to correct the public and internal
2 record regarding the detention and interrogation program within the next 90
3 days?

4 **MR. BRENNAN:** Senator, I think it's only fair of me to say that I am
5 looking forward to CIA's response to that report so that we're assured that
6 we have both the Committee's report, as well as CIA's comments on it. And I
7 will be getting back to you, yes.

8 **SENATOR UDALL:** I can understand you want to make sure you have
9 accurate time. I understand, as well, that the CIA will finish their analysis by
10 the middle of February. And so, I hope we can work within that time frame.

11 And I know that in your answers to the Committee in preparing for this
12 hearing, you wrote that "the CIA, in all instances, should convey accurate
13 information to Congress. When an inaccurate statement is made and the CIA
14 is aware of the inaccuracy, it must immediately correct the record. And
15 certainly, I would do so, if I were Director."

16 So, I take your answer in the spirit of the written testimony you
17 provided to the Committee. Let me turn to the report and its eventual
18 declassification, if I might.

19 I don't think it has to be difficult -- that is, the declassification -- for
20 these reasons: the identities of the most important detainees have already
21 been declassified; the interrogation techniques themselves have been

1 declassified; the application of techniques to detainees has been declassified
2 to some extent, with a partial declassification of the inspector general
3 report; and the intelligence was declassified to a significant extent when the
4 Bush administration described plots it claimed were thwarted as a result of
5 the program.

6 So long as the report does not identify any undercover officers, or
7 perhaps the names of certain countries, can you think of any reason why the
8 report could not be declassified with the appropriate number of redactions?
9 Can you answer yes or no to that question?

10 **MR. BRENNAN:** I would have to take that declassification request under
11 serious consideration, obviously. That's a very weighty decision, in terms of
12 declassifying that report, and I would give it due consideration. But there
13 are a lot of considerations that go into such decisions.

14 **SENATOR UDALL:** I want to, again, underline that I think this would
15 strengthen the CIA. It would strengthen our standing in the world. America
16 is at its best, as we discussed earlier today, when it acknowledges its
17 mistakes, and learns from those mistakes.

18 And I want to quote Howard Baker, who I think we all admire in this
19 room. He spoke about the Church Committee, which he, you know, was an
20 important effort on the part of this Congress. And there was much broader
21 criticism of the CIA in that Church Committee process. And the CIA came

1 out of that stronger and more poised to do what it's supposed to do.

2 So I want to quote Howard Baker. He wrote: "In all candor, however,

3 one must recognize that an investigation such as this one" -- he's referencing

4 the Church Committee, but I think it could apply to what *this* Committee has

5 done, as well -- "of necessity, will cause some short-term damage to our

6 intelligence apparatus. A responsible inquiry, as this has been, will, in the

7 long run, result in a stronger and more efficient Intelligence Community.

8 "Such short-term inquiry will be outweighed by the long-term benefits

9 gained from the restructuring of the Intelligence Community with more

10 efficient utilization of our intelligence resources."

11 So, again, Mr. Brennan, I look forward to working with you to complete

12 these tasks that we've outlined here today. In the long run, I have faith in

13 the CIA like you have faith in the CIA that it will come out of this study

14 stronger and poised to meet the 21st Century intelligence challenges that are

15 in front of us. Thank you again for your willingness to serve.

16 **MR. BRENNAN:** Thank you, Senator.

17 **CHAIRMAN FEINSTEIN:** Thank you, Senator Udall.

18 Senator Rubio?

19 **SENATOR RUBIO:** Thank you. Thank you, Mr. Brennan, for being here

20 with us today, and congratulations on your nomination.

21 I wanted to ask, in the 2007 CBS interview, you said that information

1 obtained in interrogations have saved lives. In September of 2011, you said

2 in a speech at Harvard, that whenever possible, the preference of the

3 administration is to take custody of individuals so that we could obtain

4 information which is, quote, "vital to the safety and security of the American

5 people."

6 So, obviously, you believe that interrogations of terrorists can give us

7 information that could prevent attacks in the future?

8 **MR. BRENNAN:** Absolutely agree.

9 **SENATOR RUBIO:** But you don't believe the CIA should be in the

10 business of detention, correct?

11 **MR. BRENNAN:** I agree.

12 **SENATOR RUBIO:** So, who should be?

13 **MR. BRENNAN:** Well, there are a number of options -- U.S. military,

14 which maintains an active interrogation program, detention program; the

15 FBI, as part of its efforts on counterterrorism; and our international partners,

16 and working with them. And that's where, in fact, most of the interrogations

17 are taking place of terrorists who have been taken off of the battlefields in

18 many different countries.

19 **SENATOR RUBIO:** So there are active interrogations occurring?

20 **MR. BRENNAN:** Absolutely -- every day.

21 **SENATOR RUBIO:** Okay. About the foreign partners that you talk

1 about, have you talked to folks in the CIA about their impressions of the
2 quality of information we're getting from our foreign partners?
3 **MR. BRENNAN:** Yes, on a regular basis.
4 **SENATOR RUBIO:** Would it surprise you to know that some of them
5 have indicated to us repeatedly, over the last couple of years that I've been
6 here, that the information we get directly is much better than anything we
7 get from our foreign partners on some of these issues?
8 **MR. BRENNAN:** Right. And that's why we work with our foreign
9 partners so that we can have direct access to these individuals that have
10 been detained.
11 **SENATOR RUBIO:** Well, I'll tell you why I'm concerned. Ali Ani al-Harzi
12 -- I think is how I pronounce his name -- he's a suspect in the Benghazi
13 attack, and the Tunisians detained him, correct?
14 **MR. BRENNAN:** Yes, he was taken into custody by the Tunisians.
15 **SENATOR RUBIO:** Did we not ask for access to him, to be able to
16 interrogate him and find out information?
17 **MR. BRENNAN:** Yes. And the Tunisians did not have a basis in their
18 law to hold him.
19 **SENATOR RUBIO:** So they released him?
20 **MR. BRENNAN:** They did.
21 **SENATOR RUBIO:** Where is he? We don't know?

1 **MR. BRENNAN:** He's still in Tunisia.

2 **SENATOR RUBIO:** That doesn't sound like a good system of working

3 with our foreign partners.

4 **MR. BRENNAN:** No, it shows that the Tunisians are working with their

5 rule of law, as well -- just the way we do.

6 **SENATOR RUBIO:** Well, we have someone who was a suspect in the

7 potential in the attack on Benghazi. They didn't give us access to him and

8 we don't have any information from him.

9 **MR. BRENNAN:** We work with our partners across the board, and when

10 they are able to detain individuals, according to their laws, we work to see if

11 we can have the ability to ask them questions -- sometimes indirectly and

12 sometimes directly.

13 **SENATOR RUBIO:** So your point is that Tunisian law did not allow them

14 to hold him, and therefore they let him go before we could get there to talk

15 to him?

16 **MR. BRENNAN:** And we didn't have anything on him, either, because if

17 we did, then we would've made a point to the Tunisians to turn him over to

18 us. We didn't have that.

19 **SENATOR RUBIO:** What role should the CIA play in interrogations?

20 **MR. BRENNAN:** The CIA should be able to lend its full expertise, as it

21 does right now, in terms of -- in support of military interrogations, FBI

1 debriefings and interrogations, and our foreign partner debriefings. And

2 they do that on a regular basis.

3 **SENATOR RUBIO:** And so, what's the best setting to do that in? For

4 example, if a suspected terrorist is captured, and we think we can obtain

5 information from them, where would they go? Where do you suggest that

6 they be taken, for example; what's the right setting for it?

7 **MR. BRENNAN:** There are many different options, as far as where they

8 go. Sometimes it is with -- foreign partners, they put the individuals in their

9 jails and in their detention facilities according to their laws, and people can

10 access that.

11 We take people, as we've done in the past, and put them on naval

12 vessels and interrogate them for an extended period of time.

13 **SENATOR RUBIO:** Okay. So you think that's the best setting -- the

14 naval vessel?

15 **MR. BRENNAN:** No, I think --

16 **SENATOR RUBIO:** -- from our perspective, leaving aside the foreign

17 partners for a second -- for *us*.

18 **MR. BRENNAN:** I think each case requires a very unique and tailored

19 response. And that's what we've done.

20 Whether somebody is picked up by a foreign partner, whether

21 somebody is picked up on the high seas, or anywhere else, what we need to

1 do is see what the conditions are, what we have as far as the basis for that
2 interrogation -- what type of legal basis we have for that. So it's very much
3 tailored to the circumstances.

4 **SENATOR RUBIO:** When we detain a suspected terrorist, the purpose
5 of the interrogation -- and I think you'd agree with this statement -- the
6 purpose of an interrogation is to develop information that could be used to
7 disrupt terrorist activities and prevent attacks, correct?

8 **MR. BRENNAN:** Without a doubt.

9 **SENATOR RUBIO:** It's not to lay the case for a criminal conviction.

10 **MR. BRENNAN:** Well, I think, you know, you want to take the person off
11 the battlefield. You also want to get as much intelligence as possible. You
12 don't just want to get the information from somebody and then send them
13 off. You need to be able to do something with them. And we've put people
14 away for 99 years -- for life -- so that, in fact, they're not able to hurt
15 Americans ever again.

16 So, what you want to do is get that intelligence, but also, at the same
17 time, put them away so that justice can be done.

18 **SENATOR RUBIO:** I understand. But the number one priority, initially,
19 is not necessarily to protect the record for a criminal prosecution; it's to
20 obtain timely information --

21 **MR. BRENNAN:** Absolutely right.

1 **SENATOR RUBIO:** So we can act correctly --

2 **MR. BRENNAN:** Absolutely right.

3 **SENATOR RUBIO:** Priority number two is to take them off the

4 battlefield to ensure they can't attack us in the future.

5 **MR. BRENNAN:** Right. It's not an either-or, but I agree with you.

6 **SENATOR RUBIO:** Why shouldn't we have places where we interrogate

7 people; for example, Guantanamo? Why shouldn't we have a place to take

8 people that we obtain? 'Cause is it not an incentive to kill them rather than

9 to capture them, if we don't have a --

10 **MR. BRENNAN:** No, it's never an incentive to kill them. And any time

11 that we have encountered somebody, we have come up with, in fact, the

12 route for them to take in order to be interrogated, debriefed, as well as

13 prosecuted.

14 **SENATOR RUBIO:** So, where would we -- but why is it a bad idea to

15 have a place that we can take them to?

16 **MR. BRENNAN:** It's not a bad idea. We need to have those places.

17 And again, sometimes it might be overseas, sometimes it might be a

18 naval vessel, a lot of times it's back here in the States, where we bring

19 someone back because we, in fact, have a complaint on them or an

20 indictment on them, and then we bring them into an Article 3 process. And

21 so we can elicit information from them and put them away behind bars.

1 **SENATOR RUBIO:** Is the Article 3 process, in your mind, an ideal way
2 to develop this kind of information, or aren't there limitations in the Article 3
3 process?

4 **MR. BRENNAN:** I'm very proud of our system of laws here and the
5 Article 3 process. Our track record is exceptionally strong over the past
6 dozen years, couple dozen years; that so many terrorists have been, in fact,
7 successfully prosecuted and will not --

8 **SENATOR RUBIO:** No, I understand, but in terms of -- our first priority
9 is to develop information --

10 **MR. BRENNAN:** Absolutely; the FBI does a great job.

11 **SENATOR RUBIO:** But an Article 3 setting is not the most conducive to
12 that.

13 **MR. BRENNAN:** I would disagree with that.

14 **SENATOR RUBIO:** Well, they're immediately advised about not
15 cooperating and turning over information that would incriminate them.

16 **MR. BRENNAN:** No. Again, it's tailored to the circumstances.
17 Sometimes an individual will be Mirandized. Sometimes they will not be
18 Mirandized right away. Mirandizing an individual means only that the
19 information that they give before then cannot be used in Article 3 court.

20 But, in fact, the FBI do a great job, as far as listing information after
21 they're Mirandizing them, and so they can get information as part of that

1 type of negotiation with them, let them know they can in fact languish
2 forever, or we can in fact have a dialogue about it intelligently.
3 **SENATOR RUBIO:** Just one last point, and I'm not going to use all my --
4 I only have a minute left.
5 This Harzi case that I talked about -- you're fully comfortable with this
6 notion that because the Tunisians concluded that they didn't have a legal
7 basis to hold him, we now lost the opportunity to interrogate someone that
8 could've provided us some significant information on the attack in Benghazi?
9 **MR. BRENNAN:** Senator, you know, this country of America really
10 needs to make sure that we are setting a standard and an example for the
11 world, as far as the basis that we're going to, in fact, interrogate somebody,
12 debrief somebody. We want to make sure we're doing it in conjunction with
13 our international partners.
14 We also want to make sure that we have the basis to do it, so that we
15 don't have to face, in the future, challenges about how we, in fact, obtained
16 the --
17 **SENATOR RUBIO:** What is that law? You keep on talking about the
18 basis of our law; what law exactly are you talking about in terms of the basis
19 of detaining someone? When you say that we want to make sure that we
20 have a basis to -- because you said that --
21 **MR. BRENNAN:** Well, that's right.

1 **SENATOR RUBIO:** Based on what? Which law are we talking about?

2 **MR. BRENNAN:** Well, it all depends on the circumstance. Are we
3 talking about law of war detention authority, which the U.S. military has? Are
4 you talking about Article 3 authority that the FBI has?

5 **SENATOR RUBIO:** Right.

6 **MR. BRENNAN:** The CIA does not have, by statute, any type of
7 detention authority.

8 **SENATOR RUBIO:** The point I'm trying to get at is we don't -- the truth
9 of the matter is we don't know Harzi knew anything about the Benghazi
10 attack.

11 We don't know if he knew about future attacks that were being planned
12 by the same people, because we never got to talk to him because Tunisia
13 said their laws wouldn't let them hold him, which is an excuse we've heard in
14 other parts of the world, as well.

15 And that doesn't concern you, that we don't -- that we weren't able to
16 obtain this information?

17 **MR. BRENNAN:** We press our partners and foreign governments to
18 hold individuals and to allow us access to it. Sometimes their laws do not
19 allow that to happen. I think the United States government has to respect
20 these governments' right to, in fact, enforce their laws appropriately.

21 What we don't want to do is to have these individuals being held in

1 some type of custody that's extrajudicial.

2 **SENATOR RUBIO:** Okay, thank you.

3 **CHAIRMAN FEINSTEIN:** Thank you, Senator Rubio.

4 Senator Warner?

5 **SENATOR WARNER:** Thank you, Madam Chairman. Thank you, again,

6 Mr. Brennan, for your testimony today.

7 One of the things that I think we've heard from a number of my

8 colleagues, and we had this discussion when we discussed the Committee's

9 study on detention and interrogation, is, should you be confirmed, how do

10 we ensure that the CIA Director is always going to be well-informed?

11 And particularly, to a -- we've questioned you today about a number of

12 key sensitive programs. The nature of the Agency's work is that a lot of

13 these programs are disparate, varied. And there needs to be some ability to

14 measure *objectively* the success of these programs; not simply by those

15 individuals that are implementing the programs.

16 And while this is not the setting to talk about any individual of these

17 programs, I guess what I'm interested in is pursuing the conversation we

18 started about how you might set up systems so that, to the best extent

19 possible, as the CIA Director, you're going to make sure what's going on, get

20 an accurate, objective review, and not simply have the information that

21 simply bucks up through the system?

1 **MR. BRENNAN:** Yes, that's an excellent point, Senator -- one that I'm
2 very concerned about. In order to have objective measures of effectiveness,
3 the metrics that you want to be able to evaluate the worth of a program, you
4 cannot have the individuals who are responsible for carrying it out. As hard
5 as they might try, they cannot help, I think, view the program and the results
6 in a certain way. They become witting or unwitting advocates for it.
7 So what we need to do is to set up some type of system where you can
8 have confidence that those measures of effectiveness are being done in the
9 most independent and objective way. And that's one of the things that I
10 want to make sure I take a look at, if I were to go to the Agency.
11 **SENATOR WARNER:** Again, the nature of so many programs -- all very
12 sensitive in nature; you have to have almost, as we discussed, probably not
13 an IG type vehicle, something that is more run out of the Director's Office,
14 but you've got to have some kind of red team that's going to be able to
15 check this information out to make sure you've -- so that you hear colleagues
16 here press on what you have done, or could have done, or should have done,
17 or if you had that oversight, you've got to have that objective information to
18 start with.
19 **MR. BRENNAN:** Absolutely. I tend to have a reputation for being a
20 detailed person. And having been an analyst in an intelligence office for
21 many years, I need to see the data. I cannot rely just on some interpretation

1 of it. So, I do very much look forward to finding a way that the Director's
2 Office can have this ability to independently evaluate these programs so that
3 I can fairly and accurately represent them to you. I need to be able to have
4 confidence, myself.

5 **SENATOR WARNER:** As you know -- and we all know -- our country is
6 grappling with enormous fiscal challenges. And that means, well, national
7 security remains our most essential requirement for our national
8 government. Everything's going to have to able to be done in a fiscally
9 constrained period.

10 You know, how are you going to think about thinking through those
11 challenges on where cuts, changes need to be made? And if you can
12 specifically outline -- one of the concerns that I have is, kind of, division of
13 labor and appropriate roles between the CIA and the DoD SOCOM
14 operations, fields where that kind of potential build-up in that capacity is --
15 how do we get that done in these tight budget times?

16 If you could address both of those, I'd appreciate it.

17 **MR. BRENNAN:** In a fiscally constrained environment, we have to make
18 sure, more than ever, that every single dollar that's dedicated to intelligence
19 is going to be optimized. And in fact, if sequestration kicks in, what I
20 wouldn't want to do as CIA Director is do the salami-slicing, which is, you
21 know, five percent off the top of gross, all programs, because all the

1 programs are not --

2 **SENATOR WARNER:** One of the reasons why we need to make sure

3 sequestration --

4 **MR. BRENNAN:** That's absolutely right, because it's going to have a

5 devastating impact on the national security of this country.

6 And so, I would want to make sure, even if it doesn't happen in a

7 fiscally constrained environment, that I look at the programs and prioritize.

8 And we really have to take a look at what are those programs that we really

9 need to resource appropriately.

10 As we're going to have -- and we've had some benefits from pulling

11 folks out of Iraq, and with the continued draw down of forces in Afghanistan,

12 there's going to be some resource and assets that we're going to have to

13 reallocate there. So I'll look carefully at that.

14 So what I want to do is to make sure that if I go to CIA, I have an

15 understanding about exactly how this -- these monies are being spent.

16 Then, as you point out, there is quite a bit of intelligence capability within

17 the Defense Department, and I know there's been recent press reports about

18 the Clandestine HUMINT Service -- Defense Clandestine Service -- and its

19 work with, in fact, CIA.

20 I want to make sure these efforts are not redundant whatsoever. And

21 I've had these conversations with Mike Morell, as well as with General Flynn

1 over at DIA, to make sure that these efforts are going to truly be integrated
2 and complementary, because we cannot have unnecessarily redundant
3 capabilities in this government, particularly in an environment that we have
4 right now on the fiscal front.
5 **SENATOR WARNER:** I think this is an area that's going to need a lot of
6 attention and a lot of oversight. I get concerned at times that the IC, on one
7 hand, and the DoD on the other hand, think they're coming from separate
8 originators of funding, and ultimately, they still have to be within the greater
9 budget constraints.
10 Let me -- I know my time is running down. Your background, and most
11 of your expertise, has been on the CT side. Clearly, the challenge we've got
12 is we see emerging threats in parts of the world that we're not on the front
13 line, as we see disruptions particularly through the Middle East, where,
14 perhaps in retrospect, we didn't have the right kind of coverage on social
15 media and on to the streets.
16 How do we make sure we're going to get within the kind of fiscal
17 constraints, that we don't go complete CT; that we make sure we've got the
18 coverage we need, the capabilities we need, and the worldwide coverage we
19 need, with your approach, particularly with your background; if you could
20 address that.
21 **MR. BRENNAN:** Well, clearly, counterterrorism is going to be a priority

1 area for the Intelligence Community and for CIA for many years to come.
2 Just like weapons proliferation is, as well. Those are enduring challenges.
3 And since 9/11, the CIA has dedicated a lot of effort -- and very successfully;
4 they've done a tremendous job to mitigate that terrorist threat.
5 At the same time, though, they do have this responsibility on global
6 coverage. And so, what I need to take a look at is whether or not there has
7 been too much of an emphasis of the CT front. As good as it is, we have to
8 make sure we're not going to be surprised on the strategic front and some
9 of these other areas; to make sure we're dedicating the collection
10 capabilities, the operations officers, the all-source analysts, social media, as
11 you said, the so-called "Arab Spring" that swept through the Middle East. It
12 didn't lend itself to traditional types of intelligence collection.
13 There were things that were happening in a populist way, that, you
14 know, having somebody, you know, well positioned somewhere, who can
15 provide us information, is not going to give us that insight, social media,
16 other types of things.
17 So I want to see if we can expand beyond the soda straw collection
18 capabilities, which have served us very well, and see what else we need to do
19 in order to take into account the changing nature of the global environment
20 right now, the changing nature of the communication systems that exist
21 worldwide.

1 **SENATOR WARNER:** Thank you for that. I just would, again -- back to
2 my first point, and my time's about out -- I think, should you be confirmed,
3 that trying to make sure you've got that objective oversight, the ability to
4 make sure that you have the best knowledge and best metrics possible so
5 that when future challenges arise, you can come to this Committee and
6 others and make sure that the President and this Committee is informed
7 with the best information possible.
8 Thank you, Madam Chair.
9 **CHAIRMAN FEINSTEIN:** Thank you very much, Senator.
10 Mr. Brennan, so you can be advised, we are not going to do the
11 classified hearing following this. We will do it Tuesday at 2:30. We will,
12 however, do another round just with five minutes per senator, so people can
13 wrap up whatever it is they want to ask. I hope that is okay with you.
14 **MR. BRENNAN:** Absolutely.
15 **CHAIRMAN FEINSTEIN:** Thank you. Thank you.
16 Senator Collins?
17 **SENATOR COLLINS:** Thank you.
18 Mr. Brennan, I want to follow up on an issue that several of my
19 colleagues have raised on the issue of *capturing* a terrorist versus *targeted*
20 *killing* of a terrorist.
21 In a recent speech that you gave at the Wilson Center, you said: "Our

unqualified preference is to only undertake lethal force when we believe that capturing the individual is not feasible."

Yet, a study by The New American Foundation, as well as numerous press reports, indicates that in the first two years of President Obama's administration, there were four times the number of targeted killings, than in eight years of President Bush's administration. Is your testimony today that the huge increase in number of lethal strikes has no connection to the change in the Obama administration's detention policy?

Because obviously, if we're capturing a terrorist, we have the opportunity to interrogate that individual and perhaps learn about ongoing plots; but if the strike is done, that opportunity is lost. Are you saying today that it is totally unconnected to the Obama administration's shift in its detainee policy?

**MR. BRENNAN:** I can say unequivocally, Senator, that there's never been occasion, that I'm aware of, where we had the opportunity to capture a terrorist and we didn't, and we decided to take a lethal strike. So, certainly, there is no correlation there as far as any type of termination of the CIA's detention and interrogation program and that increase in strikes.

Now, I will say that if you look out over the last four years, what happened in a number of places, such as Yemen, and other areas, was that there was, in fact, a growth of al-Qa'ida, quite unfortunately.

1 And so, what we were trying to do, in this administration, is to take
2 every measure possible to protect the lives of American citizens, whether it
3 be abroad or in the United States, as well as a maturation of capabilities and
4 insight into those intelligence plots as a result of the investment that was
5 made in the previous administration that allowed us, in *this* administration,
6 to take appropriate actions.

7 **SENATOR COLLINS:** Well, let's talk further about the targeted killings.
8 When the targeted killings began several years ago, the first-order effect of
9 these operations was the elimination of the senior operational leadership of
10 al-Qa'ida, many of the core leaders. Obviously, that is a critical priority.

11 We have heard both former CIA Director Michael Hayden, in an
12 interview on CNN, and General McChrystal say that it is now changed, and
13 that the impact of those strikes is creating a backlash.

14 For example, General McChrystal said, "The resentment created by
15 American use of unmanned strikes is much greater than the average
16 American appreciates. They are hated on a visceral level, even by people
17 who have never seen one or seen the effects of one."

18 He added that the targeted killings by remotely piloted aircraft add to
19 the perception of American arrogance that says, "Well, we can fly where we
20 want; we can shoot where we want, because we can."

21 And General Hayden has also expressed concerns, that now that the

1 strikes are being used at the lower levels, arguably, that they are creating a
2 backlash that is undermining the credibility of governments and creating
3 new terrorists when a neighbor or family member is killed in the course of
4 the operations.

5 Do you agree with General McChrystal and Director Hayden about the
6 potential backlash from the strikes, from the targeted killings, at this point?
7 I'm not talking about the initial strikes.

8 **MR. BRENNAN:** I think that is something that we have to be very
9 mindful of, in terms of what the reaction is to any type of U.S.
10 counterterrorism activities that involve the dropping of ordnance anywhere
11 in the world; absolutely. Whether it's a remotely piloted aircraft or whether
12 it's a manned aircraft, I think we have to take that into account.

13 But I would not agree with some of the statements that you had quoted
14 there, because what we, in fact, have found in many areas is that the people
15 are being held hostage to al-Qa'ida in these areas and have welcomed the
16 work that the U.S. Government has done with their governments to rid them
17 of the al-Qa'ida cancer that exists.

18 **SENATOR COLLINS:** Finally, today, this Committee received the OLC
19 memos describing the legal justifications that many of us, particularly those
20 who have been on the Committee far longer than I, have been seeking for
21 some time. And I, too, spent a large part of this morning reading them.

1 Yet the Obama administration within months of taking office released
2 several OLC memos describing the legal justification for the treatment of
3 terrorist detainees that were held in U.S. custody.
4 Do you think it was appropriate that a different standard was applied to
5 the release of the memos from the Bush administration than those produced
6 by the Obama administration?
7 **MR. BRENNAN:** Well, respectfully, Senator, I don't think it was a
8 different standard. Not being a --
9 **SENATOR COLLINS:** Well --
10 **MR. BRENNAN:** -- a lawyer --
11 **SENATOR COLLINS:** Well, one was released within four months --
12 **MR. BRENNAN:** Right.
13 **SENATOR COLLINS:** -- of the Obama administration taking office.
14 **MR. BRENNAN:** Right.
15 **SENATOR COLLINS:** The other had been requested for a very long --
16 much longer time.
17 **MR. BRENNAN:** Right.
18 **SENATOR COLLINS:** And released only today.
19 **MR. BRENNAN:** I'm not a lawyer. I've come to learn the term *sui*
20 *generis*, which means that, you know, it has obviously unique circumstances
21 surrounding it.

1 The OLC memos that were released shortly after the President came
2 into office -- they were released because the program was terminated. It was
3 no longer in existence. OLC -- Office of Legal Counsel -- opinions that deal
4 with ongoing activities, ongoing programs -- it's a different animal.
5 And, therefore, I think those decisions were looked at in a much, sort
6 of, different way because of those sui generis circumstances.
7 **SENATOR COLLINS:** Well, I would say to you that both are absolutely
8 essential to the ability of Congress to carry out its oversight responsibilities.
9 Finally, the Intelligence Reform Act and Terrorism Prevention Act of
10 2004, with which you're very familiar, and of which I was a co-author,
11 requires the Director of National Intelligence to recommend who the CIA
12 Director should be to the President of the United States.
13 I'm aware of General Clapper -- the DNI's letter endorsing your
14 nomination, but that's different from his actually *recommending* to the
15 President that you be chosen. To your knowledge, did General Clapper
16 recommend to the President that you be nominated for this position?
17 **MR. BRENNAN:** I know for certain that he made a recommendation to
18 the President, but I would defer to General Clapper to tell you what that
19 recommendation is.
20 **SENATOR COLLINS:** Thank you.
21 **CHAIRMAN FEINSTEIN:** Senator Heinrich?

1 **SENATOR HEINRICH:** Thank you, Madam Chair.

2 Mr. Brennan, let me join my colleagues in thanking you for your service
3 to your country and welcoming you to the Committee. And should you be
4 confirmed, I'd like to start by just inviting you to visit New Mexico at some
5 point, and in particular, Sandia and Los Alamos National Labs. Because,
6 while you often don't hear about the contributions that they make to our
7 Intelligence Community, I can assure you that that support is vital to keeping
8 our nation safe.

9 I've got a few questions, and please forgive me if some of these return
10 to some of the things you've heard from other senators. I want to start with
11 your November 2007 interview with CBS News, where you said: "There has
12 been a lot of information that has come out of these interrogation
13 procedures that the Agency has, in fact, used, against the real hard-core
14 terrorists. It has saved lives."

15 Other intelligence officials went a lot further than that in defending the
16 use of so-called "enhanced interrogation techniques" at the time, and some
17 still do.

18 If your review of the Committee study convinces you that these
19 techniques did not, in fact, save lives, I'd like to ask -- will you be as public in
20 *condemning* the program as you were in its defense; in other words, will you
21 set the record straight?

1 **MR. BRENNAN:** I will do whatever possible to make sure that the
2 record is straight and that I speak fully and honestly on it.
3 **SENATOR HEINRICH:** I want to return to a question that Mr. Udall
4 asked you. Would you object -- and if so, why -- to a public release of a truly
5 *declassified* version of the Committee's report?
6 **MR. BRENNAN:** Senator, I would give such a request for
7 declassification every due consideration. There is a lot of information and
8 material in those volumes with a lot of potential consequences, as far as its
9 public release. And at the same time that we have a commitment to
10 transparency, we also, though, have a tremendous commitment to making
11 sure that we keep this country safe by protecting its secrets.
12 There are a lot of equities as far as liaison partners, other types of
13 things, operational activities, maybe source and method, so it has to be
14 looked at very, very carefully.
15 **SENATOR HEINRICH:** Well, I would just say I agree with you that
16 sources and methods, and many of the operational details, absolutely should
17 never be declassified, but there's some basic principles, I think, in that
18 report that I think it's going to be very important for history to be able to
19 judge. And I would urge you to look closely at that.
20 Senator Levin asked about waterboarding. Let me follow up a little bit.
21 In November 2007 interview with CBS News, you were asked if

1 waterboarding was torture, and you said, "I think it is certainly subjecting an
2 individual to severe pain and suffering, which is the classic definition of
3 torture. And I believe, quite frankly, it's inconsistent with American values
4 and it's something that should be prohibited." Is that still your view?
5 **MR. BRENNAN:** Yes, Senator, it is.
6 **SENATOR HEINRICH:** Thank you. Do you believe that all agencies of
7 the United States Government should be held to the interrogation standards
8 that are laid out in the Army Field Manual, as currently required by Executive
9 Order 13491? And do you support efforts to codify those requirements into
10 law?
11 **MR. BRENNAN:** The Army Field Manual certainly should govern the U.S.
12 military's detention and interrogation of individuals.
13 The FBI has its own processes and procedures and laws that govern its
14 activities. So, what I wanted to do is to make sure that, you know,
15 appropriate sort of attention is paid to FBI as opposed to the military.
16 **SENATOR HEINRICH:** I understand. Back in 2006, you were part of an
17 online discussion with The Washington Post, and you suggested at that time
18 that the Director of the CIA should have a set five-year term, like the FBI
19 Director, to guarantee "the absolute need for independence, integrity, and
20 objectivity in the senior ranks of our Intelligence Community."
21 Given that you will instead serve at the pleasure of the President, how

1 do you maintain your independence?

2 **MR. BRENNAN:** Having grown up in the intelligence business for 25
3 years, I truly understand the importance and value of maintaining
4 independence, subjectivity, and integrity of the intelligence process.

5 I know when I've sat in the White House Situation Room and when I've
6 looked to the intelligence briefer, that if they were to advocate in any way a
7 policy preference, it really calls into question the independence, subjectivity,
8 and basis of that intelligence. I want them to give me the facts as it is,
9 irrespective of what their policy leanings or preferences might be, because
10 policymakers need to do that.

11 So, in order for me to maintain my integrity as an intelligence
12 professional, as I would go to the President or the Secretaries of State or
13 Defense, or into the National Security Council meetings, I would need to
14 make sure I can say it straight, give it straight, and let the policymakers
15 determine exactly the best course of action.

16 **SENATOR HEINRICH:** Thank you.

17 One last question: I believe it was during that same online discussion
18 with Washington Post, you said, quote, "I think that there is an effort
19 underway to get the CIA to adapt to the new realities of the Intelligence
20 Community. The CIA has resisted many of these changes, which has been a
21 problem. It's time to move forward."

1 What exactly did you mean, and has the CIA made progress in that
2 direction?
3 **MR. BRENNAN:** Well, Senator, a credit to you and your staff for pulling
4 up that Washington Post online interview because I had not, you know, read
5 that or thought about that in a while. And I must say that having grown up
6 in the Agency for 25 years, as I said in my testimony, I have tremendous
7 respect for that organization. It is exceptionally capable; competent.
8 But almost by dint of the nature of its work, it also at times is insular.
9 And it has not interacted and interoperated the way it needs to with the rest
10 of the Intelligence Community, the rest of the U.S. Government. At times,
11 that is to protect source and methods and to protect the secrets that it has.
12 But given the changes in the environment, given the changes in the
13 nature of our government, the CIA needs to play a part in this larger role.
14 And so, now, the head of the CIA does not sit on top of the Intelligence
15 Community; it is part of a larger Intelligence Community that is led by the
16 Director of National Intelligence.
17 So, my objective would be to make sure CIA's capabilities are truly
18 going to be leveraged and empower the -- the responsibilities, the missions
19 of the rest of the government. The Department of Homeland Security is a
20 new creation. They need intelligence just like others do as well.
21 So, what I think I was conveying there is that, you know there was

1 resistance at the time of the IRTPA, as we well know, that they didn't want to
2 sort of break some of the past practices. Well, I think a lot of that resistance
3 is overcome and now I think CIA sees the benefits of having somebody that
4 can sit on top of the Community, and not have to sit on top of the Agency,
5 as well.
6 **SENATOR HEINRICH:** That's very helpful. Thank you very much.
7 I yield back, Madam Chair.
8 **CHAIRMAN FEINSTEIN:** Thank you very much, Senator.
9 Senator King?
10 **SENATOR KING:** Thank you for your testimony and your stamina
11 today.
12 First, I should tell you that in an earlier hearing today, Secretary Panetta
13 was testifying before the Armed Services Committee. And, in answer to a
14 question, he strongly endorsed your nomination. And I think the record
15 should show that -- that Secretary Panetta was very complimentary of your
16 capabilities and experience.
17 Secondly -- and this isn't really a question -- it's incredibly important for
18 the CIA to be totally open with this Committee. The reason is that there's no
19 one else watching. Typically in our country, the public is involved. The
20 press is involved. There are a lot of people that have access to information
21 of what the Department of Commerce is doing, or the Department of State.

1 This is a unique situation, where *this* Committee and a comparable
2 committee in the House are the only places that are really paying attention,
3 in terms of our separation of powers. So it's not just *nice* to have that kind
4 of openness; I think it's critically important. And I hope you subscribe to
5 that view.
6 **MR. BRENNAN:** Absolutely; I do, Senator.
7 **SENATOR KING:** Just briefly, and I think Senator Warner touched on
8 this -- going forward, there needs to be some serious discussion with the
9 Department of Defense about where the CIA ends and the Department of
10 Defense starts, in terms of counterterrorism activities and operations.
11 And I don't need to pursue that, but I think Senator Warner raised an
12 important point, because in this day and age, we just can't be duplicating a
13 whole set of capabilities and priorities and officers and procedures and
14 everything else.
15 I take it you subscribe to that.
16 **MR. BRENNAN:** I do agree, Senator, and I look forward, in a closed
17 session, to talking to you about some specific areas where I really do believe
18 that Defense-CIA relationship and integration of effort is critically important
19 to the safety and security of this nation.
20 So again, redundant -- mindful of not having any type of redundant
21 capabilities or waste resources, we need to make sure that we can leverage

1 the capabilities that exist in both organizations for the good of this country.

2 **SENATOR KING:** And the area I want to spend a little bit of time on is

3 the drone policy, and particularly as it relates to American citizens. There's

4 a lot of law and history involved in our system of checks and balances.

5 James Madison famously, in the 51st Federalist, said: "If people were angels,

6 we wouldn't need a government, and if the government was run by angels,

7 we wouldn't need checks and balances."

8 He concluded that angels were in as short supply then as they are

9 today. And therefore, we need these kinds of checks and balances.

10 The Fifth Amendment is pretty clear: no deprivation of life, liberty or

11 property without due process of law. And we're depriving American citizens

12 of their life when we target them with a drone attack. Now, I understand

13 that it's under military circumstances; these are enemy combatants and all of

14 those kinds of things. But I would like to suggest to you that you consider --

15 and Madam Chairman, I'd like to suggest to the Committee that we consider

16 -- a FISA court-type process where an American citizen is going to be

17 targeted for a lethal strike.

18 And I understand you can't have co-commanders in chief, but having

19 the Executive being the prosecutor, the judge, the jury, and the executioner,

20 all in one, is very contrary to the traditions and the laws of this country, and

21 particularly in a situation where there's time. If -- a soldier on a battlefield

1 doesn't have time to go to court, but if you're planning a strike over a matter
2 of days, weeks or months, there is an opportunity to at least go to
3 something outside of the Executive Branch body, like the FISA court, in a
4 confidential and top-secret way, make the case that this American citizen is
5 an enemy combatant, and at least that would be -- that would be some check
6 on the activities of the Executive.

7 I have great confidence in you. I have great confidence in President
8 Obama. But all the lessons of history is it shouldn't matter who's in charge,
9 because we should have procedures and processes in place that will protect
10 us no matter who the people are that are in the particular positions.

11 How do you react to this suggestion?

12 **MR. BRENNAN:** Senator, I think it's certainly worth of discussion. Our
13 tradition -- our judicial tradition is that a court of law is used to determine
14 one's guilt or innocence for past actions, which is very different from the
15 decisions that are made on the battlefield, as well as actions that are taken
16 against terrorists, because none of those actions are to determine past guilt
17 for those actions that they took.

18 The decisions that are made are to take action so that we prevent a
19 future action, so we protect American lives. That is an inherently Executive
20 Branch function to determine, and the Commander-in-Chief and the Chief
21 Executive has the responsibility to protect the welfare, well-being of

1 American citizens.

2 So the concept I understand and we have wrestled with this in terms of
3 whether there can be a FISA-like court, whatever -- a FISA-like court is to
4 determine exactly whether or not there should be a warrant for, you know,
5 certain types of activities. You know --

6 **SENATOR KING:** It's analogous to going to a court for a warrant --
7 probable cause --

8 **MR. BRENNAN:** Right, exactly. But the actions that we take on the
9 counterterrorism front, again, are to take actions against individuals where
10 we believe that the intelligence base is so strong and the nature of the threat
11 is so grave and serious, as well as imminent, that we have no recourse
12 except to take this action that may involve a lethal strike.

13 **SENATOR KING:** I completely agree with you, and I understand the
14 dilemma. And I'm not trying to suggest anything that would limit our ability
15 to take action on behalf of American citizens. I would just feel more
16 comfortable if somebody other than a Member of the Executive said, "Yes,
17 we agree that the evidence is so strong," et cetera, as you stated it.

18 In the Hamdi decision, Sandra Day O'Connor had a wonderful
19 statement: "A state of war is not a blank check for the President when it
20 comes to the rights of the nation's citizens."

21 **MR. BRENNAN:** Right. And that's why I do think it's worthy of

1 discussion. And the point particularly about due process really needs to be
2 taken into account because there's not a different standard as far as if a U.S.
3 citizen joins al-Qa'ida, you know, in terms of the intelligence base or
4 whatever. But American citizens by definition are due much greater due
5 process than anybody else by dint of their citizenship.
6 So I think this is a very worthwhile discussion. I look forward to talking
7 to the Committee and others about it. What's that appropriate balance
8 between Executive, Legislative and Judicial Branch responsibilities in this
9 area?
10 **SENATOR KING:** I appreciate your consideration and, again, appreciate
11 your testimony today. And thank you for your service to the country.
12 Madam Chairman, I yield back my time.
13 **CHAIRMAN FEINSTEIN:** Thank you very much, Senator.
14 We'll do another quick round. I think one of the problems is now that
15 the drone program is so public, and one American citizen is killed, people
16 don't know much about this one American citizen -- so-called. They don't
17 know what he's been doing. They don't know what he's connected to. They
18 don't know the incitement that he has stirred up.
19 And I wonder if you could tell us a little bit about Mr. al-Awlaki and
20 what he had been doing?
21 **MR. BRENNAN:** Well, Senator, I'm not going to talk about any particular

1 operation or responsibility on the part of the U.S. Government for anything --

2 **CHAIRMAN FEINSTEIN:** See, that's the problem. That's the problem. I

3 think when people hear "American citizen," they think somebody who's

4 upstanding; this man was not upstanding, by a longshot. And now, maybe

5 you cannot discuss it here, but I've read enough to know that he was a real

6 problem.

7 **MR. BRENNAN:** Well, I can talk about Mr. al-Awlaki.

8 **CHAIRMAN FEINSTEIN:** And if you were in jeopardy -- that's right.

9 **MR. BRENNAN:** Yes, and before he died he was intimately involved in

10 activities that were designed to kill innocent men, women, and children, and

11 mostly Americans. He was determined to do that. He was not just a

12 propagandist. He was, in fact, part of the operational effort that is known as

13 al-Qa'ida in the Arabian Peninsula and had key responsibilities in that regard.

14 **CHAIRMAN FEINSTEIN:** Can I ask you some questions about him?

15 **MR. BRENNAN:** You're the Chairman.

16 **CHAIRMAN FEINSTEIN:** You don't have to answer. Did he have a

17 connection to Umar Farouk Abdulmutallab, who attempted to explode a

18 device on one of our planes over Detroit?

19 **MR. BRENNAN:** Yes, he did.

20 **CHAIRMAN FEINSTEIN:** Could you tell us what condition it was?

21 **MR. BRENNAN:** I would prefer not to at this time, Senator. I'm not

1 prepared to.

2 **CHAIRMAN FEINSTEIN:** Okay. Did he have a connection to the Fort

3 Hood attack?

4 **MR. BRENNAN:** That is al-Qa'ida in the Arabian Peninsula has -- as a

5 variety of means of communicating and inciting individuals, whether that be

6 websites, or e-mails, or other types of things. And so, there are a number of

7 occasions where individuals, including Mr. al-Awlaki, has been in touch with

8 individuals. And so, Senator, again, I'm not prepared to address the

9 specifics of these, but suffice it to say --

10 **CHAIRMAN FEINSTEIN:** I'll just ask you a couple questions. Did Faisal

11 Shahzad, who pled guilty to the 2010 Times Square car bombing attempt,

12 tell interrogators in 2010 that he was inspired by al-Awlaki?

13 **MR. BRENNAN:** I believe that's correct, yes.

14 **CHAIRMAN FEINSTEIN:** Last October, al-Awlaki -- did he have a direct

15 role in supervising and directing AQAP's failed attempt, well, to bring down

16 two United States cargo aircraft by detonating explosives concealed inside

17 two packages, as a matter of fact, inside a computer printer cartridge?

18 **MR. BRENNAN:** Mr. al-Awlaki was involved in overseeing a number of

19 these activities. Yes, there was a relationship there.

20 **CHAIRMAN FEINSTEIN:** And was it true that they were so concealed

21 that the first attempt to find and did not reveal them? It took an asset

1 coming back with -- to say, "Go again, look at this," to find it?

2 **MR. BRENNAN:** Yes the concealment method that was used in that was

3 one of the best we had ever encountered.

4 **CHAIRMAN FEINSTEIN:** So, Mr. al-Awlaki is not, by far, an American

5 citizen of whom anyone in America would be proud?

6 **MR. BRENNAN:** Mr. al-Awlaki was part of al-Qa'ida, and we're at war

7 with al-Qa'ida, and it was his strong determination to kill Americans on

8 behalf of al-Qa'ida.

9 **CHAIRMAN FEINSTEIN:** Thank you.

10 Is it true that in the last four years, the FBI has arrested 100 people,

11 either planning, conspiring, or trying to commit a terrorist attack on this

12 nation?

13 **MR. BRENNAN:** I don't know the exact number, Chairman, but yes --

14 they have arrested a lot of people.

15 **CHAIRMAN FEINSTEIN:** It's over 100, but they have arrested a lot of

16 people, and that's because of good -- of good, sound intelligence.

17 I think -- and this is just me -- what people forget is that they will kill us

18 if they can, and it's extraordinarily difficult if you can't get in to where they

19 were hiding. Would it have been possible to have arrested Mr. al-Awlaki

20 where he was, in Yemen?

21 **MR. BRENNAN:** It is -- there are parts of Yemen that are ungoverned

1 and beyond the reach of the Yemeni government security and intelligence
2 services. And we work very closely with the Yemenis to see if we can arrest,
3 detain, individuals. Whenever we can, we want to do that, because it's very
4 valuable for us.
5 Any actions that are taken in concert with the Yemeni government are
6 done -- in terms of any type of strikes that we might engage there with them
7 -- are done only because we do not have the ability to bring those individuals
8 into custody.
9 **CHAIRMAN FEINSTEIN:** Thank you. My time is up.
10 Senator Chambliss?
11 **VICE CHAIRMAN CHAMBLISS:** Thanks, Madam Chair.
12 In 2002, what was your knowledge of interrogation videotapes about
13 Abu Zubaydah, and did you seek any information about an Office of General
14 Counsel review of them in 2002?
15 **MR. BRENNAN:** I don't have a recollection of that, Senator.
16 **VICE CHAIRMAN CHAMBLISS:** Of the tapes, or that request?
17 **MR. BRENNAN:** At the time, in 2002, I do not know what my
18 involvement or knowledge was at the time of the tapes. I believe that they --
19 I was aware of the Abu Zubaydah debriefings and interrogation sessions
20 being taped.
21 **VICE CHAIRMAN CHAMBLISS:** Okay, it should be no surprise that

1 many Members have been dissatisfied with the administration's cooperation
2 on the Benghazi inquiries.
3 For example, Senator Graham asked Director Clapper, in a hearing, if
4 he was aware of the series attacks in Benghazi, in the summer of 2012, and
5 asked if he had informed the President about those attacks. Now, that
6 seemed like a perfectly reasonable question, and the DNI said he would get
7 us an answer.
8 When we got answers back from the DNI's office, there was a notation
9 next to this particular question that Senator Graham asked, and here's what
10 it said, and I quote, "Per NSS" -- that's the National Security Staff -- "No
11 response required."
12 Mr. Brennan, that's your shop; do you have any knowledge about why
13 Senator Graham's question was not to be answered?
14 **MR. BRENNAN:** Senator, I think there's a longstanding tradition
15 understanding of respecting the executive privilege that exists in the Office
16 of the Presidency, and in terms of what information is provided to the
17 President, or advice, counsel, to him.
18 So it's -- I would suspect, then, that that question gets into this issue of
19 the executive privilege, which I think, again, has been a longstanding
20 tradition.
21 **VICE CHAIRMAN CHAMBLISS:** Now, are you sure that's the answer, or

1 you think that's probably what it was?

2 **MR. BRENNAN:** I don't know, firsthand, because that would not been a

3 request coming to me.

4 **VICE CHAIRMAN CHAMBLISS:** And I understand that, so my direction

5 to you -- what I'll ask of you -- is that you go back and review that; we'll get

6 you notation if necessary, and if you could just give us a written response to

7 that, if possible.

8 **MR. BRENNAN:** You deserve a response, certainly.

9 **VICE CHAIRMAN CHAMBLISS:** This weekend, Secretary Panetta

10 confirmed that information that led to Bin Laden came from detainees and

11 the CIA's EIT program. His account comports with information we were

12 provided immediately after the raid, and in months to follow, from the CIA

13 analyst who actually tracked down bin Laden. These analysts told us it was

14 detainee information that was key to them finding the courier and,

15 ultimately, bin Laden.

16 Now, were you briefed by any of the analysts who tracked down bin

17 Laden?

18 **MR. BRENNAN:** Before the operation?

19 **VICE CHAIRMAN CHAMBLISS:** Yes.

20 **MR. BRENNAN:** Oh, absolutely; I was engaged with them.

21 **VICE CHAIRMAN CHAMBLISS:** Okay. And is that the information that

1 was given to you -- that it came from interrogation of detainees on whom
2 EITs had been used?
3 **MR. BRENNAN:** I don't recall if I was given that information specifically.
4 They talked about the chain of sort of collection that took place that was
5 related to some of the information coming from the detainees. Yes, so,
6 there was some there.
7 **VICE CHAIRMAN CHAMBLISS:** Do you agree with Secretary Panetta's
8 comments?
9 **MR. BRENNAN:** That there some information that came out from there?
10 **VICE CHAIRMAN CHAMBLISS:** Yes, that led to the courier.
11 **MR. BRENNAN:** Senator, I now, again, looking at this document from
12 SSCI, this report, I don't know what the facts are, or the truth is. So I really
13 need to look at that carefully and see what CIA's response is because the
14 SSCI report calls into question whether or not any of the information was
15 unique and led to it.
16 **VICE CHAIRMAN CHAMBLISS:** Fair enough. Suffice it to say, Secretary
17 Panetta's comments are in direct conflict with the report that came out of
18 this Committee recently. And you know I have serious concerns about that
19 interrogation study that was voted out by Committee.
20 Now, you told me a couple of days ago when we met that the study
21 "was not objective," and it was "a prosecutor's brief, written with an eye

1 toward finding problems." And you went on to say that you're withholding
2 judgment on the merits and action until you read the response.
3 And it's my understanding, from what you've said, that that's what
4 you're going to do. Suppose the CIA takes the position that the study's
5 Finding and Conclusions are wrong? I think I know John Brennan well
6 enough to know that you're going to stand up and say whatever's on your
7 mind, and whatever you conclude. And I'm not going to ask you for a
8 response to that, but I know you'll review it with an open mind, and give us
9 your thoughts and your opinions about the CIA's response to it, and how we
10 move forward with this.
11 **MR. BRENNAN:** I assure you, Senator, I will do that.
12 **VICE CHAIRMAN CHAMBLISS:** Thank you very much.
13 **CHAIRMAN FEINSTEIN:** Thank you very much, Senator.
14 Senator Wyden?
15 **SENATOR WYDEN:** Thank you.
16 **CHAIRMAN FEINSTEIN:** Oh, excuse me -- Senator Rockefeller?
17 **SENATOR ROCKEFELLER:** Thank you, Madam Chair.
18 I was just making a comment to the Chair, Mr. Brennan, that I've been
19 through a whole lot of confirmation hearings in 28 years here -- and
20 including quite a few CIA directors -- and I quite honestly do not recall
21 anybody who was more forthright, more direct, more accommodating,

1 without violating who you are, more open to the possibility of working with
2 this Committee in a way that will do two things: one, that will give the folks
3 at CIA, who probably constantly worry about what is the next awful thing
4 that we're going to say about them -- but that's not our intention, because
5 we're into the business of problem-solving, and if we have to write a 6,000-
6 page thing, it isn't fun for us; we're trying to solve a problem.
7 I have a feeling you understand that. I have a feeling that you feel that
8 the CIA, if they felt that they were working in -- you know, with some
9 contention with the oversight committee in the Senate, but, nevertheless,
10 that the Senate was involved, was informed, was interested; that this would
11 be something that they would welcome; that there are a lot of people who've
12 been at the CIA for quite a while, who may be sort of stuck in that mid-rank
13 crisis, et cetera, who are looking for an open, fresh, strong leader.
14 I happen to think you are that leader. I've felt that since our
15 conversation. I felt that from before our conversation. And we haven't had
16 our secret meeting yet, so I always -- but I'm not going to -- I'm sure I'm not
17 going to change my mind.
18 I just think you've done an extraordinary job of patience, of courtesy, of
19 wisdom, of being able to -- the only question that you couldn't answer that
20 I'm aware of was who was it that took notes on some meeting that you had,
21 teleconference that you had 20 years ago. But I find it in my heart to forgive

1 you for that.

2 So, to me, I think you're a terrific leader, and I'll look forward to

3 Tuesday. But I think you're the guy for the job, and the *only* guy for the job.

4 **MR. BRENNAN:** Thank you, Senator, for those very kind words. And I

5 haven't lived up to them yet. And if I were to go to CIA, as I think some

6 people have said -- some senators have said, you want to hear not just

7 words, but you want to actually see the actions.

8 It's a daunting task to go over to CIA. I want every Member of this

9 Committee to be an ardent advocate, proponent, and defender of the men

10 and women of the Central Intelligence Agency. And I see it as my obligation

11 to represent them to you on their behalf, so that when times get tough, and

12 when people are going to be criticizing and complaining about the CIA, I

13 have all of you to say you knew about what the CIA was doing, you

14 supported it, and you will defend it.

15 **CHAIRMAN FEINSTEIN:** Senator Burr?

16 **SENATOR BURR:** Thank you, Chairman.

17 I'm going to try to be brief, because I've noticed you're on your fourth

18 glass of water, and I don't want to be accused of waterboarding you.

19 *(Laughter.)*

20 Mr. Brennan, with the exception of our request for the Presidential Daily

21 Briefs around the time of Benghazi for which there was executive privilege

1 claimed, do you know of any other claim of executive privilege on any of the
2 documents that this Committee's waiting on right now?

3 **MR. BRENNAN:** Senator, I know that there are requests for some e-
4 mails that might have taken place between the Intelligence Community and
5 the White House, whatever, and so there are a number of sort of elements
6 that I think people are looking at. So --

7 **SENATOR BURR:** But none that executive privilege have been claimed
8 on. Correct?

9 **MR. BRENNAN:** Well, I am not in a position to say that, Senator, and I
10 would defer to those individuals -- the White House counsel and others -- to
11 make those determinations about what they want to --

12 **SENATOR BURR:** Well, let me say it from this end. They have not
13 justified not producing those documents based upon executive privilege.
14 So, I assume, if they're going to claim it, then they need to claim it quick.

15 On January 13th of this year, the President signed into law the 2013
16 Intelligence Authorization Act, which requires congressional notification of
17 any authorized disclosure of national intelligence.

18 Now, we've not received any notifications of authorized disclosures.
19 Have there been any authorized disclosures, to your knowledge?

20 **MR. BRENNAN:** I would like to say that since you haven't received any
21 notifications, there haven't been.

1 **SENATOR BURR:** Would you consider the information reported in the
2 press about the counterterrorism playbook an authorized disclosure?
3 **MR. BRENNAN:** I don't know which piece you're talking about. There's
4 been a lot of -- of discussion out there in the - in the media and in the
5 newspapers about this.
6 And so, I don't know specifically about any classified information. The
7 fact that the administration may be going through a process to try to
8 institutionalize, codify, make as rigorous as possible, our processes and
9 procedures in and of itself is not a classified issue.
10 So those details that are classified, I don't know of any that came out in
11 some of those reports.
12 **SENATOR BURR:** Well, if there is classified information that's out there,
13 and it was not authorized, was there a crime report filed relative to the
14 playbook?
15 **MR. BRENNAN:** Presumably there was, Senator. Those decisions, as far
16 as initiating criminal investigations, are done by those departments and
17 agencies that have stewardship of that classified information and in
18 discussions with the Department of Justice to make a determination whether
19 or not in light of the fact that maybe so many people have access to it, how
20 they can proceed with some type of criminal investigations.
21 **SENATOR BURR:** As we prepare for the closed hearing on Tuesday --

1 this is not a question -- I'll ask you today that you be prepared to provide for
2 the Committee any specific discussions that you had where you were
3 authorized to reveal classified information or to talk about information on
4 covert action.

5 Again, not something I'd like to do today. The answer may be zero. If
6 there are things, Tuesday would be an opportunity for you to provide. That
7 was a question from -- a pre-hearing question from the Committee that was
8 unanswered.

9 My last question is this: I'm still not clear on whether you think the
10 information from CIA interrogations saved lives. Have you ever made a
11 representation to a court, including the FISA court, about the type and
12 importance of information learned from detainees, including detainees in the
13 CIA detention and interrogation program?

14 **MR. BRENNAN:** First of all, on the first part of your question, that
15 you're not sure whether or not I believe that there has been misinformation, I
16 don't know --

17 **SENATOR BURR:** I said I wasn't clear whether I understood, whether I
18 was clear.

19 **MR. BRENNAN:** And I'm not clear at this time, either, because I've read
20 a report that calls into question a lot of the information that I was provided
21 earlier on my impressions.

1 When I was in the government as the head of National Counterterrorism
2 Center, I know that I had signed out a number of affirmations related to the
3 continuation of certain programs based on the analysis and intelligence that
4 was available to analysts. And I don't know exactly what it was at the time,
5 but we can look at that.

6 **SENATOR BURR:** But the Committee can assume that you had faith -- if
7 you make that claim to a court, including the FISA court -- you had faith in
8 the documents and in the information that was supplied you to make that
9 declaration?

10 **MR. BRENNAN:** Absolutely. At the time when, if I made any such
11 affirmation, I would have had faith that the information I was provided was
12 an accurate representation.

13 **SENATOR BURR:** Thank you very much, Madam Chairman.

14 **CHAIRMAN FEINSTEIN:** Senator Wyden?

15 **SENATOR WYDEN:** Thank you, Madam Chair.

16 We have talked for several hours now about the question of targeted
17 killings of Americans, and you've heard it from a number of senators. And
18 I'd like to get your reaction on one point in particular. And that is this
19 question, particularly in the context that you've given, that you've tried to
20 focus in areas where the evidence is substantial, the threat is imminent,
21 where there is a particularly persuasive case that the targeted killing of an

1 American is warranted.

2 In that kind of case, do you believe that the President should provide an

3 individual American with the opportunity to surrender before killing them?

4 **MR. BRENNAN:** Senator, I haven't spoken about any specific operations

5 --

6 **SENATOR WYDEN:** I'm talking about the concept --

7 **MR. BRENNAN:** Right.

8 **SENATOR WYDEN:** -- because you talk about the concept.

9 **MR. BRENNAN:** Right. Absolutely.

10 **SENATOR WYDEN:** You said imminent threats, serious evidence, grave

11 concern; certainly words that strike a chord with me. And that's why I'd be

12 interested in your thoughts on whether, in those kind of instances, the

13 President ought to give -- should give -- an individual American the

14 opportunity to surrender.

15 **MR. BRENNAN:** Right. I think in those instances, and right now, let's

16 use the example of al-Qa'ida, because if an American were to join al-Qa'ida,

17 we have routinely said -- openly, publicly, repeatedly -- that we're at war with

18 al-Qa'ida. We have repeatedly said that al-Qa'ida is in fact trying to kill

19 Americans, and that we are going to do everything possible to protect the

20 lives of American citizens from these murderous attacks from al-Qa'ida.

21 We have signaled this worldwide. We have repeatedly said it openly

1 and publicly. Any American who joins al-Qa'ida will know full well that they
2 have joined an organization that is at war with the United States and that has
3 killed thousands upon thousands of individuals, many, many of them who
4 are Americans.

5 So I think any American who did that should know well that they, in
6 fact, are part of an enemy against us, and that the United States will do
7 everything possible to destroy that enemy to save American lives.

8 **SENATOR WYDEN:** And I certainly -- and I said this at the very
9 beginning -- I certainly want to be part of that effort to fight al-Qa'ida on all
10 of these key fronts. I just want to have some answers -- and I'll give you
11 another chance --whether you think the President should give an individual
12 American the opportunity to surrender.

13 I think that Senator King, for example, talked about the idea of a new
14 court, and there are going to be colleagues that are going to talk about a
15 whole host of ideas. And I commend you for saying that you're open to
16 hearing about that.

17 This is something that can be set in motion, I think, in a
18 straightforward way, as a general principle. We're not talking about any one
19 individual. And I think you've answered the question, and I won't go any
20 further, unless you want to add anything to it.

21 The only other point I'd say is we've covered a lot of ground today. And

1 as far as I'm concerned, we've got a lot of ground still to cover. I've made it
2 clear that we've got to see any and all of those legal opinions, the ones that
3 the bipartisan group of senators asked for, before the vote. And to your
4 credit, you said you'd take the message back to the White House.

5 Because what it really goes to, Mr. Brennan, is this question of checks
6 and balances -- and we probably didn't use that word enough this afternoon -
7 -because I think that's really what this is all about. Our Constitution
8 fortunately gives the President significant power to protect our country in
9 dangerous times.

10 But it is not unfettered power; it's power that is balanced through this
11 special system that ensures congressional oversight and public oversight.
12 And so that's why these questions that I and others have been trying to get
13 at, in terms of congressional oversight, being able to get all of the opinions
14 that are relevant to the legal analysis for targeting Americans, and then to
15 learn more about how you're going to bring the public into the discussion.

16 And certainly you've been patient this afternoon, and I want you to
17 know I think we've covered a lot of ground, but I think we've got a lot to go.
18 And I'd be happy to give you the last word. I've got a little more time if you
19 want it.

20 **MR. BRENNAN:** Thank you, Senator. First of all, any member of al-
21 Qa'ida, whether a U.S. citizen or non-U.S. citizen, needs to know that they

1 have the ability to surrender, the right to surrender, anytime, anywhere
2 throughout the world. And they can do so before the organization is
3 destroyed. We will destroy that organization. And again, out there in al-
4 Qa'ida, U.S. citizens and others, they can surrender anytime, turn themselves
5 in.

6 **SENATOR WYDEN:** Just on that point, I don't take a backseat to
7 anybody, in terms of fighting al-Qa'ida. That was why I came out with it
8 right at the outset. But I asked you a different question, and on the question
9 of what kind of evidence ought to be applied, whether there ought to be
10 geographic limits, the question of whether an individual should be allowed
11 to surrender. For -- for example, there is I think also a question whether the
12 obligation changes if, you know, a valid target has not been publicly
13 reported.

14 So there are issues, you know, here. And I think we're going to have to
15 continue those -- those discussions.

16 And Madam Chair, I thank you for this extra round.

17 **CHAIRMAN FEINSTEIN:** Thank you.

18 Senator Coats?

19 **SENATOR COATS:** Thank you, Madam Chairman.

20 John, I want to just say, and I'm not going to go into it here -- I think it
21 may be better held for further discussion next week in a classified room --

1 but this whole idea of leaks -- nothing upsets me more on this Committee,
2 and we've had a raft of these in the last couple of years, than to see
3 something that was discussed in classified area written up the next day in
4 the newspapers or on the part of the media. It drives some of us crazy. It
5 does me, anyway.

6 And so, maybe I'm a little paranoid about all this, and so forth. I just
7 can't totally get my hands around this AQAP situation that we discussed
8 earlier. But I'm going to defer that until Tuesday so we can discuss it in
9 more detail.

10 Let me just ask you one question here. You said -- I don't have the date
11 -- "The al-Qa'ida core has been decimated in the FATA." And we're aware of
12 the significant efforts we've made and the progress we've made in that
13 regard. But we see this thing metastasizing now across northern Africa and
14 other parts.

15 What's your, you know, latest assessment of al-Qa'ida, in terms of its
16 control and operation of these smaller efforts that are popping up like a
17 whack-a-mole machine in different parts of the Middle East and North Africa?

18 **MR. BRENNAN:** Well, Senator, you used the exact right term when you
19 said al-Qa'ida has been metastasizing in different parts of the world. We
20 have the al-Qa'ida core that, in the past, I think exerted quite a bit of
21 orchestration or order over a number of these franchises that have

1 developed.

2 Now, as a result of the decimation of the core, and our ability to
3 interrupt a lot of the interaction and communication between them, a lot of
4 these different elements, like al-Qa'ida in the Arabian Peninsula, al-Qa'ida in
5 the Islamic Maghreb, and other elements, have grown up and developed as a
6 result of the domestic and local sort of environment.

7 And so they're all sort of, you know, unique unto themselves. They
8 have different features and characteristics. We need to make sure that we're
9 able to work with the governments and the intelligence and security services
10 in the area so that we can put as much pressure on them as possible.

11 A number of them have, you know, local agendas. Some of them have
12 local agendas as well as international agendas. Al-Qa'ida in the Arabian
13 Peninsula in Yemen has a very determined insurgency effort underway in
14 side of Yemen to try to, you know, bring that government down. And the
15 government has done a great job, you know, fighting back.

16 There are other elements -- al-Qa'ida in Islamic Maghreb. You know,
17 they're counter-narcotics -- they're narcotics smugglers. They're human
18 traffickers. They involve quite a bit in kidnapping and ransoms, and also
19 involve in tourist attacks.

20 So, what we need to do is to take into account what the environment is,
21 who we can work with, and how we're going to put pressure on them. But

1 any element that is associated with al-Qa'ida has, as part of its agenda,
2 death and destruction. And so, I fully agree what we need to do is be
3 mindful of the metastasization of the al-Qa'ida cancer.
4 **SENATOR COATS:** But in relationship to some kind of centralized
5 control over all these things, having said that, the core is decimated.
6 **MR. BRENNAN:** It really varies, you know. We do see al-Qa'ida core
7 trying to exert some control over some of these elements. There's a lot of
8 independence of effort, you know, autonomous efforts that are underway.
9 And I'd be happy to be able to talk in, you know, closed session about the
10 particular relationships that exist between al-Qa'ida and some of these other
11 elements.
12 **SENATOR COATS:** Very good. Thank you.
13 Thank you, Madam Chairman.
14 **CHAIRMAN FEINSTEIN:** Thank you very much, Senator.
15 Senator Collins? Last, but far from least.
16 **SENATOR COLLINS:** Thank you. Thank you, Madam Chairman.
17 Mr. Brennan, I want to follow up on the point that Senator Coats just
18 raised with you, because if you looked at a map back in 2001, you would see
19 that al-Qa'ida was mainly in Afghanistan and Pakistan. And if you look at a
20 map today, you would see al-Qa'ida in all sorts of countries.
21 That's not to say that there weren't cells in other countries back in

1 2001, but it raises the question in my mind of whether, even though we've
2 been successful in taking out some of the core of al-Qa'ida and some high-
3 level leaders, whether our strategy is working. If the cancer of al-Qa'ida is
4 metastasizing, do we need a new treatment?

5 **MR. BRENNAN:** What we've tried to do, Senator, over the past decade
6 and longer, is to be able to treat this real cancer in a number of ways:
7 sometimes it takes lethal force, sometimes it takes military might,
8 sometimes it takes working with our partners in a variety of ways,
9 sometimes it takes addressing some of the infrastructural, institutional, and
10 other deficiencies that exist in these countries that al-Qa'ida takes advantage
11 of.

12 If you look at the geographic map, you know, in the area from South
13 Asia over to the Middle East and North Africa, there has been tremendous
14 political turbulence in that area over the past decade, and particularly in the
15 last couple years. There are a lot of spaces -- ungoverned spaces -- that al-
16 Qa'ida has taken advantage of. We've been able to make some significant
17 progress in certain areas.

18 Somalia is, in fact, a good example of a place where we have worked
19 with neighboring countries, we've worked with the local government, and
20 we've worked with AMISOM, a multilateral element within Africa, to try to
21 suppress the efforts of Al Shabaab and al-Qa'ida in East Africa; good

1 progress we made there. Because it has to be comprehensive; it's not just a
2 kinetic solution to this by any means.
3 Now, as we look at the Sahel, and the area in Mali, and other areas,
4 these are tremendous expanses of territory where al-Qa'ida can put down
5 roots beyond the reach of local governments. And so they've been able to
6 put down roots, and they've been -- it's been unattended because of the
7 difficulties that these countries have even feeding their people, much less
8 putting in place a system of laws and the intelligence and security capability.
9 So, is it a different strategy; it has to be a comprehensive one. But al-
10 Qa'ida and this -- you know, the forces of Islamic extremists, that have really
11 corrupted and perverted Islam, are making some progress in areas that give
12 me real concern. That's why I look at a place like Syria right now, and what
13 is going on in that country; we cannot allow vast areas to be exploited by al-
14 Qa'ida and these extremist forces, because it will be to our peril.
15 **SENATOR COLLINS:** I certainly agree with you on that, and in our
16 classified or closed hearing next week I'm going to be asking you about
17 Syria, and also the Iranian threat. But I don't think those are appropriate in
18 open session.
19 Just two final questions: one has to do with priorities that you would
20 set as Director if you are confirmed. In recent years, paramilitary operations
21 obviously had consumed a lot of resources, expertise, time, energy, and

1 effort at the CIA; do you believe this has been at the expense of traditional

2 CIA responsibilities -- collection, analysis, all source?

3 **MR. BRENNAN:** Well, certainly, there have been opportunity costs

4 because of the dedication of those resources. What I would need to do, if I

5 were to go to CIA, is to inventory exactly how our resources are being

6 dedicated against the wide variety of strategic priorities to protect our

7 country.

8 In terms of operational collection activities worldwide, in terms of the

9 all source analysis being done, what are we doing in these other areas?

10 Cyber, you know, weapons proliferation, political turbulence -- there are so

11 many different areas. Counterterrorism is an important one. There is also

12 an intersection between counterterrorism and a lot of these other areas,

13 counter-proliferation, international organized crime, other things.

14 So we really want to optimize those resources so that we can, in fact,

15 leverage the capabilities we have, in order to deal with these very

16 challenging issues across a very large globe.

17 **SENATOR COLLINS:** Mr. Brennan, you have devoted a great deal of

18 your life to public service, for which I thank you. And you obviously

19 understand the world of intelligence in a way that few people do. You've

20 been an intelligence professional for much of your professional life.

21 In the last four years, you have held a political position at the White

1 House. And I have been talking to people at the CIA, whom I respect, and
2 one intelligence official told me that a key question for the men and women
3 of the CIA is which John Brennan are they going to get? Are they going to
4 get John Brennan who's been the right-hand advisor of President Obama in a
5 political White House -- and by the *nature* of the position -- I don't say that
6 critically; that's the position -- or are they going to get John Brennan, who
7 was a career CIA officer, who worked his way up in the ranks?
8 And the concern is that they want to hear that you are going to be the
9 CIA's representative to the White House, not the White House's
10 representative to the CIA. And I just want to give you the opportunity today
11 to respond to that concern.
12 I would note that I also heard very good comments from people with
13 whom I talked, and -- but I think it's important, when someone's coming
14 from a political role, to make clear that you're going to be the leader of the
15 Agency and not the White House's agent within the Agency.
16 **MR. BRENNAN:** Thank you, Senator. I think if I were to be fortunate,
17 privileged, and honored to go out to CIA, the CIA would get the John
18 Brennan who is neither a Democrat nor Republican, nor has ever been; a
19 John Brennan who has a deep appreciation and respect for the intelligence
20 profession -- one who has been fortunate to have lived it for 25 years; a John
21 Brennan who has had the great fortune to be in the White House the past

1 four years, watching and understanding how intelligence is used in support
2 of our national security. CIA would get a John Brennan who has been
3 working national security issues for my life.

4 They would get a John Brennan who really understands that the value of
5 intelligence, the importance of intelligence, is not to tell the President what
6 he wants to hear, not to tell this Committee what it wants to hear, but to tell
7 the policymakers, the Congressional overseers, what they need to hear --
8 what the Intelligence Community, with all its great capability and expertise,
9 has been able to uncover and understand about world events that
10 fundamentally affect the lives of not just this generation of Americans, but
11 of future generations of Americans.

12 And so, if I had the great privilege to lead the men and women of the
13 CIA, it would be the biggest honor of my life, and I would understand just
14 how important and weighty that would be. And if I ever dishonored that
15 responsibility, I couldn't look myself in the mirror. I couldn't look my
16 parents, my family in the mirror. I couldn't look *you* in the face, and that is
17 something that is very important to me.

18 So, I guess the proof will be in the pudding, the tasting of the pudding,
19 and if I do have that opportunity, it would be my intention to make sure I did
20 everything possible to live up to the trust and confidence that this Congress,
21 this Senate, and this President might place in me.

1 **SENATOR COLLINS:** Thank you very much.

2 Thank you, Madam Chairman.

3 **CHAIRMAN FEINSTEIN:** Thank you very much.

4 If there are no further questions, John, I would like to associate myself
5 with what Senator Rockefeller said. I've sat through a number of these
6 hearings; I don't think I've ever heard anyone more forthright or more honest
7 or more direct. You really didn't hedge. You said what you thought. And I
8 want you to know that that's very much appreciated.

9 And I actually think you are going to be a fine and strong leader for the
10 CIA, and, you know, I can't help but say I am really fully supportive of this
11 and will do everything I possibly can to see that our Committee works with
12 you closely and honestly.

13 We will have a classified hearing. I am specifically going to just warn
14 you that I would like to have you respond in detail to what I perceive as a
15 difficult, evolving situation in North Africa now, with Tunisia, with Libya, with
16 all these countries, and certainly with Mali, and how you plan to direct the
17 Agency to deal with this evolving momentum that's taking place in Northern
18 Africa.

19 So that will be for Tuesday. And at the request of Senator Levin, I ask
20 unanimous consent to enter into the record a Joint Statement that he and I
21 made on April 27, 2012.

1 *(Whereupon, the Joint Statement of Senators Feinstein and Levin,*
2 *dated April 27, 2012, was submitted for the record. A copy of the*
3 *Statement follows.)*

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1 **CHAIRMAN FEINSTEIN:** And secondly, in order to have Mr. Brennan's
2 answers to questions for the record by the time he returns before us in
3 closed session, I ask Members to the right questions for the record by 5
4 o'clock p.m. tomorrow -- that's Friday, February the 8th -- so we have them
5 for you as soon as possible so that you can respond to them Tuesday.
6 I want to thank you and your family for being here, and I wish you well.
7 Thank you, and the hearing is adjourned.
8 **MR. BRENNAN:** Thank you, Chairman.
9 ***(Whereupon, at 6 o'clock p.m., the Committee adjourned.)***
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# Exhibit 2

## To the Declaration of Colin Wicker

**DEPARTMENT OF JUSTICE WHITE PAPER**

Draft November 8, 2011

**Lawfulness of a Lethal Operation Directed Against a U.S. Citizen Who Is a Senior Operational Leader of Al-Qa'ida or An Associated Force**

This white paper sets forth a legal framework for considering the circumstances in which the U.S. government could use lethal force in a foreign country outside the area of active hostilities against a U.S. citizen who is a senior operational leader of al-Qa'ida or an associated force[1] of al-Qa'ida—that is, an al-Qa'ida leader actively engaged in planning operations to kill Americans. The paper does not attempt to determine the minimum requirements necessary to render such an operation lawful; nor does it assess what might be required to render a lethal operation against a U.S. citizen lawful in other circumstances, including an operation against enemy forces on a traditional battlefield or an operation against a U.S. citizen who is not a senior operational leader of such forces. Here the Department of Justice concludes only that where the following three conditions are met, a U.S. operation using lethal force in a foreign country against a U.S. citizen who is a senior operational leader of al-Qa'ida or an associated force would be lawful: (1) 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; (2) capture is infeasible, and the United States continues to monitor whether capture becomes feasible; and (3) the operation would be conducted in a manner consistent with applicable law of war principles. This conclusion is reached with recognition of the extraordinary seriousness of a lethal operation by the United States against a U.S. citizen, and also of the extraordinary seriousness of the threat posed by senior operational al-Qa'ida members and the loss of life that would result were their operations successful.

The President has authority to respond to the imminent threat posed by al-Qa'ida and its associated forces, arising from his constitutional responsibility to protect the country, the inherent right of the United States to national self defense under international law, Congress's authorization of the use of all necessary and appropriate military force against this enemy, and the existence of an armed conflict with al-Qa'ida under international law. Based on these authorities, the President may use force against al-Qa'ida and its associated forces. As detailed in this white paper, in defined circumstances, a targeted killing of a U.S. citizen who has joined al-Qa'ida or its associated forces would be lawful under U.S. and international law. Targeting a member of an enemy force who poses an imminent threat of violent attack to the United States is not unlawful. It is a lawful act of national self defense. Nor would it violate otherwise applicable federal laws barring unlawful killings in Title 18 or the assassination ban in Executive Order No. 12333. Moreover, a lethal operation in a foreign nation would be consistent with international legal principles of sovereignty and neutrality if it were conducted, for example, with the consent of the host nation's government or after a

[1] An associated force of al-Qa'ida includes a group that would qualify as a co-belligerent under the laws of war. *See Hamlily v. Obama*, 616 F. Supp. 2d 63, 74-75 (D.D.C. 2009) (authority to detain extends to "'associated forces,'" which "mean 'co-belligerents' as that term is understood under the laws of war").

determination that the host nation is unable or unwilling to suppress the threat posed by the individual targeted.

Were the target of a lethal operation a U.S. citizen who may have rights under the Due Process Clause and the Fourth Amendment, that individual's citizenship would not immunize him from a lethal operation. Under the traditional due process balancing analysis of *Mathews v. Eldridge*, we recognize that there is no private interest more weighty than a person's interest in his life. But that interest must be balanced against the United States' interest in forestalling the threat of violence and death to other Americans that arises from an individual who is a senior operational leader of al-Q'aida or an associated force of al-Q'aida and who is engaged in plotting against the United States.

The paper begins with a brief summary of the authority for the use of force in the situation described here, including the authority to target a U.S. citizen having the characteristics described above with lethal force outside the area of active hostilities. It continues with the constitutional questions, considering first whether a lethal operation against such a U.S. citizen would be consistent with the Fifth Amendment's Due Process Clause, U.S. Const. amend. V. As part of the due process analysis, the paper explains the concepts of "imminence," feasibility of capture, and compliance with applicable law of war principles. The paper then discusses whether such an operation would be consistent with the Fourth Amendment's prohibition on unreasonable seizures, U.S. Const. amend. IV. It concludes that where certain conditions are met, a lethal operation against a U.S. citizen who is a senior operational leader of al-Qa'ida or its associated forces—a terrorist organization engaged in constant plotting against the United States, as well as an enemy force with which the United States is in a congressionally authorized armed conflict—and who himself poses an imminent threat of violent attack against the United States, would not violate the Constitution. The paper also includes an analysis concluding that such an operation would not violate certain criminal provisions prohibiting the killing of U.S. nationals outside the United States; nor would it constitute either the commission of a war crime or an assassination prohibited by Executive Order 12333.

## I.

The United States is in an armed conflict with al-Qa'ida and its associated forces, and Congress has authorized the President to use all necessary and appropriate force against those entities. *See* Authorization for Use of Military Force ("AUMF"), Pub. L. No. 107-40, § 2(a), 115 Stat. 224, 224 (2001). In addition to the authority arising from the AUMF, the President's use of force against al-Qa'ida and associated forces is lawful under other principles of U.S. and international law, including the President's constitutional responsibility to protect the nation and the inherent right to national self-defense recognized in international law (*see, e.g.*, U.N. Charter art. 51). It was on these bases that the United States responded to the attacks of September 11, 2001, and "[t]hese domestic and international legal authorities continue to this day." Harold Hongju Koh, Legal Adviser, U.S. Department of State, Address to the Annual Meeting of the American Society of International Law: The Obama Administration and International Law (Mar. 25, 2010) ("2010 Koh ASIL Speech").

Any operation of the sort discussed here would be conducted in a foreign country against a senior operational leader of al-Qa'ida or its associated forces who poses an imminent threat of violent attack against the United States. A use of force under such circumstances would be justified as an act of national self-defense. In addition, such a person would be within the core of individuals against whom Congress has authorized the use of necessary and appropriate force. The fact that such a person would also be a U.S. citizen would not alter this conclusion. The Supreme Court has held that the military may constitutionally use force against a U.S. citizen who is a part of enemy forces. *See Hamdi*, 542 U.S. 507, 518 (2004) (plurality opinion); *id.* at 587, 597 (Thomas, J., dissenting); *Ex Parte Quirin*, 317 U.S. at 37-38. Like the imposition of military detention, the use of lethal force against such enemy forces is an "important incident of war." *Hamdi*, 542 U.S. at 518 (plurality opinion) (quotation omitted). *See, e.g.*, General Orders No. 100: *Instructions for the Government of Armies of the United States in the Field* ¶ 15 (Apr. 24, 1863) ("[m]ilitary necessity admits of all direct destruction of life or limb of armed enemies") (emphasis omitted); International Committee of the Red Cross, *Commentary on the Additional Protocols of 8 June 1977 to the Geneva Conventions of 12 Aug. 1949 and Relating to the Protection of Victims of Non-International Armed Conflicts* (Additional Protocol II) § 4789 (1987) ("Those who belong to armed forces or armed groups may be attacked at any time."); Yoram Dinstein, *The Conduct of Hostilities Under the Law of International Armed Conflict* 94 (2004) ("When a person takes up arms or merely dons a uniform as a member of the armed forces, he automatically exposes himself to enemy attack."). Accordingly, the Department does not believe that U.S. citizenship would immunize a senior operational leader of al-Qa'ida or its associated forces from a use of force abroad authorized by the AUMF or in national self-defense.

In addition, the United States retains its authority to use force against al-Qa'ida and associated forces outside the area of active hostilities when it targets a senior operational leader of the enemy forces who is actively engaged in planning operations to kill Americans. The United States is currently in a non-international armed conflict with al-Qa'ida and its associated forces. *See Hamdan v. Rumsfeld*, 548 U.S. 557, 628-31 (2006) (holding that a conflict between a nation and a transnational non-state actor, occurring outside the nation's territory, is an armed conflict "not of an international character" (quoting Common Article 3 of the Geneva Conventions) because it is not a "clash between nations"). Any U.S. operation would be part of this non-international armed conflict, even if it were to take place away from the zone of active hostilities. *See* John O. Brennan, Assistant to the President for Homeland Security and Counterterrorism, Remarks at the Program on Law and Security, Harvard Law School: Strengthening Our Security by Adhering to Our Values and Laws (Sept. 16, 2011) ("The United States does not view our authority to use military force against al-Qa'ida as being restricted solely to 'hot' battlefields like Afghanistan."). For example, the AUMF itself does not set forth an express geographic limitation on the use of force it authorizes. *See Hamdan*, 548 U.S. at 631 (Kennedy, J., concurring) (what makes a non-international armed conflict distinct from an international armed conflict is "the legal status of the entities opposing each other"). None of the three branches of the U.S. Government has identified a strict geographical limit on the permissible scope of the AUMF's authorization. *See, e.g.*,

Letter for the Speaker of the House of Representatives and the President Pro Tempore of the Senate from the President (June 15, 2010) (reporting that the armed forces, with the assistance of numerous international partners, continue to conduct operations "against al-Qa'ida terrorists," and that the United States has "deployed combat-equipped forces to a number of locations in the U.S. Central . . . Command area[] of operation in support of those [overseas counter-terrorist] operations"); *Bensayah v. Obama*, 610 F.3d 718, 720, 724-25, 727 (D.C. Cir. 2010) (concluding that an individual turned over to the United States in Bosnia could be detained if the government demonstrates he was part of al-Qa'ida); *al-Adahi v. Obama*, 613 F.3d 1102, 1003, 1111 (D.C. Cir. 2010) (noting authority under AUMF to detain individual apprehended by Pakistani authorities in Pakistan and then transferred to U.S. custody).

Claiming that for purposes of international law, an armed conflict generally exists only when there is "protracted armed violence between governmental authorities and organized armed groups," *Prosecutor v. Tadic*, Case No. IT-94-1AR72, Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction, ¶ 70 (Int'l Crim. Trib. for the Former Yugoslavia, App. Chamber Oct. 2, 1995), some commenters have suggested that the conflict between the United States and al-Qa'ida cannot lawfully extend to nations outside Afghanistan in which the level of hostilities is less intense or prolonged than in Afghanistan itself. *See*, *e.g.*, Mary Ellen O'Connell, *Combatants and the Combat Zone*, 43 U. Rich. L. Rev. 845, 857-59 (2009). There is little judicial or other authoritative precedent that speaks directly to the question of the geographic scope of a non-international armed conflict in which one of the parties is a transnational, non-state actor and where the principal theater of operations is not within the territory of the nation that is a party to the conflict. Thus, in considering this potential issue, the Department looks to principles and statements from analogous contexts.

The Department has not found any authority for the proposition that when one of the parties to an armed conflict plans and executes operations from a base in a new nation, an operation to engage the enemy in that location cannot be part of the original armed conflict, and thus subject to the laws of war governing that conflict, unless the hostilities become sufficiently intense and protracted in the new location. That does not appear to be the rule of the historical practice, for instance, even in a traditional international conflict. *See* John R. Stevenson, Legal Adviser, Department of State, United States Military Action in Cambodia: Questions of International Law, Address before the Hammarskjold Forum of the Association of the Bar of the City of New York (May 28, 1970), *in* 3 *The Vietnam War and International Law: The Widening Context* 23, 28-30 (Richard A. Falk, ed. 1972) (arguing that in an international armed conflict, if a neutral state has been unable for any reason to prevent violations of its neutrality by the troops of one belligerent using its territory as a base of operations, the other belligerent has historically been justified in attacking those enemy forces in that state). Particularly in a non-international armed conflict, where terrorist organizations may move their base of operations from one country to another, the determination of whether a particular operation would be part of an ongoing armed conflict would require consideration of the particular facts and circumstances in each case, including the fact that transnational non-state organizations such as al-Qa'ida may have no single site serving as their base of

operations. *See also, e.g.*, Geoffrey S. Corn & Eric Talbot Jensen, *Untying the Gordian Knot: A Proposal for Determining Applicability of the Laws of War to the War on Terror*, 81 Temp. L. Rev. 787, 799 (2008) ("If . . . the ultimate purpose of the drafters of the Geneva Conventions was to prevent 'law avoidance' by developing de facto law triggers—a purpose consistent with the humanitarian foundation of the treaties—then the myopic focus on the geographic nature of an armed conflict in the context of transnational counterterrorist combat operations serves to frustrate that purpose.").[2]

If an operation of the kind discussed in this paper were to occur in a location where al-Qa'ida or an associated force has a significant and organized presence and from which al-Qa'ida or an associated force, including its senior operational leaders, plan attacks against U.S. persons and interests, the operation would be part of the non-international armed conflict between the United States and al-Qa'ida that the Supreme Court recognized in *Hamdan*. Moreover, such an operation would be consistent with international legal principles of sovereignty and neutrality if it were conducted, for example, with the consent of the host nation's government or after a determination that the host nation is unable or unwilling to suppress the threat posed by the individual targeted. In such circumstances, targeting a U.S. citizen of the kind described in this paper would be authorized under the AUMF and the inherent right to national self-defense. Given this authority, the question becomes whether and what further restrictions may limit its exercise.

**II.**

The Department assumes that the rights afforded by Fifth Amendment's Due Process Clause, as well as the Fourth Amendment, attach to a U.S. citizen even while he is abroad. *See Reid v. Covert*, 354 U.S. 1, 5-6 (1957) (plurality opinion); *United States v. Verdugo-Urquidez*, 494 U.S. 259, 269-70 (1990); *see also In re Terrorist Bombings of U.S. Embassies in East Africa*, 552 F.3d 157, 170 n.7 (2d Cir. 2008). The U.S. citizenship of a leader of al-Qa'ida or its associated forces, however, does not give that person constitutional immunity from attack. This paper next considers whether and in what circumstances a lethal operation would violate any possible constitutional protections of a U.S. citizen.

**A.**

The Due Process Clause would not prohibit a lethal operation of the sort contemplated here. In *Hamdi*, a plurality of the Supreme Court used the *Mathews v. Eldridge* balancing test to analyze the Fifth Amendment due process rights of a U.S. citizen who had been captured on the battlefield in Afghanistan and detained in the

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[2] *See Prosecutor v. Tadic*, Case No. IT-94-1AR72, Submission of the Government of the United States of America Concerning Certain Arguments Made by Counsel for the Accused, at 27-28 (Int'l Crim. Trib. For the Former Yugoslavia, App. Chamber July 17, 1995) (in determining which body of law applies in a particular conflict, "the conflict must be considered as a whole, and "it is artificial and improper to attempt to divide it into isolated segments, either geographically or chronologically").

United States, and who wished to challenge the government's assertion that he was part of enemy forces. The Court explained that the "process due in any given instance is determined by weighing 'the private interest that will be affected by the official action' against the Government's asserted interest, 'including the function involved' and the burdens the Government would face in providing greater process." *Hamdi*, 542 U.S. at 529 (plurality opinion) (quoting *Mathews v. Eldridge*, 424 U.S. 319, 335 (1976)). The due process balancing analysis applied to determine the Fifth Amendment rights of a U.S. citizen with respect to law-of-war detention supplies the framework for assessing the process due a U.S. citizen who is a senior operational leader of an enemy force planning violent attacks against Americans before he is subjected to lethal targeting.

In the circumstances considered here, the interests on both sides would be weighty. *See Hamdi*, 542 U.S. at 529 (plurality opinion) ("It is beyond question that substantial interests lie on both sides of the scale in this case."). An individual's interest in avoiding erroneous deprivation of his life is "uniquely compelling." *See Ake v. Oklahoma*, 470 U.S. 68, 178 (1985) ("The private interest in the accuracy of a criminal proceeding that places an individual's life or liberty at risk is almost uniquely compelling."). No private interest is more substantial. At the same time, the government's interest in waging war, protecting its citizens, and removing the threat posed by members of enemy forces is also compelling. *Cf. Hamdi*, 542 U.S. at 531 (plurality opinion) ("On the other side of the scale are the weighty and sensitive governmental interests in ensuring that those who have in fact fought with the enemy during a war do not return to battle against the United States."). As the *Hamdi* plurality observed, in the "circumstances of war," "the risk of erroneous deprivation of a citizen's liberty in the absence of sufficient process . . . is very real," *id.* at 530 (plurality opinion), and, of course, the risk of an erroneous deprivation of a citizen's life is even more significant. But, "the realities of combat" render certain uses of force "necessary and appropriate," including force against U.S. citizens who have joined enemy forces in the armed conflict against the United States and whose activities pose an imminent threat of violent attack against the United States—and "due process analysis need not blink at those realities." *Id.* at 531 (plurality opinion). These same realities must also be considered in assessing "the burdens the Government would face in providing greater process" to a member of enemy forces. *Id.* at 529, 531 (plurality opinion).

In view of these interests and practical considerations, the United States would be able to use lethal force against a U.S. citizen, who is located outside the United States and is an operational leader continually planning attacks against U.S. persons and interests, 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; (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 war principles. In these circumstances, the "realities" of the conflict and the weight of the government's interest in protecting its citizens from an imminent attack are such that the Constitution would not require the government to provide further process to such a U.S. citizen before using lethal force. *Cf. Hamdi*, 542

U.S. at 535 (plurality opinion) (noting that the Court "accord[s] the greatest respect and consideration to the judgments of military authorities in matters relating to the actual prosecution of war, and . . . the scope of that discretion necessarily is wide"); *id.* at 534 (plurality opinion) ("The parties agree that initial captures on the battlefield need not receive the process we have discussed here; that process is due only when the determination is made to continue to hold those who have been seized.") (emphasis omitted).

Certain aspects of this legal framework require additional explication. *First*, the condition that an operational leader present an "imminent" threat of violent attack against the United States does not require the United States to have clear evidence that a specific attack on U.S. persons and interests will take place in the immediate future. Given the nature of, for example, the terrorist attacks on September 11, in which civilian airliners were hijacked to strike the World Trade Center and the Pentagon, this definition of imminence, which would require the United States to refrain from action until preparations for an attack are concluded, would not allow the United States sufficient time to defend itself. The defensive options available to the United States may be reduced or eliminated if al-Qa'ida operatives disappear and cannot be found when the time of their attack approaches. Consequently, with respect to al-Qa'ida leaders who are continually planning attacks, the United States is likely to have only a limited window of opportunity within which to defend Americans in a manner that has both a high likelihood of success and sufficiently reduces the probabilities of civilian causalities. *See* Michael N. Schmitt, *State-Sponsored Assassination in International and Domestic Law*, 17 Yale J. Int'l L. 609, 648 (1992). Furthermore, a "terrorist 'war' does not consist of a massive attack across an international border, nor does it consist of one isolated incident that occurs and is then past. It is a drawn out, patient, sporadic pattern of attacks. It is very difficult to know when or where the next incident will occur." Gregory M. Travalio, *Terrorism, International Law, and the Use of Military Force*, 18 Wis. Int'l L.J. 145, 173 (2000); *see also* Testimony of Attorney-General Lord Goldsmith, 660 Hansard. H.L. (April 21, 2004) 370 (U.K.), *available at* http://www.publications.parliament.uk/pa/ld200304/ldhansrd/vo040421/text/40421-07.htm (what constitutes an imminent threat "will develop to meet new circumstances and new threats . . . . It must be right that states are able to act in self-defense in circumstances where there is evidence of further imminent attacks by terrorist groups, even if there is no specific evidence of where such an attack will take place or of the precise nature of the attack."). Delaying action against individuals continually planning to kill Americans until some theoretical end stage of the planning for a particular plot would create an unacceptably high risk that the action would fail and that American casualties would result.

By its nature, therefore, the threat posed by al-Qa'ida and its associated forces demands a broader concept of imminence in judging when a person continually planning terror attacks presents an imminent threat, making the use of force appropriate. In this context, imminence must incorporate considerations of the relevant window of opportunity, the possibility of reducing collateral damage to civilians, and the likelihood of heading off future disastrous attacks on Americans. Thus, a decision maker

determining whether an al-Qa'ida operational leader presents an imminent threat of violent attack against the United States must take into account that certain members of al-Qa'ida (including any potential target of lethal force) are continually plotting attacks against the United States; that al-Qa'ida would engage in such attacks regularly to the extent it were able to do so; that the U.S. government may not be aware of all al-Qa'ida plots as they are developing and thus cannot be confident that none is about to occur; and that, in light of these predicates, the nation may have a limited window of opportunity within which to strike in a manner that both has a high likelihood of success and reduces the probability of American casualties.

With this understanding, a high-level official could conclude, for example, that an individual poses an "imminent threat" of violent attack against the United States where he is an operational leader of al-Qa'ida or an associated force and is personally and continually involved in planning terrorist attacks against the United States. Moreover, where the al-Qa'ida member in question has recently been involved in activities posing an imminent threat of violent attack against the United States, and there is no evidence suggesting that he has renounced or abandoned such activities, that member's involvement in al-Qa'ida's continuing terrorist campaign against the United States would support the conclusion that the member poses an imminent threat.

*Second*, regarding the feasibility of capture, capture would not be feasible if it could not be physically effectuated during the relevant window of opportunity or if the relevant country were to decline to consent to a capture operation. Other factors such as undue risk to U.S. personnel conducting a potential capture operation also could be relevant. Feasibility would be a highly fact-specific and potentially time-sensitive inquiry.

*Third*, it is a premise here that any such lethal operation by the United States would comply with the four fundamental law-of-war principles governing the use of force: necessity, distinction, proportionality, and humanity (the avoidance of unnecessary suffering). *See, e.g.*, United States Air Force, Targeting, Air Force Doctrine Document 2-1.9, at 88 (June 8, 2006); Dinstein, *Conduct of Hostilities* at 16-20, 115-16, 119-23; *see also 2010 Koh ASIL Speech*. For example, it would not be consistent with those principles to continue an operation if anticipated civilian casualties would be excessive in relation to the anticipated military advantage. Chairman of the Joint Chiefs of Staff Instruction 5810.01D, Implementation of the DoD Law of War Program ¶ 4.a, at 1 (Apr. 30, 2010). An operation consistent with the laws of war could not violate the prohibitions against treachery and perfidy, which address a breach of confidence by the assailant. *See, e.g.*, Hague Convention IV, Annex, art. 23(b), Oct. 18, 1907, 36 Stat. 2277, 2301-02 ("[I]t is especially forbidden . . . [t]o kill or wound treacherously individuals belonging to the hostile nation or army . . . ."). These prohibitions do not, however, categorically forbid the use of stealth or surprise, nor forbid attacks on identified individual soldiers or officers. *See* U.S. Army Field Manual 27-10, *The Law of Land Warfare*, ¶ 31 (1956) (article 23(b) of the Annex to the Hague Convention IV does not "preclude attacks on individual soldiers or officers of the enemy whether in the zone of hostilities, occupied territory, or else-where"). And the Department is not aware of

any other law-of-war grounds precluding use of such tactics. *See* Dinstein, *Conduct of Hostilities* at 94-95, 199; Abraham D. Sofaer, *Terrorism, the Law, and the National Defense*, 126 Mil. L. Rev. 89, 120-21 (1989). Relatedly, "there is no prohibition under the laws of war on the use of technologically advanced weapons systems in armed conflict—such as pilotless aircraft or so-called smart bombs—as long as they are employed in conformity with applicable laws of war." *2010 Koh ASIL Speech*. Further, under this framework, the United States would also be required to accept a surrender if it were feasible to do so.

In sum, an operation in the circumstances and under the constraints described above would not result in a violation of any due process rights.

**B.**

Similarly, assuming 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, such an operation would not violate that Amendment in the circumstances posited here. The 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." *Tennessee v. Garner*, 471 US. 1, 8 (1985) (internal quotation marks omitted); *accord Scott v. Harris*, 550 U.S. 372, 383 (2007). 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." *Garner*, 471 U.S. at 11. 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." *Id.* at 11-12.

The Fourth Amendment "reasonableness" test is situation-dependent. *Cf. Scott*, 550 U.S. at 382 ("*Garner* did not establish a magical on/off switch that triggers rigid preconditions whenever an officer's actions constitute 'deadly force.'"). What would constitute a reasonable use of lethal force for purposes of domestic law enforcement operations differs substantially from what would be reasonable in the situation and circumstances discussed in this white paper. But at least in circumstances where the targeted person is an operational leader of an enemy force and an informed, high-level government official has determined that he 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. Under such circumstances, the intrusion on any Fourth Amendment interests would be outweighed by the "importance of the governmental interests [that] justify the intrusion," *Garner*, 471 U.S. at 8—the interests in protecting the lives of Americans.

C.

Finally, the Department notes that under the circumstances described in this paper, there exists no appropriate judicial forum to evaluate these constitutional considerations. It is well-established that "[m]atters intimately related to foreign policy and national security are rarely proper subjects for judicial intervention," *Haig v. Agee*, 453 U.S. 280, 292 (1981), because such matters "frequently turn on standards that defy judicial application," or "involve the exercise of a discretion demonstrably committed to the executive or legislature," *Baker v. Carr*, 369 U.S. 186, 211 (1962). Were a court to intervene here, it might be required inappropriately to issue an ex ante command to the President and officials responsible for operations with respect to their specific tactical judgment to mount a potential lethal operation against a senior operational leader of al-Qa'ida or its associated forces. And judicial enforcement of such orders would require the Court to supervise inherently predictive judgments by the President and his national security advisors as to when and how to use force against a member of an enemy force against which Congress has authorized the use of force.

III.

Section 1119(b) of title 18 provides that a "person who, being a national of the United States, kills or attempts to kill a national of the United States while such national is outside the United States but within the jurisdiction of another country shall be punished as provided under sections 1111, 1112, and 1113." 18 U.S.C. § 1119(b) (2006).[3] Because the person who would be the target of the kind of operation discussed here would be a U.S. citizen, it might be suggested that section 1119(b) would prohibit such an operation. Section 1119, however, incorporates the federal murder and manslaughter statutes, and thus its prohibition extends only to "unlawful killing[s]," 18 U.S.C. §§ 1111(a), 1112(a) (2006). Section 1119 is best construed to incorporate the "public authority" justification, which renders lethal action carried out by a government official lawful in some circumstances. As this paper explains below, a lethal operation of the kind discussed here would fall within the public authority exception under the circumstances and conditions posited because it would be conducted in a manner consistent with applicable law of war principles governing the non-international conflict between the United States and al-Qa'ida and its associated forces. It therefore would not result in an unlawful killing.[4]

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[3] *See also* 18 U.S.C. § 1119(a) (2006) (providing that "'national of the United States' has the meaning stated in section 101(a)(22) of the Immigration and Nationality Act," 8 U.S.C. § 1101(a)(22) (2006)).

[4] In light of the conclusion that section 1119 and the statutes it cross-references incorporate this justification, and that the justification would cover an operation of the sort discussed here, this discussion does not address whether an operation of this sort could be lawful on any other grounds.

**A.**

Although section 1119(b) refers only to the "punish[ments]" provided under sections 1111, 1112, and 1113, courts have held that section 1119(b) incorporates the substantive elements of those cross-referenced provisions of title 18. *See, e.g., United States v. Wharton*, 320 F.3d 526, 533 (5th Cir. 2003); *United States v. White*, 51 F. Supp. 2d 1008, 1013-14 (E.D. Cal. 1997). Section 1111 of title 18 sets forth criminal penalties for "murder," and provides that "[m]urder is the unlawful killing of a human being with malice aforethought." 18 U.S.C. § 1111(a). Section 1112 similarly provides criminal sanctions for "[m]anslaughter," and states that "[m]anslaughter is the unlawful killing of a human being without malice." *Id.* § 1112(a). Section 1113 provides criminal penalties for "attempts to commit murder or manslaughter." *Id.* § 1113. It is therefore clear that section 1119(b) bars only "unlawful killing."

Guidance as to the meaning of the phrase "unlawful killing" in sections 1111 and 1112—and thus for purposes of section 1119(b)—can be found in the historical understandings of murder and manslaughter. That history shows that states have long recognized justifications and excuses to statutes criminalizing "unlawful" killings.[5] One state court, for example, in construing that state's murder statute, explained that "the word 'unlawful' is a term of art" that "connotes a homicide with the absence of factors of excuse or justification." *People v. Frye*, 10 Cal. Rptr. 2d 217, 221 (Cal. Ct. App. 1992). That court further explained that the factors of excuse or justification in question include those that have traditionally been recognized. *Id.* at 221 n.2. Other authorities support the same conclusion. *See, e.g., Mullaney v. Wilbur*, 421 U.S. 684, 685 (1975) (requirement of "unlawful" killing in Maine murder statute meant that killing was "neither justifiable nor excusable"); *cf. also* Rollin M. Perkins & Ronald N. Boyce, *Criminal Law* 56 (3d ed. 1982) ("Innocent homicide is of two kinds, (1) justifiable and (2) excusable."). Accordingly, section 1119 does not proscribe killings covered by a justification traditionally recognized under the common law or state and federal murder statutes. "Congress did not intend [section 1119] to criminalize justifiable or excusable killings." *White*, 51 F. Supp. 2d at 1013.

**B.**

The public authority justification is well-accepted, and it may be available even in cases where the particular criminal statute at issue does not expressly refer to a public

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[5] The same is true with respect to other statutes, including federal laws, that modify a prohibited act other than murder or manslaughter with the term "unlawfully." *See, e.g., Territory v. Gonzales*, 89 P. 250, 252 (N.M. 1907) (construing the term "unlawful" in statute criminalizing assault with a deadly weapon as "clearly equivalent" to "without excuse or justification"). For example, 18 U.S.C. § 2339C(a)(1) (2006) makes it unlawful, *inter alia*, to "unlawfully and willfully provide[] or collect[] funds" with the intention that they may be used (or knowledge they are to be used) to carry out an act that is an offense within certain specified treaties, or to engage in certain other terrorist acts. The legislative history of section 2339C makes clear that "[t]he term 'unlawfully' is intended to embody common law defenses." H.R. Rep. No. 107-307, at 12 (2001).

authority justification. Prosecutions where such a "public authority" justification is invoked are understandably rare, *see* American Law Institute Model Penal Code and Commentaries § 3.03 Comment 1, at 23-24 (1985); *cf. Visa Fraud Investigation*, 8 Op. O.L.C. 284, 285 n.2, 286 (1984), and thus there is little case law in which courts have analyzed the scope of the justification with respect to the conduct of government officials. Nonetheless, discussions in the leading treatises and in the Model Penal Code demonstrate its legitimacy. *See* 2 Wayne R. LaFave, *Substantive Criminal Law* § 10.2(b), at 135 (2d ed. 2003); Perkins & Boyce, *Criminal Law* at 1093 ("Deeds which otherwise would be criminal, such as taking or destroying property, taking hold of a person by force and against his will, placing him in confinement, or even taking his life, are not crimes if done with proper public authority."); *see also* Model Penal Code § 3.03(1)(a), (d), (e), at 22-23 (proposing codification of justification where conduct is "required or authorized by," *inter alia*, "the law defining the duties or functions of a public officer," "the law governing the armed services or the lawful conduct of war," or "any other provision of law imposing a public duty"); National Commission on Reform of Federal Criminal Laws, *A Proposed New Federal Criminal Code* § 602(1) (1971) ("Conduct engaged in by a public servant in the course of his official duties is justified when it is required or authorized by law."). And the Department's Office of Legal Counsel ("OLC") has invoked analogous rationales when it has analyzed whether Congress intended a particular criminal statute to prohibit specific conduct that otherwise falls within a government agency's authorities. *See, e.g., Visa Fraud Investigation*, 8 Op. O.L.C. at 287-88 (concluding that a civil statute prohibiting issuance of visa to an alien known to be ineligible did not prohibit State Department from issuing such a visa where "necessary" to facilitate an important Immigration and Naturalization Service undercover operation carried out in a "reasonable" fashion).

The public authority justification would not excuse all conduct of public officials from all criminal prohibitions. The legislature may design some criminal prohibitions to place bounds on the kinds of governmental conduct that can be authorized by the Executive. Or the legislature may enact a criminal prohibition in order to limit the scope of the conduct that the legislature has otherwise authorized the Executive to undertake pursuant to another statute. *See, e.g., Nardone v. United States*, 302 U.S. 379, 384 (1937) (federal statute proscribed government wiretapping). But the generally recognized public authority justification reflects that it would not make sense to attribute to Congress the intent to criminalize all covered activities undertaken by public officials in the legitimate exercise of their otherwise lawful authorities, even if Congress clearly intends to make those same actions a crime when committed by persons not acting pursuant to public authority. In some instances, therefore, the best interpretation of a criminal prohibition is that Congress intended to distinguish persons who are acting pursuant to public authority from those who are not, even if the statute does not make that distinction express. *Cf. id.* at 384 (federal criminal statutes should be construed to exclude authorized conduct of public officers where such a reading "would work obvious absurdity as, for example, the

application of a speed law to a policeman pursuing a criminal or the driver of a fire engine responding to an alarm").[6]

The touchstone for the analysis whether section 1119 incorporates not only justifications generally, but also the public authority justification in particular, is the legislative intent underlying this statute. Here, the statute should be read to exclude from its prohibitory scope killings that are encompassed by traditional justifications, which include the public authority justification. The statutory incorporation of two other criminal statutes expressly referencing "unlawful" killings is one indication. *See supra* at 10-11. Moreover, there are no indications that Congress had a contrary intention. Nothing in the text or legislative history of sections 1111-1113 of title 18 suggests that Congress intended to exclude the established public authority justification from those justifications that Congress otherwise must be understood to have imported through the use of the modifier "unlawful" in those statutes. Nor is there anything in the text or legislative history of section 1119 itself to suggest that Congress intended to abrogate or otherwise affect the availability of this traditional justification for killings. On the contrary, the relevant legislative materials indicate that, in enacting section 1119, Congress was merely closing a gap in a field dealing with entirely different kinds of conduct from that at issue here.[7]

The Department thus concludes that section 1119 incorporates the public authority justification.[8] This paper turns next to the question whether a lethal operation

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[6] Each potentially applicable statute must be carefully and separately examined to discern Congress's intent in this respect. *See generally, e.g., Nardone*, 302 U.S. 379; *United States Assistance to Countries that Shoot Down Civil Aircraft Involved in Drug Trafficking*, 18 Op. O.L.C. 148 (1994); *Application of Neutrality Act to Official Government Activities*, 8 Op. O.L.C. 58 (1984).

[7] Section 1119 was designed to close a jurisdictional loophole—exposed by a murder that had been committed abroad by a private individual—to ensure the possibility of prosecuting U.S. nationals who murdered other U.S. nationals in certain foreign countries that lacked the ability to lawfully secure the perpetrator's appearance at trial. *See* 137 Cong. Rec. 8675-76 (1991) (statement of Sen. Thurmond). This loophole is unrelated to the sort of authorized operation at issue here. Indeed, prior to the enactment of section 1119, the only federal statute expressly making it a crime to kill U.S. nationals abroad (outside the United States' special and maritime jurisdiction) reflected what appears to have been a particular concern with the protection of Americans from terrorist attacks. *See* 18 U.S.C. § 2332(a), (d) (2006) (criminalizing unlawful killings of U.S. nationals abroad where the Attorney General or his subordinate certifies that the "offense was intended to coerce, intimidate, or retaliate against a government or a civilian population").

[8] 18 U.S.C. § 956(a)(1) (2006) makes it a crime to conspire within the jurisdiction of the United States "to commit at any place outside the United States an act that would constitute the offense of murder, kidnapping, or maiming if committed in the special maritime and territorial jurisdiction of the United States" if any conspirator acts within the United States to effect any object of the conspiracy. Like section 1119(b), section 956(a) incorporates the public authority justification. In addition, the legislative history of section 956(a) indicates that the provision was "not intended to apply to duly authorized actions undertaken on behalf of the United States Government." 141 Cong. Rec. 4491, 4507 (1995) (section-by-section analysis of bill submitted by Sen. Biden, who introduced the provision at the behest of the President); *see also id.* at 11,960 (section-by-section analysis of bill submitted by Sen. Daschle, who introduced the identical provision in a different version of the anti-terrorism legislation a few months later). Thus, for the reasons that section 1119(b) does not prohibit the United States from conducting a lethal operation against a U.S. citizen, section 956(a) also does not prohibit such an operation.

could be encompassed by that justification and, in particular, whether that justification would apply when the target is a U.S. citizen. The analysis here leads to the conclusion that it would.

C.

A lethal operation against an enemy leader undertaken in national self-defense or during an armed conflict that is authorized by an informed, high-level official and carried out in a manner that accords with applicable law of war principles would fall within a well established variant of the public authority justification and therefore would not be murder. *See*, *e.g.*, 2 Paul H. Robinson, *Criminal Law Defenses* § 148(a), at 208 (1984) (conduct that would violate a criminal statute is justified and thus not unlawful "[w]here the exercise of military authority relies upon the law governing the armed forces or upon the conduct of war"); 2 LaFave, *Substantive Criminal Law* § 10.2(c) at 136 ("another aspect of the public duty defense is where the conduct was required or authorized by 'the law governing the armed services or the lawful conduct of war'"); Perkins & Boyce, *Criminal Law* at 1093 (noting that a "typical instance[] in which even the extreme act of taking human life is done by public authority" involves "the killing of an enemy as an act of war and within the rules of war").[9]

The United States is currently in the midst of a congressionally authorized armed conflict with al-Qa'ida and associated forces, and may act in national self-defense to protect U.S. persons and interests who are under continual threat of violent attack by certain al-Q'aida operatives planning operations against them. The public authority justification would apply to a lethal operation of the kind discussed in this paper if it were conducted in accord with applicable law of war principles. As one legal commentator has explained, "if a soldier intentionally kills an enemy combatant in time of war and within the rules of warfare, he is not guilty of murder," whereas, for example, if that soldier intentionally kills a prisoner of war—a violation of the laws of war—"then he commits murder." 2 LaFave, *Substantive Criminal Law* § 10.2(c), at 136; *see also State v. Gut*, 13 Minn. 341, 357 (1868) ("That it is legal to kill an alien enemy in the heat and exercise of war, is undeniable; but to kill such an enemy after he has laid down his arms, and especially when he is confined in prison, is murder."); Perkins & Boyce, *Criminal Law* at 1093 ("Even in time of war an alien enemy may not be killed needlessly after he has been disarmed and securely imprisoned . . . ."). Moreover, without invoking the public authority justification by its terms, this Department's OLC has relied on the same notion in an opinion addressing the intended scope of a federal criminal statute that concerned the use of potentially lethal force. *See United States Assistance to Countries*

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[9] *See also Frye*, 10 Cal. Rptr. 2d at 221 n.2 (identifying "homicide done under a valid public authority, such as execution of a death sentence or killing an enemy in a time of war," as examples of justifiable killing that would not be "unlawful" under the California statute describing murder as an "unlawful" killing); Model Penal Code § 3.03(2)(b), at 22 (proposing that criminal statutes expressly recognize a public authority justification for a killing that "occurs in the lawful conduct of war" notwithstanding the Code recommendation that the use of deadly force generally should be justified only if expressly prescribed by law).

*that Shoot Down Civil Aircraft Involved in Drug Trafficking*, 18 Op. O.L.C. 148, 164 (1994) (concluding that the Aircraft Sabotage Act of 1984, 18 U.S.C. § 32(b)(2) (2006), which prohibits the willful destruction of a civil aircraft and otherwise applies to U.S. government conduct, should not be construed to have "the surprising and almost certainly unintended effect of criminalizing actions by military personnel that are lawful under international law and the laws of armed conflict").

The fact that an operation may target a U.S. citizen does not alter this conclusion. As explained above, *see supra* at 3, the Supreme Court has held that the military may constitutionally use force against a U.S. citizen who is part of enemy forces. *See Hamdi*, 542 U.S. at 518 (plurality opinion); *id.* at 587, 597 (Thomas, J., dissenting); *Ex parte Quirin*, 317 U.S. at 37-38 ("Citizens who associate themselves with the military arm of the enemy government, and with its aid, guidance and direction enter [the United States] bent on hostile acts," may be treated as "enemy belligerents" under the law of war.). Similarly, under the Constitution and the inherent right to national self-defense recognized in international law, the President may authorize the use of force against a U.S. citizen who is a member of al-Qa'ida or its associated forces and who poses an imminent threat of violent attack against the United States.

In light of these precedents, the Department believes that the use of lethal force addressed in this white paper would constitute a lawful killing under the public authority doctrine if conducted in a manner consistent with the fundamental law of war principles governing the use of force in a non-international armed conflict. Such an operation would not violate the assassination ban in Executive Order No. 12333. Section 2.11 of Executive Order No. 12333 provides that "[n]o person employed by or acting on behalf of the United States Government shall engage in, or conspire to engage in, assassination." 46 Fed. Reg. 59,941, 59, 952 (Dec. 4, 1981). A lawful killing in self-defense is not an assassination. In the Department's view, a lethal operation conducted against a U.S. citizen whose conduct poses an imminent threat of violent attack against the United States would be a legitimate act of national self-defense that would not violate the assassination ban. Similarly, the use of lethal force, consistent with the laws of war, against an individual who is a legitimate military target would be lawful and would not violate the assassination ban.

## IV.

The War Crimes Act, 18 U.S.C. § 2441 (2006) makes it a federal crime for a member of the Armed Forces or a national of the United States to "commit[] a war crime." *Id.* § 2441(a). The only potentially applicable provision of section 2441 to operations of the type discussed herein makes it a war crime to commit a "grave breach" of Common Article 3 of the Geneva Conventions when that breach is committed "in the context of and in association with an armed conflict not of an international character."[10]

[10] The statute also defines "war crime" to include any conduct that is defined as a grave breach in any of the Geneva Conventions (or any Geneva protocol to which the United States is a party); that is prohibited by four specified articles of the Fourth Hague Convention of 1907; or that is a willful killing or

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*Id.* § 2441(c)(3). As defined by the statute, a "grave breach" of Common Article 3 includes "[m]urder," described in pertinent part as "[t]he act of a person who intentionally kills, or conspires or attempts to kill . . . one or more persons taking no active part in the hostilities, including those placed out of combat by sickness, wounds, detention, or any other cause." *Id.* § 2441(d)(1)(D).

Whatever might be the outer bounds of this category of covered persons, Common Article 3 does not alter the fundamental law of war principle concerning a belligerent party's right in an armed conflict to target individuals who are part of an enemy's armed forces or eliminate a nation's authority to take legitimate action in national self-defense. The language of Common Article 3 "makes clear that members of such armed forces [of both the state and non-state parties to the conflict] . . . are considered as 'taking no active part in the hostilities' only once they have disengaged from their fighting function ('have laid down their arms') or are placed *hors de combat*; mere suspension of combat is insufficient." International Committee of the Red Cross, *Interpretive Guidance on the Notion of Direct Participation in Hostilities Under International Humanitarian Law* 28 (2009). An operation against a senior operational leader of al-Qa'ida or its associated forces who poses an imminent threat of violent attack against the United States would target a person who is taking "an active part in hostilities" and therefore would not constitute a "grave breach" of Common Article 3.

**V.**

In conclusion, it would be lawful for the United States to conduct a lethal operation outside the United States against a U.S. citizen who is a senior, operational leader of al-Qa'ida or an associated force of al-Qa'ida without violating the Constitution or the federal statutes discussed in this white paper under the following conditions: (1) 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; (2) capture is infeasible, and the United States continues to monitor whether capture becomes feasible; and (3) the operation is conducted in a manner consistent with the four fundamental principles of the laws of war governing the use of force. As stated earlier, this paper does not attempt to determine the minimum requirements necessary to render such an operation lawful, nor does it assess what might be required to render a lethal operation against a U.S. citizen lawful in other circumstances. It concludes only that the stated conditions would be sufficient to make lawful a lethal operation in a foreign country directed against a U.S. citizen with the characteristics described above.

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infliction of serious injury in violation of the 1996 Protocol on Prohibitions or Restrictions on the Use of Mines, Booby-Traps and Other Devices. 18 U.S.C. § 2441(c).

# Exhibit 3

## To the Declaration of Colin Wicker

TOP SECRET/ NF (b)(1) (b)(3)

DEPARTMENT OF JUSTICE WHITE PAPER

May 25, 2011

Legality of a Lethal Operation by the Central Intelligence Agency Against a U.S. Citizen (b)(1) (b)(3)

This white paper sets forth the legal basis upon which the Central Intelligence Agency ("CIA") could use lethal force in Yemen against a United States citizen who senior officials reasonably determined was a senior leader of al-Qaida or an associated force of al-Qaida. (b)(1) (b)(3) Furthermore, 18 U.S.C. § 1119(b), which criminalizes the murder abroad of a United States national by another U.S. national, does not prohibit such use of lethal force. The text and legislative history of the relevant statutes, precedents of the Office of Legal Counsel ("OLC"), and ordinary principles of statutory construction support the conclusion that section 1119 imposes no bar to operations against a senior leader of al-Qaida or an associated force who nevertheless is a U.S. citizen. Section 1119(b) bars only "unlawful" killings (cross-referencing 18 U.S.C. §§ 1111, 1112, 1113), and, in light of the circumstances outlined below, the killing would not be "unlawful" because it would fall within the traditional justification for conduct undertaken pursuant to "public authority." Here, the authority to use lethal force in national self-defense, as recognized by congressional enactments, would make this kind of operation lawful, and section 1119 would not be violated. (b)(1) (b)(3)

Nor would such an operation violate either 18 U.S.C. § 956(a)—which makes it a crime to conspire within the jurisdiction of the United States "to commit at any place outside the United States an act that would constitute the offense of murder, kidnapping, or maiming if committed in the special maritime and territorial jurisdiction of the United States" if any conspirator acts within the United States to effect any object of the conspiracy—or the War Crimes Act, 18 U.S.C. § 2441. Finally, an operation, under the circumstances outlined below, would not transgress any possible constitutional limitations—a conclusion that is also relevant to the judgment that a CIA operation would be performed pursuant to public authority and thus would not violate either section 1119(b) or section 956(a).[1] (b)(1) (b)(3)

[1] This white paper addresses exclusively the use of force abroad, in the circumstances described herein. It does not address legal issues that the use of force in different circumstances or in any nation other than Yemen might present. (b)(1) (b)(3)

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(b)(1) (b)(3)

(6)

I.

A.

(b)(1)
(b)(3)

Furthermore, according to the CIA, although there may be no occasion for surrender in light of the means by which such an operation would be carried out, the CIA would prefer to capture this target, and if a potential target offers to surrender, such surrender would be accepted, if feasible. This would include any targets in Yemen, although the CIA assesses that a capture in Yemen would not be feasible at this time. *See infra* at 20-21. The CIA has further represented that this sort of operation would not be undertaken in a perfidious or treacherous manner.

(b)(1)
(b)(3)

(b)(1)
(b)(3)

Finally, any U.S. citizen targeted in such an operation would be an individual with an operational and senior leadership role in al-Qaida or one of its associated forces. Moreover, the individual would be one who had previously participated in operational planning for attempted attacks on the United States and who has expressed interest in conducting additional terrorist attacks in the United States.

(b)(1)
(b)(3)

B.

(b)(1)
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3

(b)(1)
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(b)(1)
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II.

Subsection 1119(b) of title 18 provides that "[a] person who, being a national of the United States, kills or attempts to kill a national of the United States while such national is outside the United States but within the jurisdiction of another country shall be punished as provided under sections 1111, 1112, and 1113." 18 U.S.C. § 1119(b).[4] In light of the nature of the operation described above, and the fact that its target would be a "national of the United States" who is outside the United States, it might be suggested that section 1119(b) would prohibit such an operation. Section 1119, however, bars only unlawful killings, and the United States' use of lethal force in national self-defense is not an unlawful killing. Section 1119 is best construed to incorporate the public authority justification, which can render lethal action carried out by a governmental official lawful in some circumstances, and this public authority justification would apply to such a CIA operation. (b)(1) (b)(3)

A.

Although section 1119(b) refers only to the "punish[ments]" provided under sections 1111, 1112, and 1113, courts have construed section 1119(b) to incorporate the substantive elements of those cross-referenced provisions of title 18. *See, e.g.*, *United States v. Wharton*, 320 F.3d 526, 533 (5th Cir. 2003); *United States v. White*, 51 F. Supp. 2d 1008, 1013-14 (E.D. Ca. 1997). Section 1111 of title 18 sets forth criminal penalties for "murder," and provides that "[m]urder is the unlawful killing of a human being with malice aforethought." *Id.* § 1111(a). Section 1112 similarly provides criminal sanctions for "manslaughter," and states that "[m]anslaughter is the unlawful killing of a human being without malice." *Id.* § 1112. Section

[4] *See also* 18 U.S.C. § 1119(a) (providing that "national of the United States" has the meaning stated in section 101(a)(22) of the Immigration and Nationality Act, 8 U.S.C. § 1101(a)(22)). (U)

(b)(1)
(b)(3)



1113 provides criminal penalties for "attempts to commit murder or manslaughter." *Id.* § 1113. It is therefore clear that section 1119(b) bars only "unlawful killings."[5] (U)

This limitation on section 1119(b)'s scope is significant, as the legislative history to the underlying offenses that the section incorporates makes clear. The provisions section 1119(b) incorporates derive from sections 273 and 274 of the Act of March 4, 1909, ch. 321, 35 Stat. 1088, 1143. The 1909 Act codified and amended the penal laws of the United States. Section 273 of the enactment defined murder as "the unlawful killing of a human being with malice aforethought," and section 274 defined manslaughter as "the unlawful killing of a human being without malice." 35 Stat. 1143.[6] In 1948, Congress codified the federal murder and manslaughter provisions at sections 1111 and 1112 of title 18 and retained the definitions of murder and manslaughter in nearly identical form, *see* Act of June 25, 1948, ch. 645, 62 Stat. 683, 756, including the references to "unlawful killing" that remain in the statutes today—references that track similar formulations in some state murder statutes.[7] (U)

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[5] Section 1119 itself also expressly imposes various procedural limitations on prosecution. Subsection 1119(c)(1) requires that any prosecution be authorized in writing by the Attorney General, the Deputy Attorney General, or an Assistant Attorney General, and precludes the approval of such an action "if prosecution has been previously undertaken by a foreign country for the same conduct." In addition, subsection 1119(c)(2) provides that "[n]o prosecution shall be approved under this section unless the Attorney General, in consultation with the Secretary of State, determines that the conduct took place in a country in which the person is no longer present, and the country lacks the ability to lawfully secure the person's return"—a determination that "is not subject to judicial review," *id.* (U)

[6] A 1908 joint congressional committee report on the Act explained that "[u]nder existing law [i.e., prior to the 1909 Act], there [had been] no statutory definition of the crimes of murder or manslaughter." Report by the Special Joint Comm. on the Revision of the Laws, Revision and Codification of the Laws, Etc., H.R. Rep. No. 2, 60th Cong., 1st Sess., at 12 (Jan. 6, 1908) ("Joint Committee Report"). The 1878 edition of the Revised Statutes, however, did contain a definition for manslaughter (but not murder): "Every person who, within any of the places or upon any of the waters [within the exclusive jurisdiction of the United States] unlawfully and willfully, but without malice, strikes, stabs, wounds, or shoots at, otherwise injures another, of which striking, stabbing, wounding, shooting, or other injury such other person dies, either on land or sea, within or without the United States, is guilty of the crime of manslaughter." Revised Statutes § 5341 (1878 ed.) (quoted in *United States v. Alexander*, 471 F.2d 923, 944-45 n.54 (D.C. Cir. 1972)). With respect to murder, the 1908 report noted that the legislation "enlarges the common-law definition, and is similar in terms to the statutes defining murder in a large majority of the States." Joint Committee Report at 24; *see also Revision of the Penal Laws: Hearings on S. 2982 Before the Senate as a Whole*, 60th Cong., 1st Sess. 1184, 1185 (1908) (statement of Senator Heyburn) (same). With respect to manslaughter, the report stated that "[w]hat is said with respect to [the murder provision] is true as to this section, manslaughter being defined and classified in language similar to that to be found in the statutes of a large majority of the States." Joint Committee Report at 24. (U)

[7] *See, e.g.*, Cal. Penal Code § 187(a) (West 2009) ("Murder is the unlawful killing of a human being, or a fetus, with malice aforethought."); Fla. Stat. § 782.04(1)(a) (West 2009) (including "unlawful killing of a human being" as an element of murder); Idaho Code Ann. § 18-4001 (West 2009) ("Murder is the unlawful killing of a human being"); Nev. Rev. Stat. Ann. § 200.010 (West 2008) (including "unlawful killing of a human being" as an element of murder); R. I. Gen. Laws § 11-23-1 (West 2008) ("The unlawful killing of a human being with malice aforethought is murder."); Tenn. Code Ann. § 39-13-201 (West 2009) ("Criminal homicide is the unlawful killing of another person"). Such statutes, in turn, reflect the view often expressed in the common law of murder that the crime requires an "unlawful" killing. *See, e.g.*, Edward Coke, *The Third Part of the Institutes of Laws of England* 47 (London, W. Clarke & Sons 1809) ("Murder is when a man of sound memory, and of the age of discretion, unlawfully killeth within any county of the realm any reasonable creature *in rerum natura* under the king's peace, with malice fore-thought, either expressed by the party, or implied by law, so as the party wounded, or hurt, &c. die of the wound, or hurt, &c. within a year and a day after the same."); 4 William Blackstone, *Commentaries on the*



(b)(1)
(b)(3)

As this legislative history indicates, guidance as to the meaning of what constitutes an "unlawful killing" in sections 1111 and 1112—and thus for purposes of section 1119(b)—can be found in the historical understandings of murder and manslaughter. That history shows that states have long recognized justifications and excuses to statutes criminalizing "unlawful" killings.[8] One state court, for example, in construing that state's murder statute explained that "the word 'unlawful' is a term of art" that "connotes a homicide with the absence of factors of excuse or justification," *People v. Frye*, 10 Cal. Rptr. 2d 217, 221 (Cal. App. 1992). That court further explained that the factors of excuse or justification in question include those that have traditionally been recognized. *Id.* at 221 n.2. Other authorities support the same conclusion. *See, e.g., Mullaney v. Wilbur*, 421 U.S. 684, 685 (1975) (requirement of "unlawful" killing in Maine murder statute meant that killing was "neither justifiable nor excusable"); *cf. also* Rollin M. Perkins & Ronald N. Boyce, *Criminal Law* 56 (3d ed. 1982) ("Innocent homicide is of two kinds, (1) justifiable and (2) excusable."). Accordingly, section 1119 does not proscribe killings covered by a justification traditionally recognized, such as under the common law or state and federal murder statutes. *See White*, 51 F. Supp. 2d at 1013 ("Congress did not intend [section 1119] to criminalize justifiable or excusable killings."). (U)

B.

Before one such recognized justification—the justification of "public authority"—can be analyzed in the context of a potential CIA operation, it is necessary to explain why section 1119(b) incorporates that particular justification. (b)(1) (b)(3)

The public authority justification, generally understood, is well-accepted, and it is clear it may be available even in cases where the particular criminal statute at issue does not expressly refer to a public authority justification.[9] Prosecutions where such a "public authority"

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*Laws of England* 195 (Oxford 1769) (same); *see also A Digest of Opinions of the Judge Advocates General of the Army* 1074 n.3 (1912) ("Murder, at common law, is the unlawful killing by a person of sound memory and discretion, of any reasonable creature in being and under the peace of the State, which malice aforethought either express or implied.") (internal quotation marks omitted). (U)

[8] The same is true with respect to other statutes, including federal laws, that modify a prohibited act other than murder or manslaughter with the term "unlawfully." *See, e.g., Territory v. Gonzales*, 89 P. 250, 252 (N.M. Terr. 1907) (construing the term "unlawful" in statute criminalizing assault with a deadly weapon as "clearly equivalent" to "without excuse or justification"). For example, 18 U.S.C. § 2339C makes it unlawful, *inter alia*, to "unlawfully and willfully provide[] or collect[] funds" with the intention that they be used (or knowledge they are to be used) to carry out an act that is an offense within certain specified treaties, or to engage in certain other terrorist acts. The legislative history of section 2339C makes clear that "[t]he term 'unlawfully' is intended to embody common law defenses." H.R. Rep. No. 107-307, at 12 (2001). Similarly, the Uniform Code of Military Justice makes it unlawful for members of the armed forces to, "without justification or excuse, unlawfully kill[] a human being" under certain specified circumstances. 10 U.S.C. § 918. Notwithstanding that the statute already expressly requires lack of justification or excuse, it is the longstanding view of the armed forces that "[k]illing a human being is *unlawful*" for purposes of this provision "when done without justification or excuse." Manual for Courts-Martial United States (2008 ed.), at IV-63, art. 118, comment (c)(1) (emphasis added). (U)

[9] Where a federal criminal statute incorporates the public authority justification, and the government conduct at issue is within the scope of that justification, there is no need to examine whether the criminal prohibition has been repealed, impliedly or otherwise, by some other statute that might potentially authorize the governmental

justification is invoked are understandably rare, *see* American Law Institute, Model Penal Code and Commentaries § 3.03 Comment 1, at 24 (1985); *cf. Visa Fraud Investigation*, 8 Op. O.L.C. 284, 285 n.2, 286 (1984), and thus there is little case law in which courts have analyzed the scope of the justification with respect to the conduct of government officials.[10] Nonetheless, discussions in the leading treatises and in the Model Penal Code demonstrate its legitimacy. *See* 2 Wayne R. LaFave, *Substantive Criminal Law* § 10.2(b), at 135 (2d ed. 2003); Perkins & Boyce, *Criminal Law* at 1093 ("Deeds which otherwise would be criminal, such as taking or destroying property, taking hold of a person by force and against his will, placing him in confinement, or even taking his life, are not crimes if done with proper public authority."); *see also* Model Penal Code § 3.03(1)(a), (d), (e), at 22-23 (proposing codification of justification where conduct is "required or authorized by," inter alia, "the law defining the duties or functions of a public officer . . ."; "the law governing the armed services or the lawful conduct of war"; or "any other provision of law imposing a public duty"); National Comm'n on Reform of Federal Criminal Laws, A Proposed New Federal Criminal Code § 602(1) ("Conduct engaged in by a public servant in the course of his official duties is justified when it is required or authorized by law."). And OLC has invoked analogous rationales when it has analyzed whether Congress intended a particular criminal statute to prohibit specific conduct that otherwise falls within a government agency's authorities.[11] (U)

The public authority justification does not excuse all conduct of public officials from all criminal prohibitions. The legislature may design some criminal prohibitions to place bounds on the kinds of governmental conduct that can be authorized by the Executive. Or the legislature may enact a criminal prohibition in order to delimit the scope of the conduct that the legislature

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conduct, including by the authorizing statute that might supply the predicate for the assertion of the public authority justification itself. Rather, in such cases, the criminal prohibition simply does not apply to the particular governmental conduct at issue in the first instance because Congress intended that prohibition to be qualified by the public authority justification that it incorporates. Conversely, where another statute expressly authorizes the government to engage in the *specific* conduct in question, then there would be no need to invoke the more general public authority justification doctrine, because in such a case the legislature itself has, in effect, carved out a specific exception permitting the executive to do what the legislature has otherwise generally forbidden. Such a circumstance is not addressed in this white paper. (U)

[10] The question of a "public authority" justification is much more frequently litigated in cases where a private party charged with a crime interposes the defense that he relied upon authority that a public official allegedly conferred upon him to engage in the challenged conduct. *See generally* United States Attorneys' Manual tit. 9, Criminal Resource Manual § 2055 (describing and discussing three different such defenses of "governmental authority"); National Comm'n on Reform of Federal Criminal Laws, A Proposed New Federal Criminal Code § 602(2); Model Penal Code § 3.03(3)(b); *see also United States v. Fulcher*, 250 F.3d 244, 253 (4th Cir. 2001); *United States v. Rosenthal*, 793 F.2d 1214, 1235-36 (11th Cir. 1986); *United States v. Duggan*, 743 F.2d 59, 83-84 (2d Cir. 1984); Fed. R. Crim. P. 12.3 (requiring defendant to notify government if he intends to invoke such a public authority defense). Such cases are not addressed in this white paper, and the discussion of the "public authority" justification is limited to the question of whether a particular criminal law applies to specific conduct undertaken by *government agencies* pursuant to their authorities. (U)

[11] *See, e.g., Visa Fraud Investigation*, 8 Op. O.L.C. at 287-88 (concluding that civil statute prohibiting issuance of visa to an alien known to be ineligible did not prohibit State Department from issuing such a visa where "necessary" to facilitate important Immigration and Naturalization Service undercover operation carried out in a "reasonable" fashion).

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has otherwise authorized the Executive to undertake pursuant to another statute.[12] But the recognition that a federal criminal statute may incorporate the public authority justification reflects the fact that it would not make sense to attribute to Congress the intent with respect to each of its criminal statutes to prohibit all covered activities undertaken by public officials in the legitimate exercise of their otherwise lawful authorities, even if Congress has clearly intended to make those same actions a crime when committed by persons who are not acting pursuant to such public authority. In some instances, therefore, the better view of a criminal prohibition may well be that Congress meant to distinguish those persons who are acting pursuant to public authority, at least in some circumstances, from those who are not, even if the statute by terms does not make that distinction express. *Cf. Nardone v. United States*, 302 U.S. 379, 384 (1937) (federal criminal statutes should be construed to exclude authorized conduct of public officers where such a reading "would work obvious absurdity as, for example, the application of a speed law to a policeman pursuing a criminal or the driver of a fire engine responding to an alarm").[13] (U)

Here, in the case of a federal murder statute, there is no general bar to applying the public authority justification to criminal prohibition. For example, with respect to prohibitions on the unlawful use of deadly force, the Model Penal Code recommended that legislatures should make the public authority (or "public duty") justification available, though only where the use of such force is covered by a more particular justification (such as defense of others or the use of deadly force by law enforcement), where the use of such force "is otherwise expressly authorized by law," or where such force "occurs in the lawful conduct of war." Model Penal Code § 3.03(2)(b), at 22; *see also id.* Comment 3, at 26. Some states proceeded to adopt the Model Penal Code recommendation.[14] Other states, although not adopting that precise formulation, have enacted specific statutes dealing with the question of when public officials are justified in using deadly force, which often prescribe that an officer acting in the performance of his official duties must reasonably have believed that such force was "necessary."[15] Other states have more broadly provided that the public authority defense is available where the government officer engages in a "reasonable exercise" of his official functions.[16] There is, however, no federal

[12] *See, e.g., Nardone v. United States*, 302 U.S. 379, 384 (1937) (government wiretapping was proscribed by federal statute). (U)

[13] Each potentially applicable statute must be carefully and separately examined to discern Congress's intent in this respect—such as whether it imposes a less qualified limitation than section 1119 imposes. *See generally, e.g., United States Assistance to Countries that Shoot Down Civil Aircraft Involved in Drug Trafficking*, 18 Op. O.L.C. 148 (1994); *Application of Neutrality Act to Official Government Activities*, 8 Op. O.L.C. 58 (1984). (U)

[14] *See, e.g.*, Neb. Rev. Stat. § 28-1408(2)(b); Pa. C.S.A. § 504(b)(2); Tex. Penal Code tit. 2, § 9.21(c). (U)

[15] *See, e.g.*, Ariz. Rev. Stat. § 13-410.C; Maine Rev. Stat. Ann. tit. 17, § 102.2. (U)

[16] *See, e.g.*, Ala. Stat. § 13A-3-22; N.Y. Penal Law § 35.05(1); LaFave, *Substantive Criminal Law* § 10.2(b), at 135 n.15; *see also* Robinson, *Criminal Law Defenses* § 149(a), at 215 (proposing that the defense should be available only if the actor engages in the authorized conduct "when and to the extent necessary to protect or further the interest protected or furthered by the grant of authority" and where it "is reasonable in relation to the gravity of the harms or evils threatened and the importance of the interests to be furthered by such exercise of authority"); *id.* § 149(e), at 218-20. (U)



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statute that is analogous, and neither section 1119 nor any of the incorporated title 18 provisions setting forth the substantive elements of the section 1119(b) offense, provide any express guidance as to the existence or scope of this justification. (U)

Against this background, the touchstone for the analysis of whether section 1119 incorporates not only justifications generally, but also the public authority justification in particular, is the legislative intent underlying this criminal statute. Here, the statute should be read to exclude from its prohibitory scope killings that are encompassed by traditional justifications, which include the public authority justification. There are no indications that Congress had a contrary intention. Nothing in the text or legislative history of sections 1111-1113 of title 18 suggests that Congress intended to exclude the established public authority justification from those that Congress otherwise must be understood to have imported through the use of the modifier "unlawful" in those statutes (which, as explained above, establish the substantive scope of section 1119(b)).[17] Nor is there anything in the text or legislative history of section 1119 itself to suggest that Congress intended to abrogate or otherwise affect the availability under that statute of this traditional justification for killings. On the contrary, the relevant legislative materials indicate that in enacting section 1119 Congress was merely closing a gap in a field dealing with entirely different kinds of conduct than that at issue here. (U)

The origin of section 1119 was a bill entitled the "Murder of United States Nationals Act of 1991," which Senator Thurmond introduced during the 102d Congress in response to the murder of an American in South Korea who had been teaching at a private school there. *See* 137 Cong. Rec. 8675-77 (1991) (statement of Sen. Thurmond). Shortly after the murder, another American teacher at the school accused a former colleague (who was also a U.S. citizen) of having committed the murder, and also confessed to helping the former colleague cover up the crime. The teacher who confessed was convicted in a South Korean court of destroying evidence and aiding the escape of a criminal suspect, but the individual she accused of murder had returned to the United States before the confession. *Id.* at 8675. The United States did not have an extradition treaty with South Korea that would have facilitated prosecution of the alleged murderer and therefore, under then-existing law, "the Federal Government ha[d] no jurisdiction to prosecute a person residing in the United States who ha[d] murdered an American abroad except in limited circumstances, such as a terrorist murder or the murder of a Federal official." *Id.* (U)

To close the "loophole under Federal law which permits persons who murder Americans in certain foreign countries to go punished," *id.*, the Thurmond bill would have added a new section to title 18 providing that "[w]hoever kills or attempts to kill a national of the United States while such national is outside the United States but within the jurisdiction of another country shall be punished as provided under sections 1111, 1112, and 1113 of this title." S. 861, 102d Cong. (1991) (incorporated in S. 1241, 102d Cong. §§ 3201-03 (1991)). The proposal also

[17] The argument that the use of the term "unlawful" supports the conclusion that section 1119 incorporates the public authority justification does not suggest that the absence of such a term would require a contrary conclusion regarding the intended application of a criminal statute to otherwise authorized government conduct in other cases. Each statute must be considered on its own terms to determine the relevant congressional intent. *See supra* note 13. (U)

contained a separate provision amending the procedures for extradition "to provide the executive branch with the necessary authority, in the absence of an extradition treaty, to surrender to foreign governments those who commit violent crimes against U.S. nationals." 137 Cong. Rec. 8676 (1991) (statement of Sen. Thurmond) (discussing S. 861, 102d Cong., § 3).[18] The Thurmond proposal was incorporated into an omnibus crime bill that both the House and Senate passed, but that bill did not become law. (U)

In the 103d Congress, a revised version of the Thurmond bill was included as part of the Violent Crime Control and Law Enforcement Act of 1994. H.R. 3355 § 60009, 103d Cong. (1994). The new legislation differed from the previous bill in two key respects. First, it prescribed criminal jurisdiction only where both the perpetrator and the victim were U.S. nationals, whereas the original Thurmond bill would have extended jurisdiction to all instances in which the victim was a U.S. national (based on so-called "passive personality" jurisdiction[19]). Second, the revised legislation did not include the separate provision from the earlier Thurmond legislation that would have amended the procedures for extradition. Congress enacted the revised legislation in 1994 as part of Public Law No. 103-322, and it was codified as section 1119 of title 18. *See* Pub. L. No. 103-322, § 60009, 108 Stat. 1796, 1972 (1994). (U)

Thus, section 1119 was designed to close a jurisdictional loophole—exposed by a murder that had been committed abroad by a private individual—to ensure the possibility of prosecuting U.S. nationals who murdered other U.S. nationals in certain foreign countries that lacked the ability to lawfully secure the perpetrator's appearance at trial. This loophole had nothing to do with the sort of (b)(3) [redacted] CIA counterterrorism operation at issue here. Indeed, prior to the enactment of section 1119, the only federal statute expressly making it a crime to kill U.S. nationals abroad, at least outside the special and maritime jurisdiction of the United States, reflected what appears to have been a particular concern with protection of Americans from terrorist attacks. *See* 18 U.S.C. § 2332(a), (d) (criminalizing unlawful killings of U.S. nationals abroad where the Attorney General or his subordinate certifies that the "offense was intended to coerce, intimidate, or retaliate against a government or a civilian population").[20] It therefore would be anomalous to now read section 1119's closing of a limited jurisdictional gap as having been intended to jettison important applications of the established public authority justification, particularly in light of the statute's incorporation of substantive offenses codified in statutory

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[18] The Thurmond proposal also contained procedural limitations on prosecution virtually identical to those that Congress ultimately enacted and codified at 18 U.S.C. § 1119(c). *See* S. 861, 102d Cong. § 2. (U)

[19] *See* Geoffrey R. Watson, *The Passive Personality Principle*, 28 Tex. Int'l L.J. 1, 13 (1993); 137 Cong. Rec. 8677 (1991) (letter for Senator Ernest F. Hollings, from Janet G. Mullins, Assistant Secretary, Legislative Affairs, U.S. State Department (Dec. 26, 1989), submitted for the record during floor debate on the Thurmond bill) (S4752) ("The United States has generally taken the position that the exercise of extraterritorial criminal jurisdiction based solely on the nationality of the victim interferes unduly with the application of local law by local authorities."). (U)

[20] Courts have interpreted other federal homicide statutes to apply extraterritorially despite the absence of an express provision for extraterritorial application. *See, e.g.*, 18 U.S.C. § 1114 (criminalizing unlawful killings of federal officers and employees); *United States v. Al Kassar*, 582 F. Supp. 2d 488, 497 (S.D.N.Y. 2008) (construing 18 U.S.C. § 1114 to apply extraterritorially). (U)

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provisions that from all indications were intended to incorporate recognized justifications and excuses. (U)

It is true that here the target may be a U.S. citizen. Nevertheless, U.S. citizenship does not provide a basis for concluding that section 1119 would fail to incorporate the established public authority justification for a killing in this case. As explained above, section 1119 incorporates the federal murder and manslaughter statutes, and thus its prohibition extends only to "unlawful" killings. 18 U.S.C. §§ 1111, 1112, a category that was intended to include, from all of the evidence of legislative intent, only those killings that may not be permissible in light of traditional justifications for such action. At the time the predecessor versions of sections 1111 and 1112 were enacted, it was understood that killings undertaken in accord with the public authority justification were not "unlawful" because they were justified. There is no indication that, because section 1119(b) proscribes the unlawful killing abroad of U.S. nationals by U.S. nationals, it silently incorporated all justifications for killings *except* that public authority justification.

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III.

Given that section 1119 incorporates the public authority justification, the next question is whether a potential CIA operation would be encompassed by that justification and, in particular, whether that justification would apply even when the target is a United States citizen. The analysis leads to the conclusion that it would—a conclusion that depends in part on the further determination that this kind of operation would accord with any potential constitutional protections of a United States citizen in these circumstances (*see infra* part VI). In reaching this conclusion, this white paper does not address other circumstances involving different facts. The facts addressed here would be sufficient to establish the justification, whether or not any particular fact is necessary to the conclusion.[21]

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A.

The frame of reference here is that the United States is currently in the midst of an armed conflict, *see* Authorization for Use of Military Force ("AUMF"), Pub. L. No. 107-40, 115 Stat. 224, § 2(a) (2001), and the public authority justification would encompass an operation such as this one were it conducted by the military consistent with the laws of war. As one legal commentator has explained by example, "if a soldier intentionally kills an enemy combatant in time of war and within the rules of warfare, he is not guilty of murder," whereas, for example, if that soldier intentionally kills a prisoner of war—a violation of the laws of war—"then he commits murder." 2 LaFave, *Substantive Criminal Law* § 10.2(c), at 136; *see also State v. Gut*, 13 Minn. 341, 357 (1868) ("That it is legal to kill an alien enemy in the heat and exercise of war, is undeniable; but to kill such an enemy after he laid down his arms, and especially when he is confined in prison, is murder."); Perkins & Boyce, *Criminal Law* at 1093 ("Even in time of war an alien enemy may not be killed needlessly after he has been disarmed and securely

[21] In light of the conclusion that section 1119 and the statutes it cross-references incorporate this justification, and that the justification would cover an operation of the sort discussed here, this discussion does not address whether other grounds might exist for concluding that such an operation would be lawful. (TS//NF)

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imprisoned").[22] Moreover, without invoking the public authority justification by terms, OLC has relied on the same notion in an opinion addressing the intended scope of a federal criminal statute that concerned the use of possibly lethal force. *See United States Assistance to Countries that Shoot Down Civil Aircraft Involved in Drug Trafficking*, 18 Op. O.L.C. 148, 164 (1994) ("*Shoot Down Opinion*") (concluding that the Aircraft Sabotage Act of 1984, 18 U.S.C. § 32(b)(2), which prohibits the willful destruction of a civil aircraft and otherwise applies to U.S. government conduct, should not be construed to have "the surprising and almost certainly unintended effect of criminalizing actions by military personnel that are lawful under international law and the laws of armed conflict"). (b)(1) (b)(3)

As explained above, an operation of this sort would be targeted at a senior leader of al-Qaida or its associated forces who participated in operational planning for attempted attacks on the United States on behalf of such forces and who continues to plan such attacks. *See supra* at 2. Such an individual would have engaged in conduct bringing him within the scope of the AUMF. Any military operation against such a person, therefore, would be carried out against someone who is within the core of individuals against whom Congress has authorized the use of necessary and appropriate force. (TS/NF)

This sort of operation would also be consistent with the laws of war applicable to a non-international armed conflict[23] if carried out by military personnel. Any military member

[22] *Cf. Public Committee Against Torture in Israel v. Government of Israel*, HCJ 769/02 ¶ 19, 46 I.L.M. 375, 382 (Israel Supreme Court sitting as the High Court of Justice, 2006) ("When soldiers of the Israel Defense Forces act pursuant to the laws of armed conflict, they are acting 'by law', and they have a good justification defense [to criminal culpability]. However, if they act contrary to the laws of armed conflict they may be, *inter alia*, criminally liable for their actions."); *Calley v. Callaway*, 519 F.2d 184, 193 (5th Cir. 1975) ("an order to kill unresisting Vietnamese would be an illegal order, and . . . if [the defendant] knew the order was illegal or should have known it was illegal, obedience to an order was not a legal defense"). (U)

[23] The rules of non-international armed conflict are relevant because the Supreme Court has held that the United States is engaged in a non-international armed conflict with al-Qaida. *Hamdan v. Rumsfeld* 548 U.S. 557, 628-31 (2006). Although an operation of the kind discussed here would occur in Yemen, a location that is far from the most active theater of combat between the United States and al-Qaida, that does not affect the conclusion. There appears to be no authority for the proposition that when one of the parties to an armed conflict plans and executes operations from a base in a new nation, an operation to engage the enemy in that location can never be part of the original armed conflict—and thus subject to the laws of war governing that conflict—unless and until the hostilities become sufficiently intensive and protracted within that new location. Nor is there any obvious reason why that more categorical, nation-specific rule should govern in a non-international armed conflict. Rather, the determination of whether a particular operation would be part of an ongoing armed conflict for purposes of international law requires consideration of the particular facts and circumstances present in each case.

Here, any potential operation would target a senior leader of al-Qaida or its associated forces. Moreover, such an operation would be conducted in Yemen, where a co-belligerent of al-Qaida, engaged in hostilities against the United States as part of the same comprehensive armed conflict and in league with the principal enemy, has a significant and organized presence, and from which it is conducting terrorist training in an organized manner and has executed and is planning to execute attacks against the United States. Finally, the target of such an operation would be someone continuously planning attacks from that Yemeni base of operations against the United States, as the conflict with al-Qaida continues. These facts in combination support the judgment that this sort of operation in Yemen would be conducted as part of the non-international armed conflict between the United States and al-Qaida. (TS/NF)

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responsible for such a strike would likely have an obligation to abort a strike if he or she concluded that civilian casualties would be disproportionate or that such a strike would in any other respect violate the laws of war. *See* Chairman of the Joint Chiefs of Staff, Instruction 5810.01D, *Implementation of the DoD Law of War Program* ¶ 4.a, at 1 (Apr. 30, 2010) ("It is DOD policy that . . . [m]embers of the DOD Components comply with the law of war during all armed conflicts, however such conflicts are characterized, and in all other military operations."). Moreover, the targeted nature of this sort of operation would help to ensure that it would comply with the principle of distinction. *See, e.g.*, United States Air Force, *Targeting*, Air Force Doctrine Document 2-1.9, at 88 (June 8, 2006) (explaining that the "four fundamental principles that are inherent to all targeting decisions" are military necessity, humanity (the avoidance of unnecessary suffering), proportionality, and distinction). Further, while such an operation would be conducted without warning, it would not violate the prohibitions on treachery and perfidy—which are addressed to conduct involving a breach of confidence by the assailant. *See, e.g.*, Hague Convention IV, Annex, art. 23(b), 36 Stat. at 2301-02 ("[I]t is especially forbidden . . . to kill or wound treacherously individuals belonging to the hostile nation or army"); *cf. also* Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts, art. 37(1) (prohibiting the killing, injuring or capture of an adversary in an international armed conflict by resort to acts "inviting the confidence of [the] adversary . . . with intent to betray that confidence," including feigning a desire to negotiate under truce or flag of surrender; feigning incapacitation; and feigning noncombatant status).[24]

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In light of all these circumstances, a military operation against the sort of individual described above would comply with international law, including the laws of war applicable to this armed conflict, and would fall within Congress's authorization to use "necessary and appropriate force" against al-Qaida. Consequently, the potential attack, if conducted under military authority in the manner described, should be understood to constitute the lawful conduct of war and thus to be encompassed by the public authority justification.

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B.

Given the assessment that an analogous operation carried out pursuant to the AUMF would fall within the scope of the public authority justification, there is no reason to reach a

[24] Although the United States is not a party to the First Protocol, the State Department has announced that "we support the principle that individual combatants not kill, injure, or capture enemy personnel by resort to perfidy." Remarks of Michael J. Matheson, Deputy Legal Adviser, Department of State, *The Sixth Annual American Red Cross-Washington College of Law Conference on International Humanitarian Law: A Workshop on Customary International Law and the 1977 Protocols Additional to the 1949 Geneva Conventions*, 2 Am. U. J. of Int'l L. & Pol'y 415, 425 (1987). (U)



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different conclusion for a CIA operation.[25] As discussed above, such an operation would consist of an attack against an operational leader of an enemy force, as part of the United States's ongoing non-international armed conflict with al-Qaida.

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Finally, the CIA would conduct an operation of this sort in a manner that accords with the rules of international humanitarian law governing this armed conflict. (b)(1) (b)(3)

See supra at 2, 4-5.[26] (b)(1) (b)(3)

[25] The potential restrictions imposed by two other criminal laws—18 U.S.C. §§ 956(a) and 2441—are addressed in Parts IV and V of this white paper. Part VI explains why the Constitution would impose no bar to a potential CIA operation under these circumstances, based on the facts outlined above. (U)

[26] (b)(1) (b)(3)

If the killing by a member of the armed forces would comply with the law of war and otherwise be lawful, actions of CIA officials facilitating that killing should also not be unlawful. *See, e.g.*, *Shoot Down Opinion* at 165 n.33 ("[O]ne cannot be prosecuted for aiding and abetting the commission of an act that is not itself a crime.") (citing *Shuttlesworth v. City of Birmingham*, 373 U.S. 262 (1963)). (b)(1) (b)(3)

Nor does the fact that CIA personnel would be involved in this sort of lethal operation itself cause it to violate the laws of war. It is true that CIA personnel, by virtue of their not being part of the armed forces, would not enjoy the immunity from prosecution under the domestic law of the countries in which they act for their conduct in targeting and killing enemy forces in compliance with the laws of war—an immunity that the armed forces enjoy by virtue of their status. *See* Philip Alston, *Report of the Special Rapporteur on extrajudicial, summary or arbitrary executions* ¶ 71, at 22 (United Nations Human Rights Council, Fourteenth Session, Agenda Item 3, May 28, 2010); *see also* Yoram Dinstein, *The Conduct of Hostilities Under the Law of International Armed Conflict* 31 (2004) ("*Conduct of Hostilities*"). Nevertheless, lethal activities conducted in accord with the laws of war, and undertaken in the course of lawfully authorized hostilities, do not violate *the laws of war* by virtue of the fact that they are carried out in part by government actors who are not entitled to the combatant's privilege. The contrary view "arises . . . from a fundamental confusion between acts punishable under international law and acts with respect to which international law affords no protection." Richard R. Baxter, *So-Called "Unprivileged Belligerency": Spies, Guerillas, and Saboteurs*, 28 Brit. Y.B. Int'l L. 323, 342 (1951) ("the law of nations has not ventured to require of states that they . . . refrain from the use of secret agents or that these activities upon the part of their military forces or civilian population be punished"). *Accord* Yoram Dinstein, *The Distinction Between Unlawful Combatants and War Criminals*, in *International Law at a Time of Perplexity: Essays in Honour of Shabtai Rosenne* 103-16 (Y. Dinstein ed., 1989). Statements in the Supreme Court's decision in *Ex parte Quirin*, 317 U.S. 1 (1942), are sometimes cited for the contrary view. *See, e.g.*, *id.* at 36 n.12 (suggesting that passing through enemy lines in order to commit "any hostile act" while not in uniform "renders the offender liable to trial for violation of the laws of war"); *id.* at 31 (enemies who come secretly through the lines for purposes of waging war by destruction of life or property "without uniform" not only are "generally not to be entitled to the status of prisoners of war," but also "to be offenders against the law of war subject to trial and punishment by military tribunals"). Because the Court in *Quirin* focused on conduct taken behind enemy lines, it is not clear whether the Court in these passages intended to refer only to conduct that would constitute perfidy or treachery. To the extent the Court meant to suggest more broadly that any hostile acts performed by unprivileged belligerents are *for that reason* violations of the laws of war, the authorities the Court cited (the Lieber Code and Colonel Winthrop's military law treatise) do not provide clear support. *See* John C. Dehn, *The Hamdan Case and the Application of a Municipal Offense*, 7 J. Int'l Crim. J. 63, 73-



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Nothing in the text or legislative history of section 1119 indicates that Congress intended to criminalize such an operation. Section 1119 incorporates the traditional public authority justification, and did not impose any special limitation on the scope of that justification. As explained above, *supra* at 10-12, the legislative history of that criminal prohibition revealed Congress's intent to close a jurisdictional loophole that would have hindered prosecutions of murders carried out by private persons abroad. It offers no indication that Congress intended to prohibit the targeting of an enemy leader during an armed conflict in a manner that would accord with the laws of war when performed by a duly authorized government agency. Nor does it indicate that Congress, in closing the identified loophole, meant to place a limitation on the CIA that would not apply to the armed forces.

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Thus, just as Congress would not have intended section 1119 to bar a military attack on the sort of individual described above, neither would it have intended the provision to prohibit an attack on the same target, in the same authorized conflict and in similar compliance with the laws of war, carried out by the CIA in accord with

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Finally, there is no basis in prior OLC precedent for reaching a different conclusion. Outside the context of the use of deadly force, OLC has had occasion to address whether particular criminal statutes should be construed to criminalize otherwise authorized government activities, notwithstanding the absence of an express exception to that effect. OLC's opinions on

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79 (2009); *see also* Baxter, *So-Called "Unprivileged Belligerency,"* 28 Brit. Y.B. Int'l L. at 339-40; Michael N. Schmitt, *Humanitarian Law and Direct Participation in Hostilities by Private Contractors or Civilian Employees*, 5 Chi. J. Int'l L. 511, 521 n.45 (2005); W. Hays Parks, *Special Forces' Wear of Non-Standard Uniforms*, 4 Chic. J. Int'l L. 493, 510-11 n.31 (2003). DoD's current Manual for Military Commissions, however, does not endorse the view that the commission of an unprivileged belligerent act, without more, constitutes a violation of the international law of war. *See* Manual for Military Commissions, Part IV, § 5(13), Comment, at IV-11 (2010 ed., Apr 27, 2010) (murder or infliction of serious bodily injury "committed while the accused did not meet the requirements of privileged belligerency" can be tried by a military commission "even if such conduct does not violate the international law of war").

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[27] As one example, the Senate Report pointed to the Department of Justice's conclusion that the Neutrality Act, 18 U.S.C. § 960, prohibits conduct by private parties but is not applicable to the CIA and other government agencies. *Id.* The Senate Report assumed that the Department's conclusion about the Neutrality Act was premised on the assertion that in the case of government agencies, there is an "absence of the mens rea necessary to the offense." *Id.* In fact, however, the Department's conclusion about that Act was not based on questions of mens rea, but instead on a careful analysis demonstrating that Congress did not intend the Act, despite its words of general applicability, to apply to the activities of government officials acting within the course and scope of their duties as officers of the United States. *See Application of Neutrality Act to Official Government Activities*, 8 Op. O.L.C. 58 (1984) (U)



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such questions have not directly invoked the public authority justification, but they have engaged in the same basic, context-specific inquiry concerning whether Congress intended the criminal statute at issue to prohibit government activities in circumstances where the same conduct would be unlawful if performed by a private person. OLC concluded in one such opinion that a statutory prohibition on granting visas to aliens in sham marriages, 8 U.S.C. § 1201(g)(3), would not prohibit granting such a visa as part of an undercover operation. *Visa Fraud Investigation*, 8 Op. O.L.C. at 284. OLC explained that courts have recognized that it may be lawful for law enforcement agents to disregard otherwise applicable laws "when taking action that is necessary to attain the permissible law enforcement objective, when the action is carried out in a reasonable fashion." *Id.* at 287. The issuance of an otherwise unlawful visa that was necessary for the undercover operation to proceed, done in circumstances—"for a limited purpose and under close supervision"—that were "reasonable," did not violate the federal statute. *Id.* at 288. Given the combination of circumstances concerning such an operation, it plainly would meet this standard. *See also infra* at 19-22 (explaining that a CIA operation under the proposed circumstances would comply with constitutional due process and the Fourth Amendment's "reasonableness" test for the use of deadly force). (b)(1) (b)(3)

Accordingly, the combination of circumstances present here supports the judgment that a CIA operation of this sort would be encompassed by the public authority justification. Such an operation, therefore, would not result in an "unlawful" killing under section 1111 and thus would not violate section 1119.

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IV.

For similar reasons, CIA operation of the kind discussed here would not violate another federal criminal statute dealing with "murder" abroad, 18 U.S.C. § 956(a). That law makes it a crime to conspire within the jurisdiction of the United States "to commit at any place outside the United States an act that would constitute the offense of murder, kidnapping, or maiming if committed in the special maritime and territorial jurisdiction of the United States" if any conspirator acts within the United States to effect any object of the conspiracy. (TS/NF)

Like section 1119(b), section 956(a) bars only unlawful killings, and the United States' use of lethal force in national self-defense is not an unlawful killing. Section 956(a) incorporates by reference the understanding of "murder" in section 1111 of title 18. For reasons explained earlier in this white paper, *see supra* at 5-7, section 956(a) thus incorporates the traditional public authority justification that section 1111 recognizes. A CIA operation, on the facts outlined above, would be covered by that justification. Nor does Congress's reference in section 956(a) to "the special maritime and territorial jurisdiction of the United States" reflect an intent to transform such a killing into a "murder" in these circumstances—notwithstanding that the analysis of the applicability of the public authority justification is limited for present purposes to operations conducted abroad. A contrary conclusion would require attributing to Congress the surprising intention of criminalizing through section 956(a) an otherwise lawful killing of an enemy leader that another statute specifically prohibiting the murder of U.S. nationals abroad does not prohibit. (b)(1) (b)(3)

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The legislative history of section 956(a) further confirms the conclusion that that statute should not be so construed. When the provision was first introduced in the Senate in 1995, its sponsors addressed and rejected the notion that the conspiracy prohibited by that section would apply to "duly authorized" actions undertaken on behalf of the federal government. Senator Biden introduced the provision at the behest of the President, as part of a larger package of anti-terrorism legislation. *See* 141 Cong. Rec. 4491 (1995) (statement of Sen. Biden). He explained that the provision was designed to "fill[] a void in the law," because section 956 at the time prohibited only U.S.-based conspiracies to commit certain property crimes abroad, and did not address crimes against persons. *Id.* at 4506. The amendment was designed to cover an offense "committed by terrorists" and was "intended to ensure that the government is able to punish those persons who use the United States as a base in which to plot such a crime to be carried out outside the jurisdiction of the United States." *Id.* Notably, the sponsors of the new legislation deliberately declined to place the new offense either within chapter 19 of title 18, which is devoted to "Conspiracy," or within chapter 51, which collects "Homicide" offenses (including those established in sections 1111, 1112, 1113 and 1119). Instead, as Senator Biden explained, "[s]ection 956 is contained in chapter 45 of title 18, United States Code, relating to interference with the foreign relations of the United States," and thus was intended to "cover[] those individuals who, without appropriate governmental authorization, engage in prohibited conduct that is harmful to the foreign relations of the United States." *Id.* at 4507. Because, as Senator Biden explained, the provision was designed, like other provisions of chapter 45, to prevent private interference with U.S. foreign relations, "[i]t is not intended to apply to duly authorized actions undertaken on behalf of the United States Government." *Id.*; *see also* 8 Op. O.L.C. 58 (1984) (concluding that section 5 of the Neutrality Act, 18 U.S.C. § 960, which is also in chapter 45 and which forbids the planning of, or participation in, military or naval expeditions to be carried on from the United States against a foreign state with which the United States is at peace, prohibits only persons acting in their private capacity from engaging in such conduct, and does not proscribe activities undertaken by government officials acting within the course and scope of their duties as United States officers). Senator Daschle expressed this same understanding when he introduced the identical provision in a different version of the anti-terrorism legislation a few months later. *See* 141 Cong. Rec. 11,960 (1995) (statement of Sen. Daschle). Congress enacted the new section 956(a) the following year, as part of the Antiterrorism and Effective Death Penalty Act, Pub. L. No. 104-132, tit. VII, § 704(a), 110 Stat. 1214, 1294-95 (1996). The legislative history appears to contain nothing to contradict the construction of section 956(a) described by Senators Biden and Daschle. (U)

Accordingly, section 956(a) would not prohibit an operation of the kind discussed here.

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(b)(3) V.

The War Crimes Act, 18 U.S.C. § 2441, which makes it a federal crime for a member of the Armed Forces or a national of the United States to "commit[] a war crime." *Id.* § 2441(a). Subsection 2441(c) defines a "war crime" for purposes of the statute to mean any conduct (i) that is defined as a grave breach in any of the Geneva Conventions (or any Geneva protocol to which the U.S. is a party); (ii) that is prohibited by four specified articles of the Fourth Hague Convention of 1907, (iii) that is a "grave breach" of Common Article 3 of the Geneva

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Conventions (as defined elsewhere in section 2441) when committed "in the context of and in association with an armed conflict not of an international character"; or (iv) that is a willful killing or infliction of serious injury in violation of the 1996 Protocol on Prohibitions or Restrictions on the Use of Mines, Booby-Traps and Other Devices. Of these, the only subsection potentially applicable here is that dealing with Common Article 3 of the Geneva Conventions.[28] (U)

In defining what conduct constitutes a "grave breach" of Common Article 3 for purposes of the War Crimes Act, subsection 2441(d) includes "murder," described in pertinent part as "[t]he act of a person who intentionally kills, or conspires or attempts to kill . . . one or more persons taking no active part in the hostilities, including those placed out of combat by sickness, wounds, detention, or any other cause." 18 U.S.C. § 2441(d)(1)(D). This language derives from Common Article 3(1) itself, which prohibits certain acts (including murder) against "[p]ersons taking no active part in the 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." *See, e.g.*, Geneva Convention Relative to the Treatment of Prisoners of War, Aug. 12, 1949, [1955], art. 3(1), 6 U.S.T. 3316, 3318-20. Although Common Article 3 is most commonly applied with respect to persons within a belligerent party's control, such as detainees, the language of the article is not so limited—it protects all "[p]ersons taking no active part in the hostilities" in an armed conflict not of an international character. (U)

Whatever might be the outer bounds of this category of covered persons, it could not encompass an individual of the sort considered here. Common Article 3 does not alter the fundamental law-of-war principle concerning a belligerent party's right in an armed conflict to target individuals who are part of an enemy's armed forces. The language of Common Article 3 "makes clear that members of such armed forces [of both the state and non-state parties to the conflict] . . . are considered as 'taking no active part in the hostilities' only once they have disengaged from their fighting function ('have laid down their arms') or are placed *hors de combat*; mere suspension of combat is insufficient." International Committee of the Red Cross, *Interpretive Guidance on the Notion of Direct Participation in Hostilities Under International Humanitarian Law* 28 (2009); *cf. also id.* at 34 ("individuals whose continuous function involves the preparation, execution, or command of acts or operations amounting to direct participation in hostilities are assuming a continuous combat function," in which case they can be deemed to be members of a non-state armed group subject to continuous targeting); *accord Gherebi v. Obama*, 609 F. Supp. 2d 43, 65 (D.D.C. 2009) ("the fact that 'members of armed forces who have laid down their arms and those placed *hors de combat*' are not 'taking [an] active part in the hostilities' necessarily implies that 'members of armed forces' who have not surrendered or been incapacitated are 'taking [an] active part in the hostilities' simply by virtue of their membership in those armed forces"); *id.* at 67 ("Common Article 3 is not a suicide pact; it does not provide a free pass for the members of an enemy's armed forces to go to or fro as they please so long as, for example, shots are not fired, bombs are not exploded, and places are not hijacked"). An

[28] An operation of the kind in question here would not involve conduct covered by the Land Mine Protocol. And the articles of the Geneva Conventions to which the United States is currently a party *other than* Common Article 3, as well as the relevant provisions of the Annex to the Fourth Hague Convention, apply by their terms only to armed conflicts between two or more of the parties to the Conventions. *See, e.g.*, Geneva Convention Relative to the Treatment of Prisoners of War, Aug. 12, 1949, [1955], art. 2, 6 U.S.T. 3316, 3406. (TS/NF)



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active, high-level leader of an enemy force who is continually involved in planning and recruiting for terrorist attacks, can on that basis fairly be said to be taking "an active part in hostilities." Accordingly, targeting him in the circumstances discussed here would not violate Common Article 3 and therefore would not violate the War Crimes Act. (b)(1) (b)(3)

VI.

Although (as explained above) this sort of CIA operation would not violate sections 1119(b), 956(a) and 2441 of title 18 of the U.S. Code, the fact that such an operation may target a U.S. citizen could raise distinct questions under the Constitution. Nevertheless, on the facts outlined above, the Constitution would not preclude such a lethal action because of a target's U.S. citizenship. (b)(1) (b)(3)

The Fifth Amendment's Due Process Clause, as well as the Fourth Amendment, likely protects a U.S. citizen in some respects even while he is abroad. *See Reid v. Covert*, 354 U.S. 1, 5-6 (1957) (plurality opinion); *United States v. Verdugo-Urquidez*, 494 U.S. 259, 269-70 (1990); *see also In re Terrorist Bombings of U.S. Embassies in East Africa*, 552 F.3d 157, 170 n.7 (2d Cir. 2008). The fact that a central figure in al-Qaida or its associated forces is a U.S. citizen, however, does not give that person constitutional immunity from attack. This conclusion finds support in Supreme Court case law addressing whether the military may constitutionally use certain types of military force against a U.S. citizen who is a part of enemy forces. *See Hamdi v. Rumsfeld*, 542 U.S. 507, 521-24 (2004) (plurality opinion); *Ex parte Quirin*, 317 U.S. 1, 37-38 (1942)). (b)(1) (b)(3)

In *Hamdi*, a plurality of the Supreme Court used the *Mathews v. Eldridge* balancing test to analyze the Fifth Amendment due process rights of a U.S. citizen captured on the battlefield in Afghanistan and detained in the United States who wished to challenge the government's assertion that he was a part of enemy forces, explaining that "the process due in any given instance is determined by weighing 'the private interest that will be affected by the official action' against the Government's asserted interest, 'including the function involved' and the burdens the Government would face in providing greater process." 542 U.S. at 529 (plurality opinion) (quoting *Mathews v. Eldridge*, 424 U.S. 319, 335 (1976)). Under this balancing test, at least in circumstances where the highest officers in the Intelligence Community have reviewed the factual basis for a lethal operation, and where the CIA has reviewed, and found infeasible, an operation to capture a targeted individual instead of killing him and continues to monitor whether changed circumstances would permit such an alternative, the Constitution does not require the government to provide further process to the U.S. person before using lethal force against him. *See Hamdi*, 542 U.S. at 534 (plurality opinion) ("[t]he parties agree that initial captures on the battlefield need not receive the process we discuss here; that process is due only when the determination is made to continue to hold those who have been seized"). On the battlefield, the Government's interests and burdens preclude offering a process to judge whether a detainee is truly an enemy combatant. (b)(1) (b)(3)

As explained above, such an operation would be carried out against an individual a decision-maker could reasonably decide poses a "continued" and "imminent" (b)(1) (b)(3)



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threat to the United States. Moreover, the CIA has represented that it would capture rather than target such an individual if feasible, but that such a capture operation in Yemen would be infeasible at this time.

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*Cf., e.g., Public Committee Against Torture in Israel v. Government of Israel*, HCJ 769/02 ¶ 40, 46 I.L.M. 375, 394 (Israel Supreme Court sitting as the High Court of Justice, 2006) (although arrest, investigation and trial "might actually be particularly practical under the conditions of belligerent occupation, in which the army controls the area in which the operation takes place," such alternatives "are not means which can always be used," either because they are impossible or because they involve a great risk to the lives of soldiers).

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Although in the "circumstances of war," as the *Hamdi* plurality observed, "the risk of erroneous deprivation of a citizen's liberty in the absence of sufficient process . . . is very real," 542 U.S. at 530, the plurality also recognized that "the realities of combat" render certain uses of force "necessary and appropriate," including against U.S. citizens who have become part of enemy forces—and that "due process analysis need not blink at those realities," *id.* at 531. Thus, at least where, as here, the target's activities pose a "continued and imminent threat of violence or death" to U.S. persons, the highest officers in the Intelligence Community have reviewed the factual basis for a lethal operation, and a capture operation would be infeasible—and where the CIA continues to monitor whether changed circumstances would permit such an alternative—the "realities of combat" and the weight of the government's interest in using an authorized means of lethal force against this enemy are such that the Constitution would not require the government to provide further process to the U.S. person before using such force. *Cf. Hamdi* 542 U.S. at 535 (noting that the Court "accord[s] the greatest respect and consideration to the judgments of military authorities in matters relating to the actual prosecution of war, and . . . the scope of that discretion necessarily is wide") (plurality opinion). (b)(1) (b)(3)

Similarly, even assuming that the Fourth Amendment provides some protection to a U.S. person abroad who is part of al-Qaida and that the sort of operation discussed here would result in a "seizure" within the meaning of that Amendment, such a lethal operation would not violate the Fourth Amendment. The 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." *Tennessee v. Garner*, 471 U.S. 1, 8 (1985) (internal quotation marks omitted); *accord Scott v. Harris*, 550 U.S. 372, 383 (2007). 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." *Garner*, 471 U.S. at 11. 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,

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deadly force may be used if necessary to prevent escape and if, where feasible, some warning has been given." *Id.* at 11-12.[1]

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The Fourth Amendment "reasonableness" test is situation-dependent. *Cf. Scott*, 550 U.S. at 382 (*Garner* "did not establish a magical on/off switch that triggers rigid preconditions whenever an officer's actions constitute 'deadly force'"). What would constitute a reasonable use of lethal force for purposes of domestic law enforcement operations will be very different from what would be reasonable in the situation discussed here. At least where high-level government officials have determined that a capture operation overseas is infeasible and that the targeted person is part of a dangerous enemy force and is engaged in activities that pose a continued and imminent threat to U.S. persons or interests;

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the use of lethal force would not violate the Fourth Amendment. Here, the intrusion on any Fourth Amendment interests would be outweighed by "the importance of the governmental interests [that] justify the intrusion," *Garner*, 471 U.S. at 8, based on the facts outlined above.

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# Exhibit 4

## To the Declaration of Colin Wicker

**U.S. Department of Justice**

Office of Legal Counsel

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Office of the Assistant Attorney General

*Washington, D.C. 20530*

July 16, 2010

MEMORANDUM FOR THE ATTORNEY GENERAL

*Re: Applicability of Federal Criminal Laws and the Constitution to Contemplated Lethal Operations Against Shaykh Anwar al-Aulaqi*

II.

We begin our legal analysis with a consideration of section 1119 of title 18, entitled "Foreign murder of United States nationals." Subsection 1119(b) provides that "[a] person who, being a national of the United States, kills or attempts to kill a national of the United States while such national is outside the United States but within the jurisdiction of another country shall be punished as provided under sections 1111, 1112, and 1113." 18 U.S.C. § 1119(b).[6] In light of the nature of the contemplated operations described above, and the fact that their target would be a "national of the United States" who is outside the United States, we must examine whether section 1119(b) would prohibit those operations. We first explain, in this part, the scope of section 1119 and why it must be construed to incorporate the public authority justification, which can render lethal action carried out by a governmental official lawful in some circumstances. We next explain in part III-A why that public authority justification would apply to the contemplated DoD operation. Finally, we explain in part III-B why that justification would apply to the contemplated CIA operation. As to each agency, we focus on the particular circumstances in which it would carry out the operation.

A.

Although section 1119(b) refers only to the "punish[ments]" provided under sections 1111, 1112, and 1113, courts have construed section 1119(b) to incorporate the substantive elements of those cross-referenced provisions of title 18. *See, e.g.*, *United States v. Wharton*, 320 F.3d 526, 533 (5th Cir. 2003); *United States v. White*, 51 F. Supp. 2d 1008, 1013-14 (E.D. Ca. 1997). Section 1111 of title 18 sets forth criminal penalties for "murder," and provides that "[m]urder is the unlawful killing of a human being with malice aforethought." *Id.* § 1111(a). Section 1112 similarly provides criminal sanctions for "manslaughter," and states that "[m]anslaughter is the unlawful killing of a human being without malice." *Id.* § 1112. Section 1113 provides criminal penalties for "attempts to commit murder or manslaughter." *Id.* § 1113. It is therefore clear that section 1119(b) bars only "unlawful killings."[7]

[6] *See also* 18 U.S.C. § 1119(a) (providing that "national of the United States" has the meaning stated in section 101(a)(22) of the Immigration and Nationality Act, 8 U.S.C. § 1101(a)(22)).

[7] Section 1119 itself also expressly imposes various procedural limitations on prosecution. Subsection 1119(c)(1) requires that any prosecution be authorized in writing by the Attorney General, the Deputy Attorney General, or an Assistant Attorney General, and precludes the approval of such an action "if prosecution has been previously undertaken by a foreign country for the same conduct." In addition, subsection 1119(c)(2) provides that

This limitation on section 1119(b)'s scope is significant, as the legislative history to the underlying offenses that the section incorporates makes clear. The provisions section 1119(b) incorporates derive from sections 273 and 274 of the Act of March 4, 1909, ch. 321, 35 Stat. 1088, 1143. The 1909 Act codified and amended the penal laws of the United States. Section 273 of the enactment defined murder as "the unlawful killing of a human being with malice aforethought," and section 274 defined manslaughter as "the unlawful killing of a human being without malice." 35 Stat. 1143.[8] In 1948, Congress codified the federal murder and manslaughter provisions at sections 1111 and 1112 of title 18 and retained the definitions of murder and manslaughter in nearly identical form, *see* Act of June 25, 1948, ch. 645, 62 Stat. 683, 756, including the references to "unlawful killing" that remain in the statutes today—references that track similar formulations in some state murder statutes.[9]

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"[n]o prosecution shall be approved under this section unless the Attorney General, in consultation with the Secretary of State, determines that the conduct took place in a country in which the person is no longer present, and the country lacks the ability to lawfully secure the person's return"—a determination that "is not subject to judicial review," *id.*

[8] A 1908 joint congressional committee report on the Act explained that "[u]nder existing law [i.e., prior to the 1909 Act], there [had been] no statutory definition of the crimes of murder or manslaughter." Report by the Special Joint Comm. on the Revision of the Laws, Revision and Codification of the Laws, Etc., H.R. Rep. No. 2, 60th Cong. 1st Sess., at 12 (Jan. 6, 1908) ("Joint Committee Report"). We note, however, that the 1878 edition of the Revised Statutes did contain a definition for manslaughter (but not murder): "Every person who, within any of the places or upon any of the waters [within the exclusive jurisdiction of the United States] unlawfully and willfully, but without malice, strikes, stabs, wounds, or shoots at, otherwise injures another, of which striking, stabbing, wounding, shooting, or other injury such other person dies, either on land or sea, within or without the United States, is guilty of the crime of manslaughter." Revised Statutes § 5341 (1878 ed.) (quoted in *United States v. Alexander*, 471 F.2d 923, 944-45 n.54 (D.C. Cir. 1972)). With respect to murder, the 1908 report noted that the legislation "enlarges the common-law definition, and is similar in terms to the statutes defining murder in a large majority of the States." Joint Committee Report at 24; *see also Revision of the Penal Laws: Hearings on S. 2982 Before the Senate as a Whole*, 60th Cong., 1st Sess. 1184, 1185 (1908) (statement of Senator Heyburn) (same). With respect to manslaughter, the report stated that "[w]hat is said with respect to [the murder provision] is true as to this section, manslaughter being defined and classified in language similar to that to be found in the statutes of a large majority of the States." Joint Committee Report at 24.

[9] *See, e.g.*, Cal. Penal Code § 187(a) (West 2009) ("Murder is the unlawful killing of a human being, or a fetus, with malice aforethought."); Fla. Stat. § 782.04(1)(a) (West 2009) (including "unlawful killing of a human being" as an element of murder); Idaho Code Ann. § 18-4001 (West 2009) ("Murder is the unlawful killing of a human being"); Nev. Rev. Stat. Ann. § 200.010 (West 2008) (including "unlawful killing of a human being" as an element of murder); R. I. Gen. Laws § 11-23-1 (West 2008) ("The unlawful killing of a human being with malice aforethought is murder."); Tenn. Code Ann. § 39-13-201 (West 2009) ("Criminal homicide is the unlawful killing of another person"). Such statutes, in turn, reflect the view often expressed in the common law of murder that the crime requires an "unlawful" killing. *See, e.g.*, Edward Coke, *The Third Part of the Institutes of Laws of England* 47 (London, W. Clarke & Sons 1809) ("Murder is when a man of sound memory, and of the age of discretion, unlawfully killeth within any county of the realm any reasonable creature *in rerum natura* under the king's peace, with malice fore-thought, either expressed by the party, or implied by law, so as the party wounded, or hurt, &c. die of the wound, or hurt, &c. within a year and a day after the same."); 4 William Blackstone, *Commentaries on the Laws of England* 195 (Oxford 1769) (same); *see also A Digest of Opinions of the Judge Advocates General of the Army* 1074 n.3 (1912) ("Murder, at common law, is the unlawful killing by a person of sound memory and discretion, of any reasonable creature in being and under the peace of the State, which malice aforethought either express or implied.") (internal quotation marks omitted).

As this legislative history indicates, guidance as to the meaning of what constitutes an "unlawful killing" in sections 1111 and 1112—and thus for purposes of section 1119(b)—can be found in the historical understandings of murder and manslaughter. That history shows that states have long recognized justifications and excuses to statutes criminalizing "unlawful" killings.[10] One state court, for example, in construing that state's murder statute explained that "the word 'unlawful' is a term of art" that "connotes a homicide with the absence of factors of excuse or justification," *People v. Frye*, 10 Cal. Rptr. 2d 217, 221 (Cal. App. 1992). That court further explained that the factors of excuse or justification in question include those that have traditionally been recognized, *id.* at 221 n.2. Other authorities support the same conclusion. *See, e.g., Mullaney v. Wilbur*, 421 U.S. 684, 685 (1975) (requirement of "unlawful" killing in Maine murder statute meant that killing was "neither justifiable nor excusable"); *cf. also* Rollin M. Perkins & Ronald N. Boyce, *Criminal Law* 56 (3d ed. 1982) ("Innocent homicide is of two kinds, (1) justifiable and (2) excusable.").[11] Accordingly, section 1119 does not proscribe killings covered by a justification traditionally recognized, such as under the common law or state and federal murder statutes. *See White*, 51 F. Supp. 2d at 1013 ("Congress did not intend [section 1119] to criminalize justifiable or excusable killings.").

B.

Here, we focus on the potential application of one such recognized justification—the justification of "public authority"—to the contemplated DoD and CIA operations. Before examining whether, on these facts, the public authority justification would apply to those operations, we first explain why section 1119(b) incorporates that particular justification.

The public authority justification, generally understood, is well-accepted, and it is clear it may be available even in cases where the particular criminal statute at issue does not expressly

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[10] The same is true with respect to other statutes, including federal laws, that modify a prohibited act other than murder or manslaughter with the term "unlawfully." *See, e.g., Territory v. Gonzales*, 89 P. 250, 252 (N.M. Terr. 1907) (construing the term "unlawful" in statute criminalizing assault with a deadly weapon as "clearly equivalent" to "without excuse or justification"). For example, 18 U.S.C. § 2339C makes it unlawful, *inter alia*, to "unlawfully and willfully provide[] or collect[] funds" with the intention that they be used (or knowledge they are to be used) to carry out an act that is an offense within certain specified treaties, or to engage in certain other terrorist acts. The legislative history of section 2339C makes clear that "[t]he term 'unlawfully' is intended to embody common law defenses." H.R. Rep. No. 107-307, at 12 (2001). Similarly, the Uniform Code of Military Justice makes it unlawful for members of the armed forces to, "without justification or excuse, unlawfully kill[] a human being" under certain specified circumstances. 10 U.S.C. § 918. Notwithstanding that the statute already expressly requires lack of justification or excuse, it is the longstanding view of the armed forces that "[k]illing a human being is *unlawful*" for purposes of this provision "when done without justification or excuse." Manual for Courts-Martial United States (2008 ed.), at IV-63, art. 118, comment (c)(1) (emphasis added).

[11]

refer to a public authority justification.[12] Prosecutions where such a "public authority" justification is invoked are understandably rare, *see* American Law Institute, Model Penal Code and Commentaries § 3.03 Comment 1, at 24 (1985); *cf. VISA Fraud Investigation*, 8 Op. O.L.C. 284, 285 n.2, 286 (1984), and thus there is little case law in which courts have analyzed the scope of the justification with respect to the conduct of government officials.[13] Nonetheless, discussions in the leading treatises and in the Model Penal Code demonstrate its legitimacy. *See* 2 Wayne R. LaFave, *Substantive Criminal Law* § 10.2(b), at 135 (2d ed. 2003); Perkins & Boyce, *Criminal Law* at 1093 ("Deeds which otherwise would be criminal, such as taking or destroying property, taking hold of a person by force and against his will, placing him in confinement, or even taking his life, are not crimes if done with proper public authority."); *see also* Model Penal Code § 3.03(1)(a), (d), (e), at 22-23 (proposing codification of justification where conduct is "required or authorized by," inter alia, "the law defining the duties or functions of a public officer . . ."; "the law governing the armed services or the lawful conduct of war"; or "any other provision of law imposing a public duty"); National Comm'n on Reform of Federal Criminal Laws, A Proposed New Federal Criminal Code § 602(1) ("Conduct engaged in by a public servant in the course of his official duties is justified when it is required or authorized by law."). And this Office has invoked analogous rationales in several instances in which it has analyzed whether Congress intended a particular criminal statute to prohibit specific conduct that otherwise falls within a government agency's authorities.[14]

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[12] Where a federal criminal statute incorporates the public authority justification, and the government conduct at issue is within the scope of that justification, there is no need to examine whether the criminal prohibition has been repealed, impliedly or otherwise, by some other statute that might potentially authorize the governmental conduct, including by the authorizing statute that might supply the predicate for the assertion of the public authority justification itself. Rather, in such cases, the criminal prohibition simply does not apply to the particular governmental conduct at issue in the first instance because Congress intended that prohibition to be qualified by the public authority justification that it incorporates. Conversely, where another statute expressly authorizes the government to engage in the *specific* conduct in question, then there would be no need to invoke the more general public authority justification doctrine, because in such a case the legislature itself has, in effect, carved out a specific exception permitting the executive to do what the legislature has otherwise generally forbidden. We do not address such a circumstance in this opinion.

[13] The question of a "public authority" justification is much more frequently litigated in cases where a private party charged with a crime interposes the defense that he relied upon authority that a public official allegedly conferred upon him to engage in the challenged conduct. *See generally* United States Attorneys' Manual tit. 9, Criminal Resource Manual § 2055 (describing and discussing three different such defenses of "governmental authority"); National Comm'n on Reform of Federal Criminal Laws, A Proposed New Federal Criminal Code § 602(2); Model Penal Code § 3.03(3)(b); *see also United States v. Fulcher*, 250 F.3d 244, 253 (4th Cir. 2001); *United States v. Rosenthal*, 793 F.2d 1214, 1235-36 (11th Cir. 1986); *United States v. Duggan*, 743 F.2d 59, 83-84 (2d Cir. 1984); Fed. R. Crim. P. 12.3 (requiring defendant to notify government if he intends to invoke such a public authority defense). We do not address such cases in this memorandum, in which our discussion of the "public authority" justification is limited to the question of whether a particular criminal law applies to specific conduct undertaken by *government agencies* pursuant to their authorities.

[14] *See, e.g.*, Memorandum for

The public authority justification does not excuse all conduct of public officials from all criminal prohibitions. The legislature may design some criminal prohibitions to place bounds on the kinds of governmental conduct that can be authorized by the Executive. Or, the legislature may enact a criminal prohibition in order to delimit the scope of the conduct that the legislature has otherwise authorized the Executive to undertake pursuant to another statute.[15] But the recognition that a federal criminal statute may incorporate the public authority justification reflects the fact that it would not make sense to attribute to Congress the intent with respect to each of its criminal statutes to prohibit all covered activities undertaken by public officials in the legitimate exercise of their otherwise lawful authorities, even if Congress has clearly intended to make those same actions a crime when committed by persons who are not acting pursuant to such public authority. In some instances, therefore, the better view of a criminal prohibition may well be that Congress meant to distinguish those persons who are acting pursuant to public authority, at least in some circumstances, from those who are not, even if the statute by terms does not make that distinction express. *Cf. Nardone v. United States*, 302 U.S. 379, 384 (1937) (federal criminal statutes should be construed to exclude authorized conduct of public officers where such a reading "would work obvious absurdity as, for example, the application of a speed law to a policeman pursuing a criminal or the driver of a fire engine responding to an alarm").[16]

Here, we consider a federal murder statute, but there is no general bar to applying the public authority justification to such a criminal prohibition. For example, with respect to prohibitions on the unlawful use of deadly force, the Model Penal Code recommended that legislatures should make the public authority (or "public duty") justification available, though only where the use of such force is covered by a more particular justification (such as defense of others or the use of deadly force by law enforcement), where the use of such force "is otherwise expressly authorized by law," or where such force "occurs in the lawful conduct of war." Model Penal Code § 3.03(2)(b), at 22; *see also id.* Comment 3, at 26. Some states proceeded to adopt the Model Penal Code recommendation.[17] Other states, although not adopting that precise

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*see also Visa Fraud Investigation*, 8 Op. O.L.C. at 287-88 (concluding that civil statute prohibiting issuance of visa to an alien known to be ineligible did not prohibit State Department from issuing such a visa where "necessary" to facilitate important Immigration and Naturalization Service undercover operation carried out in a "reasonable" fashion).

[15] *See, e.g., Nardone v. United States*, 302 U.S. 379, 384 (1937) (government wiretapping was proscribed by federal statute);

[16] In accord with our prior precedents, each potentially applicable statute must be carefully and separately examined to discern Congress's intent in this respect—such as whether it imposes a less qualified limitation than section 1119 imposes. *See generally, e.g.,* *United States Assistance to Countries that Shoot Down Civil Aircraft Involved in Drug Trafficking*, 18 Op. O.L.C. 148 (1994); *Application of Neutrality Act to Official Government Activities*, 8 Op. O.L.C. 58 (1984).

[17] *See, e.g.,* Neb. Rev. Stat. § 28-1408(2)(b); Pa. C.S.A. § 504(b)(2); Tex. Penal Code tit. 2, § 9.21(c).

formulation, have enacted specific statutes dealing with the question of when public officials are justified in using deadly force, which often prescribe that an officer acting in the performance of his official duties must reasonably have believed that such force was "necessary."[18] Other states have more broadly provided that the public authority defense is available where the government officer engages in a "reasonable exercise" of his official functions.[19] There is, however, no federal statute that is analogous, and neither section 1119 nor any of the incorporated title 18 provisions setting forth the substantive elements of the section 1119(b) offense, provide any express guidance as to the existence or scope of this justification.

Against this background, we believe the touchstone for the analysis of whether section 1119 incorporates not only justifications generally, but also the public authority justification in particular, is the legislative intent underlying this criminal statute. We conclude that the statute should be read to exclude from its prohibitory scope killings that are encompassed by traditional justifications, which include the public authority justification. There are no indications that Congress had a contrary intention. Nothing in the text or legislative history of sections 1111-1113 of title 18 suggests that Congress intended to exclude the established public authority justification from those that Congress otherwise must be understood to have imported through the use of the modifier "unlawful" in those statutes (which, as we explain above, establish the substantive scope of section 1119(b)).[20] Nor is there anything in the text or legislative history of section 1119 itself to suggest that Congress intended to abrogate or otherwise affect the availability under that statute of this traditional justification for killings. On the contrary, the relevant legislative materials indicate that in enacting section 1119 Congress was merely closing a gap in a field dealing with entirely different kinds of conduct than that at issue here.

The origin of section 1119 was a bill entitled the "Murder of United States Nationals Act of 1991," which Senator Thurmond introduced during the 102d Congress in response to the murder of an American in South Korea who had been teaching at a private school there. *See* 137 Cong. Rec. 8675-77 (1991) (statement of Sen. Thurmond). Shortly after the murder, another American teacher at the school accused a former colleague (who was also a U.S. citizen) of having committed the murder, and also confessed to helping the former colleague cover up the crime. The teacher who confessed was convicted in a South Korean court of destroying evidence and aiding the escape of a criminal suspect, but the individual she accused of murder had returned to the United States before the confession. *Id.* at 8675 The United States did not have

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[18] *See, e.g.*, Ariz. Rev. Stat. § 13-410.C; Maine Rev. Stat. Ann. tit. 17, § 102.2.

[19] *See, e.g.*, Ala. Stat. § 13A-3-22; N.Y. Penal Law § 35.05(1); LaFave, *Substantive Criminal Law* § 10.2(b), at 135 n.15; *see also* Robinson, *Criminal Law Defenses* § 149(a), at 215 (proposing that the defense should be available only if the actor engages in the authorized conduct "when and to the extent necessary to protect or further the interest protected or furthered by the grant of authority" and where it "is reasonable in relation to the gravity of the harms or evils threatened and the importance of the interests to be furthered by such exercise of authority"); *Id.* § 149(c), at 218-20.

[20] In concluding that the use of the term "unlawful" supports the conclusion that section 1119 incorporates the public authority justification, we do not mean to suggest that the absence of such a term would require a contrary conclusion regarding the intended application of a criminal statute to otherwise authorized government conduct in other cases. Each statute must be considered on its own terms to determine the relevant congressional intent. *See supra* note 16.

an extradition treaty with South Korea that would have facilitated prosecution of the alleged murderer and therefore, under then-existing law, "the Federal Government ha[d] no jurisdiction to prosecute a person residing in the United States who ha[d] murdered an American abroad except in limited circumstances, such as a terrorist murder or the murder of a Federal official." *Id.*

To close the "loophole under Federal law which permits persons who murder Americans in certain foreign countries to go punished," *id.*, the Thurmond bill would have added a new section to title 18 providing that "[w]hoever kills or attempts to kill a national of the United States while such national is outside the United States but within the jurisdiction of another country shall be punished as provided under sections 1111, 1112, and 1113 of this title." S. 861, 102d Cong. (1991) (incorporated in S. 1241, 102d Cong. §§ 3201-03 (1991)). The proposal also contained a separate provision amending the procedures for extradition "to provide the executive branch with the necessary authority, in the absence of an extradition treaty, to surrender to foreign governments those who commit violent crimes against U.S. nationals." 137 Cong. Rec. 8676 (1991) (statement of Sen. Thurmond) (discussing S. 861, 102d Cong., § 3).[21] The Thurmond proposal was incorporated into an omnibus crime bill that both the House and Senate passed, but that bill did not become law.

In the 103d Congress, a revised version of the Thurmond bill was included as part of the Violent Crime Control and Law Enforcement Act of 1994. H.R. 3355 § 60009, 103d Cong. (1994). The new legislation differed from the previous bill in two key respects. First, it prescribed criminal jurisdiction only where both the perpetrator and the victim were U.S. nationals, whereas the original Thurmond bill would have extended jurisdiction to all instances in which the victim was a U.S. national (based on so-called "passive personality" jurisdiction[22]). Second, the revised legislation did not include the separate provision from the earlier Thurmond legislation that would have amended the procedures for extradition. Congress enacted the revised legislation in 1994 as part of Public Law No. 103-322, and it was codified as section 1119 of title 18. *See* Pub. L. No. 103-322, § 60009, 108 Stat. 1796, 1972 (1994).

Thus, section 1119 was designed to close a jurisdictional loophole—exposed by a murder that had been committed abroad by a private individual—to ensure the possibility of prosecuting U.S. nationals who murdered other U.S. nationals in certain foreign countries that lacked the ability to lawfully secure the perpetrator's appearance at trial. This loophole had nothing to do with the conduct of an authorized military operation by U.S. armed forces or the sort of CIA counterterrorism operation contemplated here. Indeed, prior to the enactment of section 1119, the only federal statute expressly making it a crime to kill U.S. nationals abroad, at least outside the special and maritime jurisdiction of the United States,

[21] The Thurmond proposal also contained procedural limitations on prosecution virtually identical to those that Congress ultimately enacted and codified at 18 U.S.C. § 1119(c). *See* S. 861, 102d Cong. § 2.

[22] *See* Geoffrey R. Watson, *The Passive Personality Principle*, 28 Tex. Int'l L.J. 1, 13 (1993); 137 Cong. Rec. 8677 (1991) (letter for Senator Ernest F. Hollings, from Janet G. Mullins, Assistant Secretary, Legislative Affairs, U.S. State Department (Dec. 26, 1989), submitted for the record during floor debate on the Thurmond bill) (S4752 ("The United States has generally taken the position that the exercise of extraterritorial criminal jurisdiction based solely on the nationality of the victim interferes unduly with the application of local law by local authorities.").

reflected what appears to have been a particular concern with protection of Americans from terrorist attacks. *See* 18 U.S.C. § 2332(a), (d) (criminalizing unlawful killings of U.S. nationals abroad where the Attorney General or his subordinate certifies that the "offense was intended to coerce, intimidate, or retaliate against a government or a civilian population").[23] It therefore would be anomalous to now read section 1119's closing of a limited jurisdictional gap as having been intended to jettison important applications of the established public authority justification, particularly in light of the statute's incorporation of substantive offenses codified in statutory provisions that from all indications were intended to incorporate recognized justifications and excuses.

It is true that here the target of the contemplated operations would be a U.S. citizen. But we do not believe al-Aulaqi's citizenship provides a basis for concluding that section 1119 would fail to incorporate the established public authority justification for a killing in this case. As we have explained, section 1119 incorporates the federal murder and manslaughter statutes, and thus its prohibition extends only to "unlawful" killings, 18 U.S.C. §§ 1111, 1112, a category that was intended to include, from all of the evidence of legislative intent we can find, only those killings that may not be permissible in light of traditional justifications for such action. At the time the predecessor versions of sections 1111 and 1112 were enacted, it was understood that killings undertaken in accord with the public authority justification were not "unlawful" because they were justified. There is no indication that, because section 1119(b) proscribes the unlawful killing abroad of U.S. nationals by U.S. nationals, it silently incorporated all justifications for killings *except* that public authority justification.

## III.

Given that section 1119 incorporates the public authority justification, we must next analyze whether the contemplated DoD and CIA operations would be encompassed by that justification. In particular, we must analyze whether that justification would apply even though the target of the contemplated operations is a United States citizen. We conclude that it would—a conclusion that depends in part on our determination that each operation would accord with any potential constitutional protections of the United States citizen in these circumstances (*see infra* part VI). In reaching this conclusion, we do not address other cases or circumstances, involving different facts. Instead, we emphasize the sufficiency of the facts that have been represented to us here, without determining whether such facts would be necessary to the conclusion we reach.[24]

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[23] Courts have interpreted other federal homicide statutes to apply extraterritorially despite the absence of an express provision for extraterritorial application. *See, e.g.,* 18 U.S.C. § 1114 (criminalizing unlawful killings of federal officers and employees); *United States v. Al Kassar*, 582 F. Supp. 2d 488, 497 (S.D.N.Y. 2008) (construing 18 U.S.C. § 1114 to apply extraterritorially).

[24] In light of our conclusion that section 1119 and the statutes it cross-references incorporate this justification, and that the operations here would be covered by that justification, we need not and thus do not address whether other grounds might exist for concluding that the operations would be lawful.

A.

We begin with the contemplated DoD operation. We need not attempt here to identify the minimum conditions that might establish a public authority justification for that operation. In light of the combination of circumstances that we understand would be present, and which we describe below, we conclude that the justification would be available because the operation would constitute the "lawful conduct of war"—a well-established variant of the public authority justification.[25]

As one authority has explained by example, "if a soldier intentionally kills an enemy combatant in time of war and within the rules of warfare, he is not guilty of murder," whereas, for example, if that soldier intentionally kills a prisoner of war—a violation of the laws of war—"then he commits murder." 2 LaFave, *Substantive Criminal Law* § 10.2(c), at 136; *see also State v. Gut*, 13 Minn. 341, 357 (1868) ("That it is legal to kill an alien enemy in the heat and exercise of war, is undeniable; but to kill such an enemy after he laid down his arms, and especially when he is confined in prison, is murder."); Perkins & Boyce, *Criminal Law* at 1093 ("Even in time of war an alien enemy may not be killed needlessly after he has been disarmed and securely imprisoned").[26] Moreover, without invoking the public authority justification by terms, our Office has relied on the same notion in an opinion addressing the intended scope of a federal criminal statute that concerned the use of possibly lethal force. *See United States Assistance to Countries that Shoot Down Civil Aircraft Involved in Drug Trafficking*, 18 Op. O.L.C. 148, 164 (1994) ("*Shoot Down Opinion*") (concluding that the Aircraft Sabotage Act of 1984, 18 U.S.C. § 32(b)(2), which prohibits the willful destruction of a civil aircraft and otherwise applies to U.S. government conduct, should not be construed to have "the surprising and almost certainly

[25] *See, e.g.*, 2 Paul H. Robinson, *Criminal Law Defenses* § 148(a), at 208 (1984) (conduct that would violate a criminal statute is justified and thus not unlawful "[w]here the exercise of military authority relies upon the law governing the armed forces or upon the conduct of war"); 2 LaFave, *Substantive Criminal Law* § 10.2(c), at 136 ("another aspect of the public duty defense is where the conduct was required or authorized by 'the law governing the armed services or the lawful conduct of war'") (internal citation omitted); Perkins & Boyce, *Criminal Law* at 1093 (noting that a "typical instance[] in which even the extreme act of taking human life is done by public authority" involves "the killing of an enemy as an act of war and within the rules of war"); *Frye*, 10 Cal. Rptr. 2d at 221 n.2 (identifying "homicide done under a valid public authority, such as execution of a death sentence or killing an enemy in a time of war," as one example of a justifiable killing that would not be "unlawful" under the California statute describing murder as an "unlawful" killing); *State v. Gut*, 13 Minn. 341, 357 (1868) ("that it is legal to kill an alien enemy in the heat and exercise of war, is undeniable"); *see also* Model Penal Code § 3.03(2)(b) (proposing that criminal statutes expressly recognize a public authority justification for a killing that "occurs in the lawful conduct of war," notwithstanding the Code recommendation that the use of deadly force generally should be justified only if expressly prescribed by law); *see also id.* at 25 n.7 (collecting representative statutes reflecting this view enacted prior to Code's promulgation); 2 Robinson, *Criminal Law Defenses* § 148(b), at 210-11 nn.8-9 (collecting post-Model Code state statutes expressly recognizing such a defense).

[26] *Cf. Public Committee Against Torture in Israel v. Government of Israel*, HCJ 769/02 ¶ 19, 46 I.L.M. 375, 382 (Israel Supreme Court sitting as the High Court of Justice, 2006) ("When soldiers of the Israel Defense Forces act pursuant to the laws of armed conflict, they are acting 'by law', and they have a good justification defense [to criminal culpability]. However, if they act contrary to the laws of armed conflict they may be, *inter alia*, criminally liable for their actions."); *Calley v. Callaway*, 519 F.2d 184, 193 (5th Cir. 1975) ("an order to kill unresisting Vietnamese would be an illegal order, and . . . if [the defendant] knew the order was illegal or should have known it was illegal, obedience to an order was not a legal defense").

unintended effect of criminalizing actions by military personnel that are lawful under international law and the laws of armed conflict").

In applying this variant of the public authority justification to the contemplated DoD operation, we note as an initial matter that DoD would undertake the operation pursuant to Executive war powers that Congress has expressly authorized. *See Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 635 (1952) (Jackson, J., concurring) ("When the President acts pursuant to an express or implied authorization of Congress, his authority is at its maximum, for it includes all that he possesses in his own right plus all that Congress can delegate."). By authorizing the use of force against "organizations" that planned, authorized, and committed the September 11th attacks, Congress clearly authorized the President's use of "necessary and appropriate" force against al-Qaida forces, because al-Qaida carried out the September 11th attacks. *See* Authorization for Use of Military Force ("AUMF"), Pub. L. No. 107-40, 115 Stat. 224, §2(a) (2001) (providing that the President may "use all necessary and appropriate force against those nations, organizations, or persons he determines planned, authorized, committed or aided the terrorist attacks that occurred on September 11, 2001, or harbored such organizations or persons, in order to prevent any future acts of international terrorism against the United States by such nations, organizations, or persons.").[27] And, as we have explained, *supra* at 9, a decision-maker could reasonably conclude that this leader of AQAP forces is part of al-Qaida forces. Alternatively, and as we have further explained, *supra* at 10 n.5, the AUMF applies with respect to forces "associated with" al-Qaida that are engaged in hostilities against the U.S. or its coalition partners, and a decision-maker could reasonably conclude that the AQAP forces of which al-Aulaqi is a leader are "associated with" al Qaida forces for purposes of the AUMF. On either view, DoD would carry out its contemplated operation against a leader of an organization that is within the scope of the AUMF, and therefore DoD would in that respect be operating in accord with a grant of statutory authority.

Based upon the facts represented to us, moreover, the target of the contemplated operation has engaged in conduct as part of that organization that brings him within the scope of the AUMF. High-level government officials have concluded, on the basis of al-Aulaqi's activities in Yemen, that al-Aulaqi is a leader of AQAP whose activities in Yemen pose a "continued and imminent threat" of violence to United States persons and interests. Indeed, the facts represented to us indicate that al-Aulaqi has been involved, through his operational and leadership roles within AQAP, in an abortive attack within the United States and continues to plot attacks intended to kill Americans from his base of operations in Yemen. The contemplated DoD operation, therefore, would be carried out against someone who is within the core of individuals against whom Congress has authorized the use of necessary and appropriate force.[28]

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[27] We emphasize this point not in order to suggest that statutes such as the AUMF have superseded or implicitly repealed or amended section 1119, but instead as one factor that helps to make particularly clear why the operation contemplated here would be covered by the public authority justification that section 1119 (and section 1111) itself incorporates.

[28] *See Hamlily*, 616 F. Supp. at 75 (construing AUMF to reach individuals who "function[] or participate[] within or under the command structure of [al-Qaida]"); *Gherebi v. Obama*, 609 F. Supp. 2d 43, 68 (D.D.C. 2009); *see also al-Marri v. Pucciarelli*, 534 F.3d 213, 325 (4th Cir. 2008) (en banc) (Wilkinson, J., dissenting in part) (explaining that the ongoing hostilities against al-Qaida permit the Executive to use necessary and appropriate force

Al-Aulaqi is a United States citizen, however, and so we must also consider whether his citizenship precludes the AUMF from serving as the source of lawful authority for the contemplated DoD operation. There is no precedent directly addressing the question in circumstances such as those present here; but the Supreme Court has recognized that, because military detention of enemy forces is "by 'universal agreement and practice,' [an] 'important incident[] of war,'" *Hamdi v. Rumsfeld*, 542 U.S. 507, 518 (2004) (plurality opinion) (quoting *Ex parte Quirin*, 317 U.S. 1, 28, 30 (1942)), the AUMF authorized the President to detain a member of Taliban forces who was captured abroad in an armed conflict against the United States on a traditional battlefield. *See id.* at 517-19 (plurality opinion).[29] In addition, the Court held in

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under the AUMF against an "enemy combatant," a term Judge Wilkinson would have defined as a person who is (1) "a member of" (2) "an organization or nation against whom Congress has declared war or authorized the use of military force," and (3) who "knowingly plans or engages in conduct that harms or aims to harm persons or property for the purpose of furthering the military goals of the enemy nation or organization"), *vacated and remanded sub nom. al-Marri v. Spagone*, 129 S. Ct. 1545 (2009); Government March 13th *Guantánamo Bay Detainee* Brief at 1 (arguing that AUMF authorizes detention of individuals who were "part of, or substantially supported, Taliban or al-Qaida 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").

Several of the Guantánamo habeas petitioners, as well as some commentators, have argued that in a non-international conflict of this sort, the laws of war and/or the AUMF do not permit the United States to treat persons who are part of al-Qaida as analogous to members of an enemy's armed forces in a traditional international armed conflict, but that the United States instead must treat all such persons as civilians, which (they contend) would permit targeting those persons only when they are directly participating in hostilities. *Cf. also al-Marri*, 534 F.3d at 237-47 (Motz, J. concurring in the judgment, and writing for four of nine judges) (arguing that the AUMF and the Constitution, as informed by the laws of war, do not permit military detention of an alien residing in the United States whom the government alleged was "closely associated with" al-Qaida, and that such individual must instead be treated as a civilian, because that person is not affiliated with the military arm of an enemy nation); Philip Alston, *Report of the Special Rapporteur on extrajudicial, summary or arbitrary executions* ¶ 58, at 19 (United Nations Human Rights Council, Fourteenth Session, Agenda Item 3, May 28, 2010) ("*Report of the Special Rapporteur*") (reasoning that because "[u]nder the [international humanitarian law] applicable to non-international armed conflict, there is no such thing as a 'combatant'"—i.e., a non-state actor entitled to the combatant's privilege—it follows that "States are permitted to attack only civilians who 'directly participate in hostilities'"). Primarily for the reasons that Judge Walton comprehensively examined in the *Gherebi* case, *see* 609 F. Supp. 2d at 62-69, we do not think this is the proper understanding of the laws of war in a non-international armed conflict, or of Congress's authorization under the AUMF. *Cf. also* International Committee of the Red Cross, *Interpretive Guidance on the Notion of Direct Participation in Hostilities Under International Humanitarian Law* 28, 34 (2009) (even if an individual is otherwise a "citizen" for purposes of the laws of war, a member of a non-state armed group can be subject to targeting by virtue of having assumed a "continuous combat function" on behalf of that group); Alston, *supra*, ¶ 65, at 30-31 (acknowledging that under the ICRC view, if armed group members take on a continuous command function, they can be targeted anywhere and at any time); *infra* at 37-38 (explaining that al-Aulaqi is continually and "actively" participating in hostilities and thus not protected by Common Article 3 of the Geneva Conventions).

[29] *See also Al Odah v. Obama*, No. 09-5331, 2010 WL 2679752, at *1, and other D.C. Circuit cases cited therein (D.C. Cir. 2010) (AUMF gives United States the authority to detain a person who is "part of" al-Qaida or Taliban forces); *Hamlily*, 616 F. Supp. 2d at 74 (Bates, J.); *Gherebi*, 609 F. Supp. 2d at 67 (Walton, J.); *Mattan v. Obama*, 618 F. Supp. 2d 24, 26 (D.D.C. 2009) (Lamberth, C. J.); *Al Mutairi v. United States*, 644 F. Supp. 2d 78, 85 (D.D.C. 2009) (Kollar-Kotelly, J.); *Awad v. Obama*, 646 F. Supp. 2d 20, 23 (D.D.C. 2009) (Robertson, J.); *Anam v. Obama*, 653 F. Supp. 2d 62, 64 (D.D.C. 2009) (Hogan, J.); *Hatim v.* Obama, 677 F. Supp. 2d 1, 7, (D.D.C. 2009) (Urbina, J.); *Al-Adahi v. Obama*, No. 05-280, 2009 WL 2584685 (D.D.C. Aug. 21, 2009) (Kessler, J.), *rev'd on other grounds*, No. 09-5333 (D.C. Cir. July 13, 2010).

*Hamdi* that this authorization applied even though the Taliban member in question was a U.S. citizen. *Id.* at 519-24; *see also Quirin*, 317 U.S. at 37-38 ("[c]itizens who associate themselves with the military arm of the enemy government, and with its aid, guidance and direction enter [the United States] bent on hostile acts," may be treated as "enemy belligerents" under the law of war). Furthermore, lower federal courts have relied upon *Hamdi* to conclude that the AUMF authorizes DoD to detain individuals who are part of al-Qaida even if they are apprehended and transferred to U.S. custody while not on a traditional battlefield. *See, e.g.*, *Bensayah v. Obama*, No. 08-5537, 2010 WL 2640626, at *1, *5, *8 (D.C. Cir. June 28, 2010) (concluding that the Department of Defense could detain an individual turned over to the U.S. in Bosnia if it demonstrates he was part of al-Qaida); *Al-Adahi v. Obama*, No. 09-5333 (D.C. Cir. July 13, 2010) (DoD has authority under AUMF to detain individual apprehended by Pakistani authorities in Pakistan and then transferred to U.S.); *Anam v. Obama*, 2010 WL 58965 (D.D.C. 2010) (same); *Razak Ali v. Obama*, 2009 WL 4030864 (D.D.C. 2009) (same); *Sliti v. Bush*, 592 F. Supp. 2d 46 (D.D.C. 2008) (same).

In light of these precedents, we believe the AUMF's authority to use lethal force abroad also may apply in appropriate circumstances to a United States citizen who is part of the forces of an enemy organization within the scope of the force authorization. The use of lethal force against such enemy forces, like military detention, is an "'important incident of war,'" *Hamdi*, 542 U.S. at 518 (plurality opinion) (quotation omitted). *See, e.g.*, General Orders No. 100: Instructions for the Government of Armies of the Untied States in the Field ¶ 15 (Apr. 24, 1863) (the "Lieber Code") ("[m]ilitary necessity admits of all direct destruction of life or limb of armed enemies"); International Committee of the Red Cross, *Commentary on the Additional Protocols of 8 June 1977 to the Geneva Conventions of 12 Aug. 1949 and Relating to the Protection of Victims of Non-International Armed Conflicts (Additional Protocol II)* § 4789 (1987); Yoram Dinstein, *The Conduct of Hostilities Under the Law of International Armed Conflict* 94 (2004) ("*Conduct of Hostilities*") ("When a person takes up arms or merely dons a uniform as a member of the armed forces, he automatically exposes himself to enemy attack."). And thus, just as the AUMF authorizes the military detention of a U.S. citizen captured abroad who is part of an armed force within the scope of the AUMF, it also authorizes the use of "necessary and appropriate" lethal force against a U.S. citizen who has joined such an armed force. Moreover, as we explain further in Part VI, DoD would conduct the operation in a manner that would not violate any possible constitutional protections that al-Aulaqi enjoys by reason of his citizenship. Accordingly, we do not believe al-Aulaqi's citizenship provides a basis for concluding that he is immune from a use of force abroad that the AUMF otherwise authorizes.

In determining whether the contemplated DoD operation would constitute the "lawful conduct of war," LaFave, *Substantive Criminal Law* § 10.2(c), at 136, we next consider whether that operation would comply with the international law rules to which it would be subject—a question that also bears on whether the operation would be authorized by the AUMF. *See* Response for Petition for Rehearing and Rehearing En Banc, *Al Bihani v. Obama*, No. 09-5051 at 7 (D.C. Cir.) (May 13, 2010) (AUMF "should be construed, if possible, as consistent with international law") (citing *Murray v. Schooner Charming Betsy*, 6 U.S. (2 Cranch) 64, 118 (1804) ("an act of Congress ought never to be construed to violate the law of nations, if any other possible construction remains")); *see also F. Hoffman-La Roche Ltd. v. Empagran S.A.*, 542 U.S. 155, 164 (2004) (customary international law is "law that (we must assume) Congress ordinarily

seeks to follow"). Based on the combination of facts presented to us, we conclude that DoD would carry out its operation as part of the non-international armed conflict between the United States and al-Qaida, and thus that on those facts the operation would comply with international law so long as DoD would conduct it in accord with the applicable laws of war that govern targeting in such a conflict.

In *Hamdan v. Rumsfeld*, the Supreme Court held that the United States is engaged in a non-international armed conflict with al-Qaida. 548 U.S. 557, 628-31 (2006). In so holding, the Court rejected the argument that non-international armed conflicts are limited to civil wars and other internal conflicts between a state and an internal non-state armed group that are confined to the territory of the state itself; it held instead that a conflict between a transnational non-state actor and a nation, occurring outside that nation's territory, is an armed conflict "not of an international character" (quoting Common Article 3 of the Geneva Conventions) because it is not a "clash between nations." *Id.* at 630.

Here, unlike in *Hamdan*, the contemplated DoD operation would occur in Yemen, a location that is far from the most active theater of combat between the United States and al-Qaida. That does not affect our conclusion, however, that the combination of facts present here would make the DoD operation in Yemen part of the non-international armed conflict with al-Qaida.[30] To be sure, *Hamdan* did not directly address the geographic scope of the non-international armed conflict between the United States and al-Qaida that the Court recognized, other than to implicitly hold that it extended to Afghanistan, where Hamdan was apprehended. *See* 548 U.S. at 566; *see also id.* at 641-42 (Kennedy, J., concurring in part) (referring to Common Article 3 as "applicable to our Nation's armed conflict with al Qaeda in Afghanistan"). The Court did, however, specifically reject the argument that non-international armed conflicts are necessarily limited to internal conflicts. The Common Article 3 term "conflict not of an international character," the Court explained, bears its "literal meaning"—namely, that it is a conflict that "does not involve a clash between nations." *Id.* at 630 (majority opinion). The Court referenced the statement in the 1949 ICRC Commentary on the Additional Protocols to the Geneva Conventions that a non-international armed conflict "'is distinct from an international armed conflict *because of the legal status of the entities opposing each other*,'" *id.* at 631 (emphasis added). The Court explained that this interpretation—that the nature of the conflict depends at least in part on the status of the parties, rather than simply on the locations in which they fight—in turn accords with the view expressed in the commentaries to the Geneva Conventions that "the scope of application" of Common Article 3, which establishes basic protections that govern conflicts not of an international character, "must be as wide as possible.'" *Id.*[31]

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[30] Our analysis is limited to the circumstances presented here, regarding the contemplated use of lethal force in Yemen. We do not address issues that a use of force in other locations might present. *See also supra* note 1.

[31] We think it is noteworthy that the AUMF itself does not set forth an express geographic limitation on the use of force it authorizes, and that nearly a decade after its enactment, none of the three branches of the United States Government has identified a strict geographical limit on the permissible scope of the authority the AUMF confers on the President with respect to this armed conflict. *See, e.g.*, Letter from the President to the Speaker of the House of Representatives and the President Pro Tempore of the Senate (June 15, 2010) (reporting, "consistent with . . . the War Powers Resolution," that the armed forces, with the assistance of numerous international partners,

Invoking the principle that for purposes of international law an armed conflict generally exists only when there is "protracted armed violence between governmental authorities and armed groups," Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction, *Prosecutor v. Tadic*, Case No. IT-94-1AR72, ¶ 70 (ICTY App. Chamber Oct. 2, 1995) ("*Tadic* Jurisdictional Decision"), some commentators have suggested that the conflict between the United States and al-Qaida cannot extend to nations outside Afghanistan in which the level of hostilities is less intense or prolonged than in Afghanistan itself. *See, e.g.*, Mary Ellen O'Connell, *Combatants and the Combat Zone*, 43 U. Rich. L. Rev. 845, 857-59 (2009); *see also* Philip Alston, *Report of the Special Rapporteur on extrajudicial, summary or arbitrary executions* ¶ 54, at 18 (United Nations Human Rights Council, Fourteenth Session, Agenda Item 3, May 28, 2010) (acknowledging that a non-international armed conflict can be transnational and "often does" exist "across State borders," but explaining that the duration and intensity of attacks in a particular nation is also among the "cumulative factors that must be considered for the objective existence of an armed conflict"). There is little judicial or other authoritative precedent that speaks directly to the question of the geographic scope of a non-international armed conflict in which one of the parties is a transnational, non-state actor and where the principal theater of operations is not within the territory of the nation that is a party to the conflict. Thus, in considering this issue, we must look to principles and statements from analogous contexts, recognizing that they were articulated without consideration of the particular factual circumstances of the sort of conflict at issue here.

In looking for such guidance, we have not come across any authority for the proposition that when one of the parties to an armed conflict plans and executes operations from a base in a new nation, an operation to engage the enemy in that location can never be part of the original armed conflict—and thus subject to the laws of war governing that conflict—unless and until the hostilities become sufficiently intensive and protracted within that new location. That does not appear to be the rule, or the historical practice, for instance, in a traditional international conflict. *See* John R. Stevenson, Legal Adviser, Department of State, *United States Military Action in Cambodia: Questions of International Law* (address before the Hammarskjold Forum of the Association of the Bar of the City of New York, May 28, 1970), *in* 3 *The Vietnam War and International Law: The Widening Context* 23, 28-30 (Richard A. Falk, ed. 1972) (arguing that in an international armed conflict, if a neutral state has been unable for any reason to prevent violations of its neutrality by the troops of one belligerent using its territory as a base of operations, the other belligerent has historically been justified in attacking those enemy forces in that state). Nor do we see any obvious reason why that more categorical, nation-specific rule should govern in analogous circumstances in this sort of non-international armed conflict.[32]

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continue to conduct operations "against al-Qa'ida terrorists," and that the United States has "deployed combat-equipped forces to a number of locations in the U.S. Central . . . Command area[] of operation in support of those [overseas counter-terrorist] operations"); Letter for the Speaker of the House of Representatives and the President Pro Tempore of the Senate, from President Barack Obama (Dec. 16, 2009) (similar); *DoD May 18 Memorandum for OLC*, at 2 (explaining that U.S. armed forces have conducted AQAP targets in Yemen since December 2009, and that DoD has reported such strikes to the appropriate congressional oversight committees).

[32] In the speech cited above, Legal Adviser Stevenson was referring to cases in which the government of the nation in question is unable to prevent violations of its neutrality by belligerent troops.

Rather, we think the determination of whether a particular operation would be part of an ongoing armed conflict for purposes of international law requires consideration of the particular facts and circumstances present in each case. Such an inquiry may be particularly appropriate in a conflict of the sort here, given that the parties to it include transnational non-state organizations that are dispersed and that thus may have no single site serving as their base of operations.[33]

We also find some support for this view in an argument the United States made to the International Criminal Tribunal for Yugoslavia (ICTY) in 1995. To be sure, the United States was there confronting a question, and a conflict, quite distinct from those we address here. Nonetheless, in that case the United States argued that in determining *which* body of humanitarian law applies in a particular conflict, "the conflict must be considered as a whole," and that "it is artificial and improper to attempt to divide it into isolated segments, either geographically or chronologically, in an attempt to exclude the application of [the relevant] rules." Submission of the Government of the United States of America Concerning Certain Arguments Made by Counsel for the Accused in the Case of *The Prosecutor of the Tribunal v. Dusan Tadic*, Case No. IT-94-1AR72 (ICTY App. Chamber) at 27-28 (July 1995) ("U.S. *Tadic* Submission"). Likewise, the court in *Tadic*—although not addressing a conflict that was transnational in the way the U.S. conflict with al-Qaida is—also concluded that although "the definition of 'armed conflict' varies depending on whether the hostilities are international or internal . . . the scope of both internal and international armed conflicts *extends beyond the exact time and place of hostilities*." *Tadic* Jurisdictional Decision ¶ 67 (emphasis added); *see also* International Committee of the Red Cross, *International Humanitarian Law and the Challenges of Contemporary Armed Conflicts* 18 (2003) (asserting that in order to assess whether an armed conflict exists it is necessary to determine "whether the totality of the violence taking place between states and transnational networks can be deemed to be armed conflict in the legal sense"). Although the basic approach that the United States proposed in *Tadic*, and that the ICTY may be understood to have endorsed, was advanced without the current conflict between the U.S. and al-Qaida in view, that approach reflected a concern with ensuring that the laws of war, and the limitations on the use of force they establish, should be given an appropriate application.[34] And that same consideration, reflected in *Hamdan* itself, *see supra* at 24, suggests

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[33] The fact that the operation occurs in a new location might alter the way in which the military must apply the relevant principles of the laws of war—for example, requiring greater care in some locations in order to abide by the principles of distinction and proportionality that protect civilians from the use of military force. But that possible distinction should not affect the question of whether the laws of war govern the conflict in that new location in the first instance

[34] *See also* Geoffrey S. Corn & Eric Talbot Jensen, *Untying the Gordian Knot: A Proposal for Determining Applicability of the Laws of War to the War on Terror*, 81 Temp. L. Rev. 787, 799 (2008) ("If . . . the ultimate purpose of the drafters of the Geneva Conventions was to prevent 'law avoidance' by developing de facto law triggers—a purpose consistent with the humanitarian foundation of the treaties—then the myopic focus on the geographic nature of an armed conflict in the context of transnational counterterrorist combat operations serves to frustrate that purpose."); *cf. also* Derek Jinks, *September 11 and the Laws of War*, 28 Yale J. Int'l L. 1, 40-41 (2003) (arguing that if Common Article 3 applies to wholly internal conflicts, then it "applies a fortiori to armed conflicts with international or transnational dimensions," such as to the United States's armed conflict with al-Qaida).

a further reason for skepticism about an approach that would categorically deny that an operation is part of an armed conflict absent a specified level and intensity of hostilities in the particular location where it occurs.

For present purposes, in applying the more context-specific approach to determining whether an operation would take place within the scope of a particular armed conflict, it is sufficient that the facts as they have been represented to us here, in combination, support the judgment that DoD's operation in Yemen would be conducted as part of the non-international armed conflict between the United States and al-Qaida. Specifically, DoD proposes to target a leader of AQAP, an organized enemy force[35] that is either a component of al-Qaida or that is a co-belligerent of that central party to the conflict and engaged in hostilities against the United States as part of the same comprehensive armed conflict, in league with the principal enemy. *See supra at* 9-10 & n.5. Moreover, DoD would conduct the operation in Yemen, where, according to the facts related to us, AQAP has a significant and organized presence, and from which AQAP is conducting terrorist training in an organized manner and has executed and is planning to execute attacks against the United States. Finally, the targeted individual himself, on behalf of that force, is continuously planning attacks from that Yemeni base of operations against the United States, as the conflict with al-Qaida continues. *See supra at* 7-9. Taken together, these facts support the conclusion that the DoD operation would be part of the non-international armed conflict the Court recognized in *Hamdan.*[36]

[35] *Cf. Prosecutor v. Haradnizaj*, No IT-04-84-T 60 (ICTY Trial Chamber I, 2008) ("an armed conflict can exist only between parties that are sufficiently organized to confront each other with military means—a condition that can be evaluated with respect to non-state groups by assessing "several indicative factors, none of which are, in themselves, essential to establish whether the 'organization' criterion is fulfilled," including, among other things, the existence of a command structure, and disciplinary rules and mechanisms within the group, the ability of the group to gain access to weapons, other military equipment, recruits and military training, and its ability to plan, coordinate, and carry out military operations).

[36] We note that the Department of Defense, which has a policy of compliance with the law of war "during all armed conflicts, however such conflicts are characterized, *and in all other military operations*," Chairman of the Joint Chiefs of Staff, Instruction 5810.01D, *Implementation of the DoD Law of War Program* ¶ 4.a, at 1 (Apr. 30, 2010) (emphasis added), has periodically used force—albeit in contexts different from a conflict such as this—in situations removed from "active battlefields," in response to imminent threats. *See, e.g.*, Nat'l Comm'n on Terrorist Attacks Upon the United States, *The 9/11 Commission Report* 116-17 (2004) (describing 1998 cruise missile attack on al-Qaida encampments in Afghanistan following al-Qaida bombings of U.S. embassies in East Africa); W. Hays Parks, *Memorandum of Law: Executive Order 12333 and Assassination*, Army Lawyer, at 7 (Dep't of Army Pamphlet 27-50-204) (Dec. 1989) ("*Assassination*") at 7 n.8 (noting examples of uses of military force in "[s]elf defense against a continuing threat," including "the U.S. Navy air strike against Syrian military objections in Lebanon on 4 December 1983, following Syrian attacks on U.S. Navy F-14 TARPS flights supporting the multinational peacekeeping force in Beirut the preceding day," and "air strikes against terrorist-related targets in Libya on the evening of 15 April 1986"); *see also id.* at 7 ("A national decision to employ military force in self defense against a legitimate terrorist or related threat would not be unlike the employment of force in response to a threat by conventional forces; only the nature of the threat has changed, rather than the international legal right of self defense. The terrorist organizations envisaged as appropriate to necessitate or warrant an armed response by U.S. forces are well-financed, highly-organized paramilitary structures engaged in the illegal use of force."); Advisory Opinion of 8 July 1996 on the Legality of the Threat or Use of Nuclear Weapons ¶ 42, 1996 I.C.J. 226, 245 ("Nuclear Weapons Advisory Opinion") (fundamental law-of-war norms are applicable even where military force might be employed outside the context of an armed conflict, such as when using powerful weapons in an act of national self-defense); *cf. also 9/11 Commission Report* at 116-17 (noting the Clinton Administration position—with respect to a presidential memorandum authorizing CIA assistance to an operation that could result in the killing of Usama Bin Ladin "if the CIA and the tribals judged that capture was not feasible"—that "under the law of armed

There remains the question whether DoD would conduct its operation in accord with the rules governing targeting in a non-international armed conflict—namely, international humanitarian law, commonly known as the laws of war. *See* Dinstein, *Conduct of Hostilities* at 17 (international humanitarian law "takes a middle road, allowing belligerent States much leeway (in keeping with the demands of military necessity) and yet circumscribing their freedom of action (in the name of humanitarianism")).[37] The 1949 Geneva Conventions to which the United States is a party do not themselves directly impose extensive restrictions on the conduct of a non-international armed conflict—with the principal exception of Common Article 3, *see Hamdan*, 548 U.S. at 630-31. But the norms specifically described in those treaties "are not exclusive, and the laws and customs of war also impose limitations on the conduct of participants in non-international armed conflict." U.S. *Tadic* Submission at 33 n.53; *see also, e.g.*, Convention Respecting the Laws and Customs of War on Land, Oct. 18, 1907, Preamble ("Hague Convention (IV)"), 36 Stat. 2277, 2280 (in cases "not included" under the treaty, "the inhabitants and the belligerents remain under the protection and the rule of the principles of the law of nations, as they result from the usages among civilized peoples, from the laws of humanity, and the dictates of the public conscience").

In particular, the "fundamental rules" and "intransgressible principles of international customary law," Advisory Opinion of 8 July 1996 on the Legality of the Threat or Use of Nuclear Weapons ¶ 79, 1996 I.C.J. 226, 257 ("Nuclear Weapons Advisory Opinion"), which apply to all armed conflicts, include the "four fundamental principles that are inherent to all targeting decisions"—namely, military necessity, humanity (the avoidance of unnecessary suffering), proportionality, and distinction. United States Air Force, *Targeting*, Air Force Doctrine Document 2-1.9, at 88 (June 8, 2006); *see also generally id.* at 88-92; Dinstein, *Conduct of Hostilities* at 16-20, 115-16, 119-23. Such fundamental rules also include those listed in the annex to the Fourth Hague Convention, *see* Nuclear Weapons Advisory Opinion ¶ 80, at 258, article 23 of which makes it "especially forbidden" to, inter alia, kill or wound treacherously, refuse surrender, declare a denial of quarter, or cause unnecessary suffering, 36 Stat. at 2301-02.

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conflict, killing a person who posed an imminent threat to the United States would be an act of self-defense, not an assassination"). As we explain below, DoD likewise would conduct the operation contemplated here in accord with the laws of war and would direct its lethal force against an individual whose activities have been determined to pose a "continued and imminent threat" to U.S. persons and interests.

[37] *Cf.* Nuclear Weapons Advisory Opinion ¶ 25, 1996 I.C.J. at 240 (explaining that the "test" of what constitutes an "arbitrary" taking of life under international human rights law, such as under article 6(1) of the International Covenant of Civil and Political Rights (ICCPR), must be determined by "the law applicable in armed conflict which is designed to regulate the conduct of hostilities," and "can only be decided by reference to the law applicable in armed conflict and not deduced from terms of the Covenant itself"); Written Statement of the Government of the United States of America before the International Court of Justice, *Re: Request by the United Nations General Assembly for an Advisory Opinion on the Legality of the Threat or Use of Nuclear Weapons* at 44 (June 20, 1995) (ICCPR prohibition on arbitrary deprivation of life "was clearly understood by its drafters to exclude the lawful taking of human life," including killings "lawfully committed by the military in time of war"); Dinstein, *Conduct of Hostilities* at 23 (right to life under human rights law "does not protect persons from the ordinary consequences of hostilities"); *cf. also infra* Part VI (explaining that the particular contemplated operations here would satisfy due process and Fourth Amendment standards because, *inter alia*, capturing al-Aulaqi is currently infeasible).

DoD represents that it would conduct its operation against al-Aulaqi in compliance with these fundamental law-of-war norms. *See* Chairman of the Joint Chiefs of Staff, Instruction 5810.01D, *Implementation of the DoD Law of War Program* ¶ 4.a, at 1 (Apr. 30, 2010) ("It is DOD policy that . . . [m]embers of the DOD Components comply with the law of war during all armed conflicts, however such conflicts are characterized, and in all other military operations."). In particular, the targeted nature of the operation would help to ensure that it would comply with the principle of distinction, and DoD has represented to us that it would make every effort to minimize civilian casualties and that the officer who launches the ordnance would be required to abort a strike if he or she concludes that civilian casualties will be disproportionate or that such a strike will in any other respect violate the laws of war. *See DoD May 18 Memorandum for OLC*, at 1 ("Any official in the chain of command has the authority and duty to abort" a strike "if he or she concludes that civilian casualties will be disproportionate or that such a strike will otherwise violate the laws of war.").

Moreover, although DoD would specifically target al-Aulaqi, and would do so without advance warning, such characteristics of the contemplated operation would not violate the laws of war and, in particular, would not cause the operation to violate the prohibitions on treachery and perfidy—which are addressed to conduct involving a breach of confidence by the assailant. *See, e.g.*, Hague Convention IV, Annex, art. 23(b), 36 Stat. at 2301-02 ("[I]t is especially forbidden . . . to kill or wound treacherously individuals belonging to the hostile nation or army"); *cf. also* Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts, art. 37(1) (prohibiting the killing, injuring or capture of an adversary in an international armed conflict by resort to acts "inviting the confidence of [the] adversary. . . with intent to betray that confidence," including feigning a desire to negotiate under truce or flag of surrender; feigning incapacitation; and feigning noncombatant status).[38] Those prohibitions do not categorically preclude the use of stealth or surprise, nor forbid military attacks on identified, individual soldiers or officers, *see* U.S. Army Field Manual 27-10, ¶ 31 (1956) (article 23(b) of the Annex to the Hague Convention IV does not "preclude attacks on individual soldiers or officers of the enemy whether in the zone of hostilities, occupied territory, or else-where"), and we are not aware of any other law-of-war grounds precluding the use of such tactics. *See* Dinstein, *Conduct of Hostilities* at 94-95, 199; Abraham D. Sofaer, *Terrorism, The Law, and the National Defense*, 126 Mil. L. Rev. 89, 120-21 (1989).[39] Relatedly, "there is no prohibition under the laws of war on the use of technologically advanced weapons systems in armed conflict—such as pilotless aircraft or so-called smart

[38] Although the United States is not a party to the First Protocol, the State Department has announced that "we support the principle that individual combatants not kill, injure, or capture enemy personnel by resort to perfidy." Remarks of Michael J, Matheson, Deputy Legal Adviser, Department of State, *The Sixth Annual American Red Cross-Washington College of Law Conference on International Humanitarian Law: A Workshop on Customary International Law and the 1977 Protocols Additional to the 1949 Geneva Conventions*, 2 Am. U. J. of Int'l L. & Pol'y 415, 425 (1987). (U)

[39] There is precedent for the United States targeting attacks against particular commanders. *See, e.g.*, Patricia Zengel, *Assassination and the Law of Armed Conflict*, 134 Mil. L. Rev. 123, 136-37 (1991) (describing American warplanes' shoot-down during World War II of plane carrying Japanese Admiral Isoroku Yamamoto); *see also* Parks, *Assassination*, Army Lawyer at 5.

bombs—as long as they are employed in conformity with applicable laws of war." Koh, *The Obama Administration and International Law*. DOD also informs us that if al-Aulaqi offers to surrender, DoD would accept such an offer.[40]

In light of all these circumstances, we believe DoD's contemplated operation against al-Aulaqi would comply with international law, including the laws of war applicable to this armed conflict, and would fall within Congress's authorization to use "necessary and appropriate force" against al-Qaida. In consequence, the operation should be understood to constitute the lawful conduct of war and thus to be encompassed by the public authority justification. Accordingly, the contemplated attack, if conducted by DoD in the manner described, would not result in an "unlawful" killing and thus would not violate section 1119(b).

B.

We next consider whether the CIA's contemplated operation against al-Aulaqi in Yemen would be covered by the public authority justification. We conclude that it would be; and thus that operation, too, would not result in an "unlawful" killing prohibited by section 1119. As with our analysis of the contemplated DoD operation, we rely on the sufficiency of the particular factual circumstances of the CIA operation as they have been represented to us, without determining that the presence of those specific circumstances would be necessary to the conclusion we reach.

[40] *See* Geneva Conventions Common Article 3(1) (prohibiting "violence to life and person, in particular murder of all kinds," with respect to persons "taking no active part in the hostilities" in a non-international armed conflict, "including members of armed forces who have laid down their arms"); *see also* Hague Convention IV, Annex, art. 23(c), 37 Stat. at 2301-02 ("it is especially forbidden . . . [t]o kill or wound an enemy who, having laid down his arms, or having no longer means of defence, has surrendered at discretion"); *id.* art. 23(d) (forbidding a declaration that no quarter will be given); 2 William Winthrop, *Military Law and Precedents* 788 (1920) ("The time has long passed when 'no quarter' was the rule on the battlefield, or when a prisoner could be put to death simply by virtue of his capture.").

We explain in Part VI why the Constitution would impose no bar to the CIA's contemplated operation under these circumstances, based on the facts as they have been represented to us. There thus remains the question whether that operation would violate any statutory restrictions, which in turn requires us to consider whether 18 U.S.C. § 1119 would apply to the contemplated CIA operation.[42] Based on the combination of circumstances that we understand would be present, we conclude that the public authority justification that section 1119 incorporates—and that would prevent the contemplated DoD operation from violating section 1119(b)—would also encompass the contemplated CIA

operation.[43]

[42] We address potential restrictions imposed by two other criminal laws—18 U.S.C. §§ 956(a) and 2441—in Parts IV and V of this opinion.

[43] We note, in addition, that the "lawful conduct of war" variant of the public authority justification, although often described with specific reference to operations conducted by the armed forces, is not necessarily limited to operations by such forces; some descriptions of that variant of the justification, for example, do not imply such a limitation. *See, e.g.*, *Frye*, 10 Cal. Rptr. 2d at 221 n.2 ("homicide done under a valid public authority, such as execution of a death sentence or killing an enemy in a time of war"); Perkins & Boyce, *Criminal Law* at 1093 ("the killing of an enemy as an act of war and within the rules of war").

Specifically, we understand that the CIA, like DoD, would carry out the attack against an operational leader of an enemy force, as part of the United States's ongoing non-international armed conflict with al-Qaida.

the CIA—

—would conduct the operation in a manner that accords with the rules of international humanitarian law governing this armed conflict, and in circumstances

*See supra* at 10-11.[44]

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If the killing by a member of the armed forces would comply with the law of war and otherwise be lawful, actions of CIA officials facilitating that killing should also not be unlawful. *See, e.g., Shoot Down Opinion* at 165 n. 33 ("[O]ne cannot be prosecuted for aiding and abetting the commission of an act that is not itself a crime.") (citing *Shuttlesworth v. City of Birmingham*, 373 U.S. 262 (1963)).

Nor would the fact that CIA personnel would be involved in the operation itself cause the operation to violate the laws of war. It is true that CIA personnel, by virtue of their not being part of the armed forces, would not enjoy the immunity from prosecution under the domestic law of the countries in which they act for their conduct in targeting and killing enemy forces in compliance with the laws of war—an immunity that the armed forces enjoy by virtue of their status. *See Report of the Special Rapporteur* ¶ 71, at 22; *see also* Dinstein, *Conduct of Hostilities*, at 31. Nevertheless, lethal activities conducted in accord with the laws of war, and undertaken in the course of lawfully authorized hostilities, do not violate *the laws of war* by virtue of the fact that they are carried out in part by government actors who are not entitled to the combatant's privilege. The contrary view "arises . . . from a fundamental confusion between acts punishable under international law and acts with respect to which international law affords no protection." Richard R. Baxter, *So-Called "Unprivileged Belligerency": Spies, Guerillas, and Saboteurs*, 28 Brit. Y.B. Int'l L. 323, 342 (1951) ("the law of nations has not ventured to require of states that they . . . refrain from the use of secret agents or that these activities upon the part of their military forces or civilian population be punished"). *Accord* Yoram Dinstein, *The Distinction Between Unlawful Combatants and War Criminals*, in *International Law at a Time of Perplexity: Essays in Honour of Shabtai Rosenne* 103-16 (Y. Dinstein ed., 1989);

Statements in the Supreme Court's decision in *Ex parte Quirin*, 317 U.S. 1 (1942), are sometimes cited for the contrary view. *See, e.g., id.* at 36 n.12 (suggesting that passing through enemy lines in order to commit "any hostile act" while not in uniform "renders the offender liable to trial for violation of the laws of war"); *id.* at 31 (enemies who come secretly through the lines for purposes of waging war by destruction of life or property "without uniform" not only are "generally not to be entitled to the status of prisoners of war," but also "to be offenders against the law of war subject to trial and punishment by military tribunals"). Because the Court in *Quirin* focused on conduct taken behind enemy lines, it is not clear whether the Court in these passages intended to refer only to conduct that would constitute perfidy or treachery. To the extent the Court meant to suggest more broadly that any hostile acts performed by unprivileged belligerents are *for that reason* violations of the laws of war, the authorities the Court cited (the Lieber Code and Colonel Winthrop's military law treatise) do not provide clear support. *See* John C. Dehn, *The* Hamdan *Case and the Application of a Municipal Offense*, 7 J. Int'l Crim. J. 63, 73-79 (2009); *see also* Baxter, *So-Called "Unprivileged Belligerency,"* 28 Brit. Y.B. Int'l L. at 339-40; Michael N. Schmitt, *Humanitarian Law and Direct Participation in Hostilities by Private Contractors or Civilian Employees*, 5 Chi. J. Int'l L. 511, 521 n.45 (2005); W. Hays Parks, *Special Forces' Wear of Non-Standard Uniforms*, 4 Chic. J. Int'l L. 493, 510-11 n.31 (2003). We note

Nothing in the text or legislative history of section 1119 indicates that Congress intended to criminalize such an operation. Section 1119 incorporates the traditional public authority justification, and did not impose any special limitation on the scope of that justification. As we have explained, *supra* at 17-19, the legislative history of that criminal prohibition revealed Congress's intent to close a jurisdictional loophole that would have hindered prosecutions of murders carried out by private persons abroad. It offers no indication that Congress intended to prohibit the targeting of an enemy leader during an armed conflict in a manner that would accord with the laws of war when performed by a duly authorized government agency. Nor does it indicate that Congress, in closing the identified loophole, meant to place a limitation on the CIA that would not apply to DoD.

Thus, we conclude that just as Congress did not intend section 1119 to bar the particular attack that DoD contemplates, neither did it intend to prohibit a virtually identical attack on the same target, in the same authorized conflict and in similar compliance with the laws of war, that the CIA would carry out in accord with

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in this regard that DoD's current Manual for Military Commissions does not endorse the view that the commission of an unprivileged belligerent act, without more, constitutes a violation of the international law of war. *See* Manual for Military Commissions, Part IV, § 5(13), Comment, at IV-11 (2010 ed., Apr. 27, 2010) (murder or infliction of serious bodily injury "committed while the accused did not meet the requirements of privileged belligerency" can be tried by a military commission "even if such conduct does not violate the international law of war").

[45] As one example, the Senate Report pointed to the Department of Justice's conclusion that the Neutrality Act, 18 U.S.C. § 960, prohibits conduct by private parties but is not applicable to the CIA and other government agencies. *Id.* The Senate Report assumed that the Department's conclusion about the Neutrality Act was premised on the assertion that in the case of government agencies, there is an "absence of the mens rea necessary to the offense." *Id.* In fact, however, this Office's conclusion about that Act was not based on questions of mens rea, but instead on a careful analysis demonstrating that Congress did not intend the Act, despite its words of general applicability, to apply to the activities of government officials acting within the course and scope of their duties as officers of the United States. *See Application of Neutrality Act to Official Government Activities*, 8 Op. O.L.C. 58 (1984).

*See also infra* at 38-41 (explaining that the CIA operation under the circumstances described to us would comply with constitutional due process and the Fourth Amendment's "reasonableness" test for the use of deadly force).

Accordingly, we conclude that, just as the combination of circumstances present here supports the judgment that the public authority justification would apply to the contemplated operation by the armed forces, the combination of circumstances also supports the judgment that the CIA's operation, too, would be encompassed by that justification. The CIA's contemplated operation, therefore, would not result in an "unlawful" killing under section 1111 and thus would not violate section 1119.

IV.

For similar reasons, we conclude that the contemplated DoD and CIA operations would not violate another federal criminal statute dealing with "murder" abroad, 18 U.S.C. § 956(a). That law makes it a crime to conspire within the jurisdiction of the United States "to commit at any place outside the United States an act that would constitute the offense of murder, kidnapping, or maiming if committed in the special maritime and territorial jurisdiction of the United States" if any conspirator acts within the United States to effect any object of the conspiracy.

[46] *Cf. also VISA Fraud Investigation*, 8 Op. O.L.C. at 287 (applying similar analysis in evaluating the effect of criminal prohibitions on certain otherwise authorized law enforcement operations, and explaining that courts have recognized it may be lawful for law enforcement agents to disregard otherwise applicable laws "when taking action that is necessary to attain the permissible law enforcement objective, when the action is carried out in a reasonable fashion"); *id.* at 288 (concluding that issuance of an otherwise unlawful visa that was necessary for undercover operation to proceed, and done in circumstances—"for a limited purpose and under close supervision"—that were "reasonable," did not violate federal statute).

Like section 1119(b), section 956(a) incorporates by reference the understanding of "murder" in section 1111 of title 18. For reasons we explained earlier in this opinion, *see supra* at 12-14, section 956(a) thus incorporates the traditional public authority justification that section 1111 recognizes. As we have further explained both the CIA and DoD operations, on the facts as they have been represented to us, would be covered by that justification. Nor do we believe that Congress's reference in section 956(a) to "the special maritime and territorial jurisdiction of the United States" reflects an intent to transform such a killing into a "murder" in these circumstances—notwithstanding that our analysis of the applicability of the public authority justification is limited for present purposes to operations conducted abroad. A contrary conclusion would require attributing to Congress the surprising intention of criminalizing through section 956(a) an otherwise lawful killing of an enemy leader that another statute specifically prohibiting the murder of U.S. nationals abroad does not prohibit.

The legislative history of section 956(a) further confirms our conclusion that that statute should not be so construed. When the provision was first introduced in the Senate in 1995, its sponsors addressed and rejected the notion that the conspiracy prohibited by that section would apply to "duly authorized" actions undertaken on behalf of the federal government. Senator Biden introduced the provision at the behest of the President, as part of a larger package of anti-terrorism legislation. *See* 141 Cong. Rec. 4491 (1995) (statement of Sen. Biden). He explained that the provision was designed to "fill[] a void in the law," because section 956 at the time prohibited only U.S.-based conspiracies to commit certain property crimes abroad, and did not address crimes against persons. *Id.* at 4506. The amendment was designed to cover an offense "committed by terrorists" and was "intended to ensure that the government is able to punish those persons who use the United States as a base in which to plot such a crime to be carried out outside the jurisdiction of the United States." *Id.* Notably, the sponsors of the new legislation deliberately declined to place the new offense either within chapter 19 of title 18, which is devoted to "Conspiracy," or within chapter 51, which collects "Homicide" offenses (including those established in sections 1111, 1112, 1113 and 1119). Instead, as Senator Biden explained, "[s]ection 956 is contained in chapter 45 of title 18, United States Code, relating to interference with the foreign relations of the United States," and thus was intended to "cover[] those individuals who, without appropriate governmental authorization, engage in prohibited conduct that is harmful to the foreign relations of the United States." *Id.* at 4507. Because, as Senator Biden explained, the provision was designed, like other provisions of chapter 45, to prevent private interference with U.S. foreign relations, "[i]t is not intended to apply to duly authorized actions undertaken on behalf of the United States Government." *Id.*; *see also* 8 Op. O.L.C. 58 (1984) (concluding that section 5 of the Neutrality Act, 18 U.S.C. § 960, which is also in chapter 45 and which forbids the planning of, or participation in, military or naval expeditions to be carried on from the United States against a foreign state with which the United States is at peace, prohibits only persons acting in their private capacity from engaging in such conduct, and does not proscribe activities undertaken by government officials acting within the course and scope of their duties as United States officers). Senator Daschle expressed this same understanding when he introduced the identical provision in a different version of the anti-terrorism legislation a few months later. *See* 141 Cong. Rec. 11,960 (1995) (statement of Sen. Daschle). Congress enacted the new section 956(a) the following year, as part of the Antiterrorism and Effective Death Penalty Act, Pub. L. No. 104-132, tit. VII, § 704(a), 110 Stat. 1214, 1294-95 (1996). As far as

we have been able to determine, the legislative history contains nothing to contradict the construction of section 956(a) described by Senators Biden and Daschle.

Accordingly, we do not believe section 956(a) would prohibit the contemplated operations.

V.

We next consider the potential application of the War Crimes Act, 18 U.S.C. § 2441, which makes it a federal crime for a member of the Armed Forces or a national of the United States to "commit[] a war crime." *Id.* § 2441(a). Subsection 2441(c) defines a "war crime" for purposes of the statute to mean any conduct (i) that is defined as a grave breach in any of the Geneva Conventions (or any Geneva protocol to which the U.S. is a party); (ii) that is prohibited by four specified articles of the Fourth Hague Convention of 1907; (iii) that is a "grave breach" of Common Article 3 of the Geneva Conventions (as defined elsewhere in section 2441) when committed "in the context of and in association with an armed conflict not of an international character"; or (iv) that is a willful killing or infliction of serious injury in violation of the 1996 Protocol on Prohibitions or Restrictions on the Use of Mines, Booby-Traps and Other Devices. Of these, the only subsection potentially applicable here is that dealing with Common Article 3 of the Geneva Conventions.[47]

In defining what conduct constitutes a "grave breach" of Common Article 3 for purposes of the War Crimes Act, subsection 2441(d) includes "murder," described in pertinent part as "[t]he act of a person who intentionally kills, or conspires or attempts to kill . . . one or more persons taking no active part in the hostilities, including those placed out of combat by sickness, wounds, detention, or any other cause." 18 U.S.C. § 2441(d)(1)(D). This language derives from Common Article 3(1) itself, which prohibits certain acts (including murder) against "[p]ersons taking no active part in the 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." *See, e.g.*, Geneva Convention Relative to the Treatment of Prisoners of War, Aug. 12, 1949, [1955], art. 3(1), 6 U.S.T. 3316, 3318-20. Although Common Article 3 is most commonly applied with respect to persons within a belligerent party's control, such as detainees, the language of the article is not so limited—it protects all "[p]ersons taking no active part in the hostilities" in an armed conflict not of an international character.

Whatever might be the outer bounds of this category of covered persons, we do not think it could encompass al-Aulaqi. Common Article 3 does not alter the fundamental law-of-war principle concerning a belligerent party's right in an armed conflict to target individuals who are part of an enemy's armed forces. *See supra* at 23. The language of Common Article 3 "makes clear that members of such armed forces [of both the state and non-state parties to the conflict] . . . are considered as 'taking no active part in the hostilities' only once they have disengaged

[47] The operations in question here would not involve conduct covered by the Land Mine Protocol. And the articles of the Geneva Conventions to which the United States is currently a party *other than* Common Article 3, as well as the relevant provisions of the Annex to the Fourth Hague Convention, apply by their terms only to armed conflicts between two or more of the parties to the Conventions. *See, e.g.*, Geneva Convention Relative to the Treatment of Prisoners of War, Aug. 12, 1949, [1955], art. 2, 6 U.S.T. 3316, 3406.

from their fighting function ('have laid down their arms') or are placed *hors de combat*; mere suspension of combat is insufficient." International Committee of the Red Cross, *Interpretive Guidance on the Notion of Direct Participation in Hostilities Under International Humanitarian Law* 28 (2009); *cf. also id.* at 34 ("individuals whose continuous function involves the preparation, execution, or command of acts or operations amounting to direct participation in hostilities are assuming a continuous combat function," in which case they can be deemed to be members of a non-state armed group subject to continuous targeting); *accord Gherebi v. Obama*, 609 F. Supp. 2d 43, 65 (D.D.C. 2009) ("the fact that 'members of armed forces who have laid down their arms and those placed *hors de combat*' are not 'taking [an] active part in the hostilities' necessarily implies that 'members of armed forces' who have not surrendered or been incapacitated are 'taking [an] active part in the hostilities' simply by virtue of their membership in those armed forces"); *id.* at 67 ("Common Article 3 is not a suicide pact; it does not provide a free pass for the members of an enemy's armed forces to go to or fro as they please so long as, for example, shots are not fired, bombs are not exploded, and places are not hijacked"). Al-Aulaqi, an active, high-level leader of an enemy force who is continually involved in planning and recruiting for terrorist attacks, can on that basis fairly be said to be taking "an active part in hostilities." Accordingly, targeting him in the circumstances posited to us would not violate Common Article 3 and therefore would not violate the War Crimes Act.

## VI.

We conclude with a discussion of potential constitutional limitations on the contemplated operations due to al-Aulaqi's status as a U.S. citizen, elaborating upon the reasoning in our earlier memorandum discussing that issue. Although we have explained above why we believe that neither the DoD or CIA operation would violate sections 1119(b), 956(a) and 2441 of title 18 of the U.S. Code, the fact that al-Aulaqi is a United States citizen could raise distinct questions under the Constitution. As we explained in our earlier memorandum, Barron Memorandum at 5-7, we do not believe that al-Aulaqi's U.S. citizenship imposes constitutional limitations that would preclude the contemplated lethal action under the facts represented to us by DoD, the CIA and the Intelligence Community.

Because al-Aulaqi is a U.S. citizen, the Fifth Amendment's Due Process Clause, as well as the Fourth Amendment, likely protects him in some respects even while he is abroad. *See Reid v. Covert*, 354 U.S. 1, 5-6 (1957) (plurality opinion); *United States v. Verdugo-Urquidez*, 494 U.S. 259, 269-70 (1990); *see also In re Terrorist Bombings of U.S. Embassies in East Africa*, 552 F.3d 157, 170 n.7 (2d Cir. 2008).

In *Hamdi*, a plurality of the Supreme Court used the *Mathews v. Eldridge* balancing test to analyze the Fifth Amendment due process rights of a U.S. citizen captured on the battlefield in Afghanistan and detained in the United States who wished to challenge the government's assertion that he was a part of enemy forces, explaining that "the process due in any given instance is determined by weighing 'the private interest that will be affected by the official action' against the Government's asserted interest, 'including the function involved' and the burdens the Government would face in providing greater process." 542 U.S. at 529 (plurality opinion) (quoting *Mathews v. Eldridge*, 424 U.S. 319, 335 (1976)).

We believe similar reasoning supports the constitutionality of the contemplated operations here. As explained above, on the facts represented to us, a decision-maker could reasonably decide that the threat posed by al-Aulaqi's activities to United States persons is "continued" and "imminent"

In addition to the nature of the threat posed by al-Aulaqi's activities, both agencies here have represented that they intend to capture rather than target al-Aulaqi if feasible; yet we also understand that an operation by either agency to capture al-Aulaqi in Yemen would be infeasible at this time.

*Cf., e.g., Public Committee Against Torture in Israel v. Government of Israel*, HCJ 769/02 ¶ 40, 46 I.L.M. 375, 394 (Israel Supreme Court sitting as the High Court of Justice, 2006) (although arrest, investigation and trial "might actually be particularly practical under the conditions of belligerent occupation, in which the army controls the area in which the operation takes place," such alternatives "are not means which can always be used," either because they are impossible or because they involve a great risk to the lives of soldiers).

Although in the "circumstances of war," as the *Hamdi* plurality observed, "the risk of erroneous deprivation of a citizen's liberty in the absence of sufficient process . . . is very real," 542 U.S. at 530, the plurality also recognized that "the realities of combat" render certain uses of force "necessary and appropriate," including against U.S. citizens who have become part of enemy forces—and that "due process analysis need not blink at those realities," *id.* at 531. we conclude that at least where, as here, the target's activities pose a "continued and imminent threat of violence or death" to U.S. persons, "the highest officers in the Intelligence Community have reviewed the factual basis" for the lethal operation, and a capture operation would be infeasible—and where the CIA and DoD "continue to monitor whether changed circumstances would permit such an alternative," *see also DoD May 18 Memorandum for OLC* at 2—the "realities of combat" and the weight of the government's interest in using an authorized means of lethal force against this enemy are such that the Constitution would not require the government to provide further process to the U.S. person before using such force. *Cf. Hamdi* 542 U.S. at 535 (noting that Court "accord[s] the greatest respect and consideration to the judgments of military

authorities in matters relating to the actual prosecution of war, and . . . the scope of that discretion necessarily is wide") (plurality opinion).

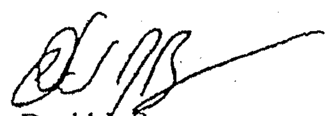
Similarly, assuming that the Fourth Amendment provides some protection to a U.S. person abroad who is part of al-Qaida and that the operations at issue here would result in a "seizure" within the meaning of that Amendment,

The 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." *Tennessee v. Garner*, 471 U.S. 1, 8 (1985) (internal quotation marks omitted); *accord Scott v. Harris*, 550 U.S. 372, 383 (2007). 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." *Garner*, 471 U.S. at 11. 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." *Id.* at 11-12.

The Fourth Amendment "reasonableness" test is situation-dependent. *Cf. Scott*, 550 U.S. at 382 (*Garner* "did not establish a magical on/off switch that triggers rigid preconditions whenever an officer's actions constitute 'deadly force'"). What would constitute a reasonable use of lethal force for purposes of domestic law enforcement operations will be very different from what would be reasonable in a situation like such as that at issue here. In the present circumstances, as we understand the facts, the U.S. citizen in question has gone overseas and become part of the forces of an enemy with which the United States is engaged in an armed conflict; that person is engaged in continual planning and direction of attacks upon U.S. persons from one of the enemy's overseas bases of operations; the U.S. government does not know precisely when such attacks will occur; and a capture operation would be infeasible.

. at least where high-level government officials have determined that a capture operation overseas is infeasible and that the targeted person is part of a dangerous enemy force and is engaged in activities that pose a continued and imminent threat to U.S. persons or interests the use of lethal force would not violate the Fourth Amendment. and thus that the intrusion on any Fourth Amendment interests would be outweighed by "the importance of the governmental interests [that] justify the intrusion," *Garner*, 471 U.S. at 8, based on the facts that have been represented to us.

Please let us know if we can be of further assistance.



David J. Barron
Acting Assistant Attorney General

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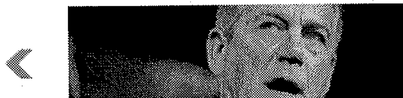
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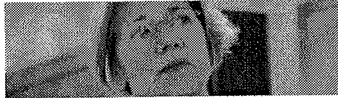
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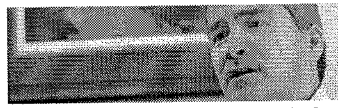
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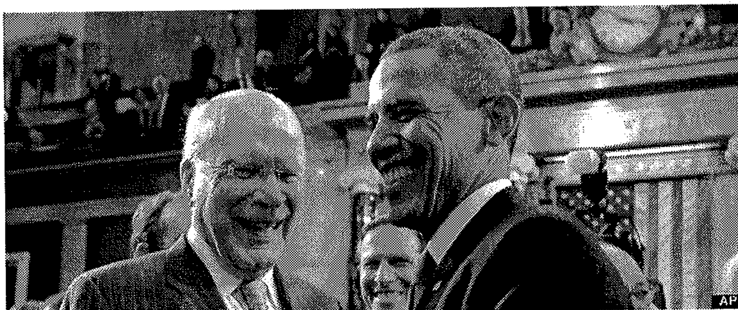
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WASHINGTON -- Sen. Dianne Feinstein's office revealed Wednesday that the Obama administration has yet to show members of the Senate Select Committee on Intelligence seven additional opinions laying out the legal basis for targeted killing.

Disclosure of the existence of the additional seven opinions from the Justice Department's Office of Legal Counsel came the day after President Barack Obama pledged greater transparency during his State of the Union address.

Feinstein (D-Calif.) said there were a total of 11 OLC opinions related to targeted killing. Senators had already seen two of them and an additional two were made available to senators -- but not their staffers -- last week, leaving seven that haven't yet been disclosed.

Feinstein said the committee "has devoted significant time and attention to targeted killings by drones" and receives "notifications with key details of each strike shortly after it occurs, and the committee holds regular briefings and hearings on these operations—reviewing the strikes, examining their effectiveness as a counterterrorism tool, verifying the care taken to avoid deaths to non-combatants and understanding the intelligence collection and analysis that underpins these operations."

She also said the committee staff has held 35 "monthly, in-depth oversight meetings"

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with government officials in which strike records, including video footage of the drone attacks, are reviewed.

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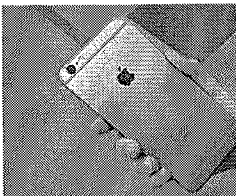

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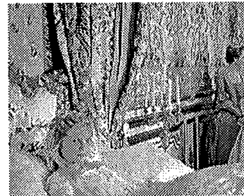

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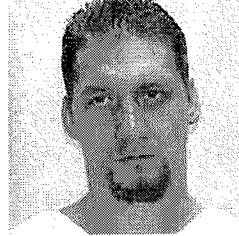

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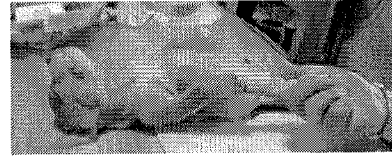

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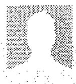

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**rone_ttacks** ★ 11
36 Fans

This article has been up all day, 900 comments. Replace, "Obama," with, "Bush" and there would be 15,000 comments
13 FEB 2013 8:31 PM
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**Thomas_Paine2323** ★ 8
41 Fans · I guard the guardians

Yeah. Well, you know I guess so much time has passed since Bush everyones just become so desensitized about war and violence...No one really cares, war is just an inevitable consequence. The only way to spread freedom and liberty is through force, right?

And I mean rights and the rule of law aren't real and tangible things. The only important thing is how people feel. And Obama makes them feel safe and secure like he's reading them a nice bedtime story.
13 FEB 2013 8:37 PM
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**ReadThomasSowell** ★ 11
1,186 Fans · Liberals STILL support the Davis/Bacon Act

Rubio saying a government can't control the weather (how in the f.uq is that controversial?) is a more important story than this one, huh HP?

And the lack of comments on this story speak VOLUMES about how much Liberals actually care about the erosion of liberty. Friggin sickening.
13 FEB 2013 8:40 PM
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**myconoclast** ★ 10
120 Fans

I don't think I'd want the government to control the weather. They probably screw it up like everything else.
13 FEB 2013 8:49 PM

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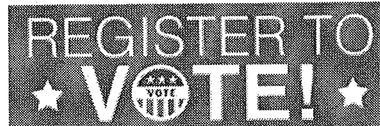


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**threewarveteran**
988 Fans ♥ If you don't like what I say then I made MY POINT

Support the President or get out of our country. Simple. There is a reason YOU are not the President.
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**oldstudent10** ★ 7
194 Fans ♥

aaahhhh... the voice of the unintelligent, useful i-di-ot that demands allehiance no matter what.
13 FEB 2013 2:44 PM
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**djfpga** ★ 12
50 Fans ♥ Puzzled? Just ask, "What would Newt do?"

Quite honestly, the fact that we are debating the extrajudicial killing of Americans is sickening. Something awful has happened to this country in the last 10 years.
13 FEB 2013 3:14 PM
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**bill555** ★ 2
253 Fans ♥

Everyday ordinary policemen make extrajudicial decisions that can and do result in the death of Americans. Circumstances matter.
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**Maddy-O** ★ 19
405 Fans ♥

Who cares, you guys???? Haven't you heard? Marco Rubio took a sip of water!!!!

[sarc]
13 FEB 2013 2:55 PM
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**Gary_Bryan_Selmes** ★ 1
SUPER USER 75 Fans ♥ someone has to stand up for common sense

That was his favorite flavor of Kool-aid; Plain Crackpot.
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**sammy3110** ★ 17
323 Fans · Humpty Dumpty was pushed

Shouldn't the people on Obama's "kill list" (and those happening nearby) have a vote? There weren't any Pakistani widows and orphans at last night's speech though, funny thing.
13 FEB 2013 2:46 PM

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**Scott Winters** (Scott_Winters) ★ 1
SUPER USER · 620 Fans · Party Cheerleaders should be tried for Obstruction

Bravo...Or folks from Yamen or the six countries we have been striking in the region.
13 FEB 2013 3:05 PM

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**The_j0ker** ★ 16
146 Fans · I never told a joke in my life

Well of course they are still undisclosed...he needs time to set up the fake ones to hide just how bad this situation is.

Of course the sheep here still think he can do no wrong.
13 FEB 2013 2:52 PM

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**sixyfivepercentwater**
521 Fans

I've never met anyone who thinks he can do no wrong.
13 FEB 2013 2:56 PM

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**Right_Girl** ★ 15
1,284 Fans · The harder I work, the luckier I get

The President isn't showing us everything? That can't be right .... isn't he the "transparent" President? The most amusing thing about Obama is that he's Mr. Opposite. Whatever he says, you can bank on the fact that what he means is the opposite.
13 FEB 2013 3:03 PM

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**independentM** ★ 2
SUPER USER · 233 Fans · waiting for Madam President

He doesn't need to show us everything! For what, what purpose would that serve? What can you do about the drone program, NOTHING that's what. The only thing that will happen is more rhetoric, false accusations, and more ly&&g by fake news. The majority of people who are whining about transparency have never spent a minute in the military and would scatter like roaches if a draft were ever implemented. Let the military and leadership do their job and keep us safe. So far, so good, let's keep it that way and focus on things you can do something about.
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Can definitely understand why Rubio's gulping water and silliness is the screaming top of the fold story while the Messiah's hiding of more drone information is less newsworthy.
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as long as he doesnt put it on top of the car the left has no problem
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Part of HPMG News

# Exhibit 6

## To the Declaration of Colin Wicker

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WORLD NEWS

# U.S. Seeks Cleric Backing Jihad

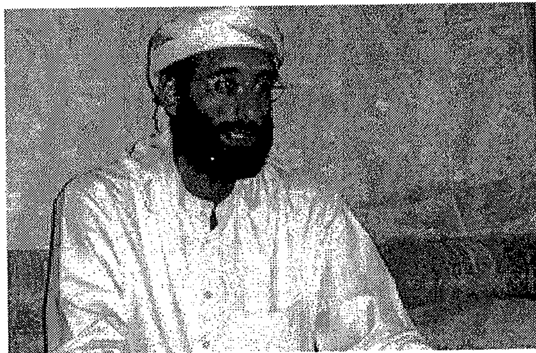
*Preacher Radicalized Activists With Writings, Officials Say*

By KEITH JOHNSON

Updated March 26, 2010 12:01 a.m. ET

WASHINGTON—One of the U.S.'s prime terrorism suspects doesn't carry a rifle or explosives. But U.S.-born cleric Anwar al Awlaki's prominence as an apologist for jihad—especially in the English-speaking world—has put him squarely in the cross hairs of the antiterror effort.

Mr. Awlaki, born in New Mexico in 1971 to Yemeni parents and believed to be hiding in Yemen, is the most prominent of a handful of native-English-speaking preachers, whose calls for jihad, or holy war, are helping radicalize a new generation through the Internet, counterterrorism investigators say.



U.S.-born cleric Anwar al Awlaki exchanged emails with the shooter behind last year's fatal rampage at Fort Hood in Killeen, Texas. *Associated Press*

He exchanged dozens of emails with Fort Hood shooter Maj. Nidal Hasan in the months before the November killing spree at a U.S. Army base. He calls Umar Farouk Abdulmutallab, the underwear bomber who allegedly tried to blow up a Detroit-bound airliner on Christmas Day, "my student." His writings helped to radicalize several Canadians, at least one of whom went to fight for al Qaeda in Somalia.

"He's clearly someone that we're looking for," said Leon Panetta, director of the Central Intelligence Agency, in an interview last week. "There isn't any question that he's one of the individuals that we're focusing on."

Mr. Panetta cited Mr. Awlaki's role in inspiring past attacks as well as his efforts to "inspire additional attacks on the United States."

In a statement disseminated widely on pro-Jihadi Web sites last week, Mr. Awlaki ratcheted up his calls for jihad against the West, especially the U.S., and said that thanks in part to the spread of his ideas, "Jihad is becoming as American as apple pie and as British as afternoon tea."

Mr. Awlaki's importance as an instigator of jihad has increased at the same time that al Qaeda has become more decentralized. Recent terrorist acts against the U.S. have been attempted or carried out by individuals with little or no formal connection to al Qaeda's core, some of whom may have become radicalized by reading English-language versions of violent treatises, such as Mr. Awlaki's "Constants

on the Path of Jihad."

U.S. officials aren't making that distinction. "He's considered al Qaeda," a senior intelligence official said, adding that the U.S. government doesn't let terrorist suspects "self-define."

Shortly after the Sept. 11, 2001, attacks on the U.S., a presidential covert action finding signed by George W. Bush authorized the capturing or killing of al Qaeda operatives, including Americans. At the time, Congress authorized the president to use all necessary force against groups or persons linked to the 9/11 strikes.

Lt. Col. Charles Keller and his family at a vigil for victims of the attack. *Getty Images*

An order to kill an American, however, "has to meet legal thresholds," the official said. He declined to be more specific.

Mr. Awlaki burst into the spotlight after the Fort Hood shootings, when it emerged that he had counseled Maj. Hasan by email about the immorality of a Muslim serving in the U.S. Army.

But Mr. Awlaki's links to radical Islam go further back, according to the 9/11 Commission Report. In the late 1990s, while living in California, he was investigated by the Federal Bureau of Investigation for ties to the Palestinian group Hamas. After 9/11, he was questioned by the FBI about his relationship with two of the hijackers, whom he met while serving as imam at a mosque in northern Virginia.

Mr. Awlaki fled the U.S. for Europe, and eventually settled in Yemen, where he was detained by authorities in 2006 and questioned by the FBI. He was later released.

"The combination of perfect English, having the proper religious credentials, and being a jihadi theorist makes him a very significant figure, both in terms of radicalizing people and perhaps even in an operational context," said Daveed Gartenstein-Ross, director of the Center for Terrorism Research at the Foundation for the Defense of Democracies in Washington.

In late December, Yemeni forces bombed a rural hideout where Mr. Awlaki and other terrorism targets were believed to be hiding. Mr. Awlaki was initially thought killed, but he promptly resurfaced on the Internet, through recorded statements and interviews with Arab media.

—Siobhan Gorman
contributed to this article.

**Write to** Keith Johnson at keith.johnson@wsj.com

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# Exhibit 7

## To the Declaration of Colin Wicker

# 'This Week' Transcript: Panetta

**Jake Tapper Interviews CIA Director Leon Panetta**

**June 27, 2010 —**

ABC News "This Week" Jake Tapper interviews CIA Director Leon Panetta Sunday, June 27, 2010

TAPPER: Good morning and welcome to "This Week."

This morning of this week, exclusive. CIA Director Leon Panetta. His first network news interview.

Top questions on the threats facing the U.S., and whether the CIA is up to the task.

(BEGIN VIDEO CLIP)

PANETTA: And what keeps me awake at night--

(END VIDEO CLIP)

TAPPER: The latest on Al Qaida, the hunt for Osama bin Laden, Iran, North Korea, global hotspots in an increasingly dangerous world, and the threat of homegrown terrorists.

(BEGIN VIDEO CLIP)

PANETTA: We are being aggressive at going after this threat.

(END VIDEO CLIP)

TAPPER: CIA Director Leon Panetta only on "This Week."

Then, the McChrystal mess.

(BEGIN VIDEO CLIP)

PRESIDENT BARACK OBAMA: I welcome debate among my team, but I won't tolerate division.

(END VIDEO CLIP)

TAPPER: The change in command in Afghanistan raises new questions about the president's strategy to win the war. That and the rest of the week's politics on our roundtable with George Will, author Robin Wright of the U.S. Institute of Peace, David Sanger of the New York Times, and the Washington Post's Rajiv Chandrasekaran.

And as always, the Sunday Funnies.

(BEGIN VIDEO CLIP)

DAVID LETTERMAN, TALK SHOW HOST: It took President Obama 45 minutes to make a decision to pick a new Afghanistan commander, 45 minutes. It took him six months to pick a dog for the White House.

(END VIDEO CLIP)

TAPPER: Good morning. When the president takes a look at the world, he's confronted with threats literally all over the map. In Afghanistan, U.S. and international forces struggle to make headway against the Taliban. Iran moves ahead with a nuclear program in defiance of international condemnation. North Korea becomes even more unpredictable as it prepares for a new supreme leader. New terror threats from Pakistan, Yemen, Somalia. No one knows these threats better than the president's director of the Central Intelligence Agency, Leon Panetta. He's been in the job for 16 months, and he's here with me this morning, his first network news interview. Mr. Panetta, welcome.

PANETTA: Nice to be with you, Jake.

TAPPER: Now, this was a momentous week, with President Obama relieving General McChrystal of his command. When this was all going down, you were with General Petraeus at a joint CIA-CENTCOM conference. And I want to ask you about the war in Afghanistan, because this has been the deadliest month for NATO forces in Afghanistan, the second deadliest for U.S. troops, with 52 at least killed this month. Are we winning in Afghanistan, and is the Taliban stronger or weaker than when you started on the job?

PANETTA: I think the president said it best of all, that this is a very tough fight that we are engaged in. There are some serious problems here. We're dealing with a tribal society. We're dealing with a country that has problems with governance, problems with corruption, problems with narcotics trafficking, problems with a Taliban insurgency. And yet, the fundamental purpose, the mission that the president has laid out is that we have to go after Al Qaida. We've got to disrupt and dismantle Al Qaida and their militant allies so they never attack this country again.

Are we making progress? We are making progress. It's harder, it's slower than I think anyone anticipated. But at the same time, we are seeing increasing violence, particularly in Kandahar and in Helmand provinces. Is the strategy the right strategy? We think so, because we're looking at about 100,000 troops being added by the end of August. If you add 50,000 from NATO, you've got 150,000. That's a pretty significant force, combined with the Afghans.

But I think the fundamental key, the key to success or failure is whether the Afghans accept responsibility, are able to deploy an effective army and police force to maintain stability. If they can do that, then I think we're going to be able to achieve the kind of progress and the kind of stability that the president is after.

TAPPER: Have you seen any evidence that they're able to do that?

PANETTA: I think so. I think that what we're seeing even in a place like Marjah, where there's been a lot of attention -- the fact is that if you look at Marjah on the ground, agriculture, commerce is, you know, moving back to some degree of normality. The violence is down from a year ago. There is some progress there.

We're seeing some progress in the fact that there's less deterioration as far as the ability of the Taliban to maintain control. So we're seeing elements of progress, but this is going to be tough. This is not going to be easy, and it is going to demand not only the United States military trying to take on, you know, a difficult Taliban insurgency, but it is going to take the Afghan army and police to be able to accept the

responsibility that we pass on to them. That's going to be the key.

TAPPER: It seems as though the Taliban is stronger now than when President Obama took office. Is that fair to say?

PANETTA: I think the Taliban obviously is engaged in greater violence right now. They're doing more on IED's. They're going after our troops. There's no question about that. In some ways, they are stronger, but in some ways, they are weaker as well.

I think the fact that we are disrupting Al Qaida's operations in the tribal areas of the Pakistan, I think the fact that we are targeting Taliban leadership -- you saw what happened yesterday with one of the leaders who was dressed as a woman being taken down -- we are engaged in operations with the military that is going after Taliban leadership. I think all of that has weakened them at the same time.

So in some areas, you know, with regards to some of the directed violence, they seem to be stronger, but the fact is, we are undermining their leadership, and that I think is moving in the right direction.

TAPPER: How many Al Qaida do you think are in Afghanistan?

PANETTA: I think the estimate on the number of Al Qaida is actually relatively small. I think at most, we're looking at maybe 50 to 100, maybe less. It's in that vicinity. There's no question that the main location of Al Qaida is in tribal areas of Pakistan.

TAPPER: Largely lost in the trash talking in the Rolling Stone magazine were some concerns about the war. The chief of operations for General McChrystal told the magazine that the end game in Afghanistan is, quote, "not going to look like a win, smell like a win or taste like a win. This is going to end in an argument."

What does winning in Afghanistan look like?

PANETTA: Winning in Afghanistan is having a country that is stable enough to ensure that there is no safe haven for Al Qaida or for a militant Taliban that welcomes Al Qaida. That's really the measure of success for the United States. Our purpose, our whole mission there is to make sure that Al Qaida never finds another safe haven from which to attack this country. That's the fundamental goal of why the United States is there. And the measure of success for us is do you have an Afghanistan that is stable enough to make sure that never happens.

TAPPER: What's the latest thinking on where Osama bin Laden is, what kind of health he's in and how much control or contact he has with Al Qaida?

PANETTA: He is, as is obvious, in very deep hiding. He's in an area of the -- the tribal areas in Pakistan that is very difficult. The terrain is probably the most difficult in the world.

TAPPER: Can you be more specific? Is it in Waziristan or--

PANETTA: All i can tell you is that it's in the tribal areas. That's all we know, that he's located in that vicinity. The terrain is very difficult. He obviously has tremendous security around him.

But having said that, the more we continue to disrupt Al Qaida's operations, and we are engaged in the most aggressive operations in the history of the CIA in that part of the world, and the result is that we are disrupting their leadership. We've taken down more than half of their Taliban leadership, of their Al Qaida leadership. We just took down number three in their leadership a few weeks ago. We continue to

disrupt them. We continue to impact on their command-and-control. We continue to impact on their ability to plan attacks in this country. If we keep that pressure on, we think ultimately we can flush out bin Laden and Zawahiri and get after them.

TAPPER: When was the last time we had good intelligence on bin Laden's location?

PANETTA: It's been a while. I think it almost goes back, you know, to the early 2000s, that, you know, in terms of actually when he was moving from Afghanistan to Pakistan, that we had the last precise information about where he might be located. Since then, it's been very difficult to get any intelligence on his exact location.

TAPPER: We're in a new phase now of the war, in which the threat can come from within, the so-called homegrown terrorists or the lone wolf terrorists. I'm talking about Faisal Shahzad, the would-be Times Square bomber; Umar Farouk Abdulmutallab, the failed Christmas Day bomber; Lieutenant (sic) Nidal Hasan, the Fort Hood shooter. What do these incidents and the apparent increased occurrences of these types of attacks say about the nature of the threat we face?

PANETTA: I think what's happened is that the more we put pressure on the Al Qaida leadership in the tribal areas in Pakistan -- and I would say that as a result of our operations, that the Taliban leadership is probably at its weakest point since 9/11 and their escape from Afghanistan into Pakistan. Having said that, they clearly are continuing to plan, continuing to try to attack this country, and they are using other ways to do it.

TAPPER: Al Qaida you're talking about.

PANETTA: That's correct. They are continuing to do that, and they're using other ways to do it, which are in some ways more difficult to try to track. One is the individual who has no record of terrorism. That was true for the Detroit bomber in some ways. It was true for others.

They're using somebody who doesn't have a record in terrorism, it's tougher to track them. If they're using people who are already here, who are in hiding and suddenly decide to come out and do an attack, that's another potential threat that they're engaged in. The third is the individual who decides to self-radicalize. Hasan did that in the Fort Hood shootings. Those are the kinds of threats that we see and we're getting intelligence that shows that's the kind of stream of threats that we face, much more difficult to track. At the same time, I think we're doing a good job of moving against those threats. We've stopped some attacks, we continue to work the intelligence in all of these areas. But that area, those kinds of threats represent I think the most serious threat to the United States right now.

TAPPER: All three of those individuals were tied in some way to an American cleric who is now supposedly in Yemen, Anwar al-Awlaki. He has said to be on an assassination list by President Obama. Is that true and does being an American afford him any protection that any other terrorist might not enjoy?

PANETTA: Awlaki is a terrorist who has declared war on the United States. Everything he's doing now is to try to encourage others to attack this country, there's a whole stream of intelligence that goes back to Awlaki and his continuous urging of others to attack this country in some way. You can track Awlaki to the Detroit bomber. We can track him to other attacks in this country that have been urged by Awlaki or that have been influenced by Awlaki. Awlaki is a terrorist and yes, he's a U.S. citizen, but he is first and foremost a terrorist and we're going to treat him like a terrorist. We don't have an assassination list, but I can tell you this. We have a terrorist list and he's on it.

TAPPER: "The New York Times" reported this week that Pakistani officials say they can deliver the

network of Sirajuddin Haqqani, an ally of Al Qaida, who runs a major part of the insurgency into Afghanistan into a power sharing arrangement. In addition, Afghan officials say the Pakistanis are pushing various other proxies with Pakistani General Kayani personally offering to broker a deal with the Taliban leadership. Do you believe Pakistan will be able to push the Haqqani network into peace negotiations?

PANETTA: You know, I read all the same stories, we get intelligence along those lines, but the bottom line is that we really have not seen any firm intelligence that there's a real interest among the Taliban, the militant allies of Al Qaida, Al Qaida itself, the Haqqanis, TTP, other militant groups. We have seen no evidence that they are truly interested in reconciliation, where they would surrender their arms, where they would denounce Al Qaida, where they would really try to become part of that society. We've seen no evidence of that and very frankly, my view is that with regards to reconciliation, unless they're convinced that the United States is going to win and that they're going to be defeated, I think it's very difficult to proceed with a reconciliation that's going to be meaningful.

TAPPER: I know you can't discuss certain classified operations or even acknowledge them, but even since you've been here today, we've heard about another drone strike in Pakistan and there's been much criticism of the predator drone program, of the CIA. The United Nations official Phil Alston earlier this month said quote, "In a situation in which there is no disclosure of who has been killed for what reason and whether innocent civilians have died, the legal principle of international accountability is by definition comprehensibly violated." Will you give us your personal assurance that everything the CIA is doing in Pakistan is compliant with U.S. and international law?

PANETTA: There is no question that we are abiding by international law and the law of war. Look, the United States of America on 9/11 was attacked by Al Qaida. They killed 3,000 innocent men and women in this country. We have a duty, we have a responsibility, to defend this country so that Al Qaida never conducts that kind of attack again. Does that make some of the Al Qaida and their supporters uncomfortable? Does it make them angry? Yes, it probably does. But that means that we're doing our job. We have a responsibility to defend this country and that's what we're doing. And anyone who suggests that somehow we're employing other tactics here that somehow violate international law are dead wrong. What we're doing is defending this country. That's what our operations are all about.

TAPPER: I'd like to move on to Iran, just because that consumes a lot of your time as director of the CIA. Do you think these latest sanctions will dissuade the Iranians from trying to enrich uranium?

PANETTA: I think the sanctions will have some impact. You know, the fact that we had Russia and China agree to that, that there is at least strong international opinion that Iran is on the wrong track, that's important. Those sanctions will have some impact. The sanctions that were passed by the Congress this last week will have some additional impact. It could help weaken the regime. It could create some serious economic problems. Will it deter them from their ambitions with regards to nuclear capability? Probably not.

TAPPER: The 2007 national intelligence estimate said all of Iran's work on nuclear weapons ended in 2003. You don't still believe that, do you?

PANETTA: I think they continue to develop their know-how. They continue to develop their nuclear capability.

TAPPER: Including weaponization?

PANETTA: I think they continue to work on designs in that area. There is a continuing debate right now

as to whether or nor they ought to proceed with the bomb. But they clearly are developing their nuclear capability, and that raises concerns. It raises concerns about, you know, just exactly what are their intentions, and where they intend to go. I mean, we think they have enough low-enriched uranium right now for two weapons. They do have to enrich it, fully, in order to get there. And we would estimate that if they made that decision, it would probably take a year to get there, probably another year to develop the kind of weapon delivery system in order to make that viable.

But having said that, you know, the president and the international community has said to Iran, you've got to wake up, you've got to join the family of nations, you've got to abide by international law. That's in the best interests of Iran. It's in the best interests of the Iranian people.

TAPPER: The administration has continually said that Iran has run into technical troubles in their nuclear program. Is that because the Iranians are bad at what they do, or because the U.S. and other countries are helping them be bad at what they do, by sabotaging in some instances their program?

PANETTA: Well, I can't speak to obviously intelligence operations, and I won't. It's enough to say that clearly, they have had problems. There are problems with regards to their ability to develop enrichment, and I think we continue to urge them to engage in peaceful use of nuclear power. If they did that, they wouldn't have these concerns, they wouldn't have these problems. The international community would be working with them rather than having them work on their own.

TAPPER: How likely do you think it is that Israel strikes Iran's nuclear facilities within the next two years?

PANETTA: I think, you know, Israel obviously is very concerned, as is the entire world, about what's happening in Iran. And they in particular because they're in that region in the world, have a particular concern about their security. At the same time, I think, you know, on an intelligence basis, we continue to share intelligence as to what exactly is Iran's capacity. I think they feel more strongly that Iran has already made the decision to proceed with the bomb. But at the same time, I think they know that sanctions will have an impact, they know that if we continue to push Iran from a diplomatic point of view, that we can have some impact, and I think they're willing to give us the room to be able to try to change Iran diplomatically and culturally and politically as opposed to changing them militarily.

TAPPER: There was a big announcement over the weekend. South Korea and the U.S. agreed to delay the transfer of wartime operational control to Seoul for three years because of the belligerence of North Korea. Kim Jong-il appears to be setting the stage for succession, including what many experts believe that torpedo attack in March on a South Korean warship. They believe that this is all setting the stage for the succession of his son, Kim Jong-un. Is that how you read all this and the sinking of the warship?

PANETTA: There is a lot to be said for that. I think our intelligence shows that at the present time, there is a process of succession going on. As a matter of fact, I think the--

TAPPER: Was the warship attack part of that?

PANETTA: I think that could have been part of it, in order to establish credibility for his son. That's what went on when he took power. His son is very young. His son is very untested. His son is loyal to his father and to North Korea, but his son does not have the kind of credibility with the military, because nobody really knows what he's going to be like.

So I think, you know, part of the provocations that are going on, part of the skirmishes that are going on are in part related to trying to establish credibility for the son. And that makes it a dangerous period.

Will it result in military confrontation? I don't think so. For 40 years, we've been going through these kinds of provocations and skirmishes with a rogue regime. In the end, they always back away from the brink and I think they'll do that now.

TAPPER: The CIA recently entered into a new $100 million contract with Blackwater, now called Xe Services for Security in Afghanistan. Blackwater guards allegedly opened fire in a city square in Baghdad in 2007, killing 17 unarmed civilians and since then, the firm has been fighting off prosecution and civil suits. Earlier this year, a federal grant jury indicted five Blackwater officials on 15 counts of conspiracy weapons and obstruction of justice charges. Here's Congresswoman Jan Schakowsky, a Democrat from Illinois, who's a member of the House Intelligence Committee.

(BEGIN VIDEO CLIP)

REP. JAN SCHAKOWSKY (D), ILLINOIS: I'm just mystified why any branch of the government would decide to hire Blackwater, such a repeat offender. We're talking about murder, a company with a horrible reputation, that really jeopardizes our mission in so many different ways.

(END VIDEO CLIP)

TAPPER: What's your response?

PANETTA: Since I've become director, I've asked us to -- asked our agency to review every contract we have had with Blackwater and whatever their new name is, Xe now. And to ensure that first and foremost, that we have no contract in which they are engaged in any CIA operations. We're doing our own operations. That's important, that we not contract that out to anybody. But at the same time, I have to tell you that in the war zone, we continue to have needs for security. You've got a lot of forward bases. We've got a lot of attacks on some of these bases. We've got to have security. Unfortunately, there are a few companies that provide that kind of security. The State Department relies on them, we rely on them to a certain extent.

So we bid out some of those contracts. They provided a bid that was underbid everyone else by about $26 million. And a panel that we had said that they can do the job, that they have shaped up their act. So their really was not much choice but to accept that contract. But having said that, I will tell you that I continue to be very conscious about any of those contracts and we're reviewing all of the bids that we have with that company.

TAPPER: This month, Attorney General Eric Holder announced that Assistant United States Attorney John Durham is close to completing a preliminary review of whether or not there's evidence that CIA agents or contractors violated the law when they used brutal methods, some call it torture, to interrogate terrorist detainees. Do you oppose this investigation? Are your officers -- your current officers, concerned about their legal jeopardy in the future under a future administration and what kind of guarantees can you give them?

PANETTA: Well look, CIA is an agency that has to collect intelligence, do operations. We have to take risks and it's important that we take risks and that we know that we have the support of the government and we have the support of the American people in what we're doing. With regards to this investigation, I know the reasons the attorney general decided to proceed. I didn't agree with them, but he decided to proceed. We're cooperating with him in that investigation. I've had discussions with the attorney general. He assures me that this investigation will be expedited and I think in the end, it will turn out to be OK. What I've told my people is please focus on the mission we have. Let me worry about Washington and those issues. And I think that's -- they have and I think frankly the morale at the CIA is higher than it's

ever been.

TAPPER: We only have a few minutes left, but I want to ask, you're now privy to information about some of the ugliest, toughest tactics carried out by intelligence agencies with the purpose of defending our nation, stuff that probably as a member of Congress or OMB director of White House chief of staff, you suspected, but didn't actually know for a fact. How rough is it, and does any of it ever make it difficult for you to sleep at night or run to do an extra confession?

PANETTA: Well, I didn't realize that I would be making decisions, many decisions about life and death as I do now. And I don't take those decisions lightly. Those are difficult decisions. But at the same time, I have to tell you that the most rewarding part of this job -- I mean, we had a tragedy where we lost seven of our officers and it was tragic. But at the same time, it also provided a great deal of inspiration because the quality of people that work at the CIA are very dedicated and very committed to trying to help save this country and protect this country. They're not Republicans, they're not Democrats, they're just good Americans trying to do their job and that, I think, is the most rewarding part of being director of the CIA.

TAPPER: What's the flip side? Sleepless nights?

PANETTA: The flip side is you have to spend an awful lot of time worried about what the hell is going to go on our there and that keeps me up at night.

TAPPER: What -- this is my last question for you because we only have about a minute left -- what terrorist threat are we as a nation not paying enough attention to?

Or forget terrorist threat, what threat are we not paying enough attention to?

PANETTA: I think the one I worry about is, again, the proliferation of nuclear weapons and the fact that one of those weapons could fall into the hands of a terrorist. I think that's one concern. And there is a lot of the stuff out there, and you worry about just exactly where it's located and who's getting their hands on it.

The other is the whole area of cyber security. We are now in a world in which cyber warfare is very real. It could threaten our grid system. It could threaten our financial system. It could paralyze this country, and I think that's an area we have to pay a lot more attention to.

TAPPER: All right, Director Leon Panetta, thank you so much for coming here today. Really appreciate it.

TAPPER: Scenes from the McChrystal mess, one of many topics for our roundtable with George Will; from The Washington Post Rajiv Chandrasekaran; from the New York Times, David Sanger, and from the U.S. Institute of Peace, Robin Wright.

Thanks so much for joining us.

Normally, I would just go into the McChrystal thing, but Panetta does so few interviews, I do want to go around and just get your take on what you found most interesting.

George, I'll start with you.

WILL: Well, four things. First of all, he repeated the fact that we are in Afghanistan to prevent it from becoming a sovereignty vacuum into which Al Qaida could flow. He said there may be as few as 50 Al Qaida there now, which means we're there to prevent Afghanistan from becoming Yemen and Somalia,

which raises the question of what we'll do about them.

Second, the president said our job, on December 1st, is to break the momentum of the Taliban. And Mr. Panetta did not really say we'd done that.

Third, the point of breaking the momentum of the Taliban was to encourage reconciliation so we can get out on -- begin to get out in July 2011. And Mr. Panetta did not suggest there was much evidence of reconciliation, which brings us to the...

TAPPER: Quite the opposite, actually.

WILL: Right, which brings us to the fourth consideration. The argument since the McChrystal debacle is the meaning of the July 2011 deadline. And it evidently has not much meaning.

TAPPER: Rajiv?

CHANDRASEKARAN: That point on reconciliation was a fundamental admission. Reconciliation is a key tenet of the Obama administration's Afghanistan strategy: apply pressure so you'll get those guys to the negotiating table; come up with a deal. We've been pushing the Karzai government for a big peace jirga. Moving forward on that front, Director Panetta sees no sign that any of those key insurgent groups are really ready to come to the table, negotiate meaningfully. That's a big red flag here.

TAPPER: David, you, like everyone else here, knows a lot of stuff about a lot of stuff. But you're, maybe, most expert on Iran. Did he say anything about Iran you thought was interesting?

SANGER: You know, Jake, I saw three things, I thought that he said that was notable. The first was that he believed that the Iranians are still working on the designs for nuclear weapons. Now, that is clearly in contravention to what was in the 2007 NIE, which was the last national intelligence estimate that was put together in the Bush administration.

He said -- he was more specific on the timeline. He said it would take them a year to enrich what they currently had in the way of nuclear fuel into bomb fuel and then another year to turn it into a weapon. So that gives you a pretty good sense where the U.S. believes, you know, is the outline of how far they could let the Iranians go.

And, finally, he said that there was a division with the Israelis on the question of whether the Iranians have determined that they should go ahead with a weapons program with the U.S. believing that there's been no decision made and the Israelis believing that, in fact, the Iranian leadership does want to move ahead with a weapon. I thought all three of those were pretty newsy.

TAPPER: Robin?

WRIGHT: Yes, I -- they took the best headlines already.

(LAUGHTER)

But it's clear that one of the things that's been most interesting in this town is the expected national intelligence estimate on Iran and it's been delayed over and over and over. And he basically gave us an outline of what is going to contain and the concern that we're going to reverse what was the controversial NIE under the Bush administration, that Iran wasn't working on weaponization and now the U.S. believes it is. And of course that then escalates the timetable, how much time do we have to try to get the Iranians to come to talk to us, to engage with the international community. And this is going to, I think, play into

the questions of what do we do next since there's every indication, as he said, that the sanctions alone are not going to be enough to convince them to either give up their enrichment program or to come back in the negotiating table.

TAPPER: Interesting. Well let's move on to the big news of the week which is obviously President Obama's dismissal of General Stanley McChrystal. George, do you think the president did the right thing?

WILL: Life is full of close calls, this is not one of them. He did the right thing and he did it with the right way, with the right words and an agreeable parsimony of words saying this is just not behavior acceptable at the senior levels of our military. And then he picked the only man around who could fill the leadership vacuum in Petraeus. But this again raises the question of you're sending Petraeus into a situation with this deadline. One of the reasons of setting the July deadline was to concentrate the mysterious mind of Hamid Karzai on what, reconciliation. But having the deadline makes the incentive for the Taliban to reconcile minimal.

TAPPER: And in fact, here's Senator Lindsey Graham talking about that this week.

(BEGIN VIDEO CLIP)

SEN. LINDSEY GRAHAM (R), SOUTH CAROLINA: I would argue that when the Taliban sends around leaflets quoting members of the administration and suggesting to people in Afghanistan after July, the Americans are going to leave you, that the enemy is seizing upon this inconsistency and uncertainty.

(END VIDEO CLIP)

TAPPER: David, can we do this on this timetable? The timetable is July 2011, U.S. troops will begin to withdraw, according the Vice President Biden, a lot of troops. According to other members of the administration, maybe not so much. But is this timeline even feasible?

SANGER: It strikes me from listening to what we have heard this past week and the underlying debate that was taking place before General McChrystal was dismissed that the general's timeline and the politicians' time lines are very different. President Obama has got a big reason to want to begin to withdraw, even if it's a small withdrawal, by next summer.

There's an election that follows here in a few months after that. But at the same time, anybody who has done counterinsurgency work in the military tells you the same thing which is counterinsurgency is taking a decade or more. That was the British experience in Malaysia. It's been the experience in many other countries.

And certainly if you look at what Director Panetta said today about how the Taliban are not yet facing any incentive to reach reconciliation, it tells you that it would take a much longer time. And I think that's the fundamental issue. You know, the president said he doesn't mind dissent, he can't stand division. Firing General McChrystal I think only submerged the dissent. It is going to come back when this review takes place in December of the overall policy.

TAPPER: Robin?

WRIGHT: Absolutely. And I think that one of the challenges is it's not when they do the review in December, they have to look at what can they accomplish in the remaining six months and the fact is, this is Afghanistan, this is not Iraq. This is a place where you don't have a middle class. You don't have a lot of literacy even among the army and the police you're trying to recruit. The tribal structure, we relied in

Iraq on the tribes to be the ones we could recruit to turn against al Qaeda. In Afghanistan, they have been decimated first by the decade-long war with the Soviet Union by the war lords and the civil war afterwards, and by the Taliban. And so you don't have the kind of network that you can turn in your favor to help lure, either defeat the Taliban or lure the Taliban in. And so the obstacles we face with just a year left in the cycle are truly daunting. And it's very hard to see how we can be very successful.

TAPPER: Rajiv, you just returned from Afghanistan. You were there a couple of weeks ago. And in fact, you were in Marjah.

CHANDRASEKARAN: Yes.

TAPPER: What did you see?

CHANDRASEKARAN: A long, hard slog there. Contrary to the initial messaging out of the Pentagon and the White House that Marjah was turning successful very quickly, what I saw was the start of what is going to be a month's long effort to try to stabilize it. And what they had hoped -- General McChrystal and Petraeus hopes for is that Marjah would be exhibit A in demonstration momentum, showing that the strategy is working. TAPPER: It's a relatively small town, 60,000 or so.

CHANDRASEKARAN: And it really should be a fairly self-contained fight. And it is, but it's not moving as quickly as they want. Now, the White House I don't think was under illusions that counter-insurgency wouldn't take a long time in Afghanistan. I think what they were hoping for was that in this narrow window, the 18 months between President Obama's decision to commit those 30,000 additional troops and next summer, that they would get enough momentum that it would compel the insurgents to sue for peace. It would get the Afghan government to get off the fence and move more quickly, to be able to field more Afghan security forces. That U.S. civilians would get out there and start to engage in helpful reconstruction efforts.

What we're now seeing is that all of that is taking much longer than anybody anticipated. Really raising the question, what can you accomplish by the summer of 2011?

Now, you know, I think President Obama, he managed to escape any short-term political peril in naming General Petraeus to succeed General McChrystal, something with broad bipartisan support here in this town this week. But I think this comes with a potential longer- term political cost, Jake, because he's now putting out in Kabul the godfather of counter-insurgency, the guy who wrote the Army field manual on this. So that at the end of this year, when the White House has a strategy review, and next spring as they start to debate what will the pace of that drawdown be, he's going to have -- General -- having Petraeus there is a much more formidable advocate for delaying this drawdown or really attenuating it compared to what McChrystal would have been.

TAPPER: George?

WILL: And when I saw the godfather of counter-insurgency in Tampa about two months ago, it was clear to me that he read the crucial paragraph in the president's December 1st speech about the withdrawal deadline. The phrase "conditions-based withdrawal" is making the deadline all loophole and no deadline. That is to say, you can stay as long as you need. We just hope the conditions will be good then, and that hope is not a policy.

WRIGHT: One of the things that's so important is the fact that, as David pointed out, there are different -- the division that was represented in the McChrystal firing is still there. And it's going to play out over the next year, because the political timeline is what the White House is thinking about. The military is thinking about do they want to be seen to replicate the Soviet experience? After a decade, they still

haven't managed to succeed. And here they are, the mightiest military in the world, fighting alongside the mightiest military alliance in the world, against a ragtag militia that has no air power, has no satellite intelligence, has no tanks, and the United States can't defeat that. What kind of image does that leave at a time when the United States leaves, it is not only superior moral power but the superior military power in the world?

TAPPER: David?

SANGER: You know, Rajiv is exactly right that putting General Petraeus in place bolsters the argument for continuing a counter- insurgency. But if you listen to what Director Panetta said today, all of the other evidence that we have that the application of more troops, at least so far, has not quieted the Taliban.

It also bolsters Vice President Biden's case, that in fact applying more troops is not necessarily going to turn this around. And that's why I think we're headed for a much bigger collision later in the year on the strategy.

WILL: And the collision is going to be between the president and his base. The president, going into the 2010 elections, looking forward to 2012, hoped for three things. Rapid creation of jobs, the health care bill becoming more popular after it was signed. Neither has happened. And third, radical improvement in Afghanistan. The biggest number haunting the White House has to be enthusiasm deficit between Republicans eager to vote and Democrats tepid about this. And Afghanistan is going to do nothing to energize his base.

CHANDRASEKARAN: Not only not energize his base, it's won him no Republican support. The most concerning quote uttered by General McChrystal is not anything in those Rolling Stone interviews, nothing about the vice president, about Holbrooke. The most alarming thing for Washington that he said recently was in Europe, a couple of weeks ago, when he acknowledged that it's going to take far more time to convince the Afghans that international forces are there to protect them. That's a fundamental prerequisite to counter-insurgency.

TAPPER: In Kandahar. And he said that the Kandahar operation was going to be delayed because of that.

CHANDRASEKARAN: If you've got these guys who don't want us to be helping them out, helping to protect them, how do you do this?

TAPPER: Right now, President Obama is in Toronto, and I want to move on to the G-20 conference, because there's been a big debate there between President Obama and many in Europe about stimulus versus austerity. Spending more money to help the economy versus focusing on debt. Here's Treasury Secretary Tim Geithner.

(BEGIN VIDEO CLIP)

TREASURY SECRETARY TIMOTHY F. GEITHNER: There's another mistake governments, some governments have made over time, which is to, in a sense, step back too quickly. What we want to do is continue to emphasize that we're going to avoid that mistake, by making sure we recognize that, you know, it's only been a year since the world economy stopped collapsing.

(END VIDEO CLIP)

TAPPER: Rajiv, what does this debate mean for the president's agenda?

CHANDRASEKARAN: Well what this debate that played out over the weekend in Toronto means is

that the president now faces opposition not just among Republicans on Capitol Hill to additional stimulus activity but he's facing it from his European allies who are also concerned about growing government debt. Certainly the fallout from the Greek debt crisis reverberating around continental Europe. The Germans, the British are all very concerned about this and the president, Secretary Geithner, wanted to get out of Toronto, they really haven't gotten in terms of a commitment among the G-8 allies to do more of the second round of stimulus sending.

TAPPER: David, you know, you and I have been on these trips. The president really likes the G-20 more than he likes the G-8. He kind of thinks the G-8 is an anachronism.

SANGER: He does because the G-8 is filled, by and large, with older economies, Europe, Canada, Japan, all of whom are deeply in debt at this point, none of which feel that they can afford this kind of stimulus. And so when he brings in the G-20 for all the difficulties of managing a group that large, and the G-20 could barely come to an agreement on when to break for lunch, there -- the one advantage they bring is that there are big, growing economies there -- China, Brazil, India, and these are countries I think that the president feels over time he can manage to help stimulate the world economy in a way that he'll never get out of the old G-7.

WILL: And in the G-8, Germany lives large. And Germany and the United States have different national memories. The great economic trauma of the United States is the deflationary episode of the 1930s, the Depression. For Germany, the national memory is the inflation of the 1920s that destroyed the republic and brought on Hitler. Furthermore, the Europeans are not in that big mood to be lectured by us. They say, where did this crisis start? Oh, that's right, it was in the United States. Whose central bank kept interest rates at a bubble producing low for too long? Whose social policy encouraged an unreasonably high home ownership in the United States? And by the way, whose stimulus has by its own criterion, failed?

TAPPER: Now Robin, one of the things that the White House says is look at the growth rates. Germany, less than 1 percent. Europe, as a whole, about 1 percent. The U.S., 2.7 percent. How can they lecture us or disagree with us when our way is winning?

WRIGHT: Well, look, I think the stakes in Canada are really that two years ago, or the last two years, you have seen the international community respond, or the major economies respond as one voice. They've followed the same kind of pattern. For now, they're beginning to differ. And the danger is recovery is a lot about psychology. And if there's a sense of uncertainty, there's a danger that people don't know which way things are going to go. And the U.S. keeps arguing, look, if you don't keep stimulus, you're not likely to generate whether it's new jobs or and if you retrench too far, then that affects the sense of recovery, that you have to cut back, and that hurts the economies across the board. So there's real danger that the uncertainty generated out of Canada is going to begin to play against that sense -- the kind of momentum they've created.

SANGER: And the president's also in the position in Canada of saying, don't do as I do, do as I say. I mean, just the day before he left, Congress could not come to an agreement on a very small extension of unemployment benefits, the most basic stimulus effort that the president tried to push.

TAPPER: 1.2 million Americans are going to lose their unemployment benefit extensions -- or unemployment benefits this week.

SANGER: That's right. So there's a fundamental stimulus action and the president had to go up and tell the Europeans they weren't doing enough for stimulus. TAPPER: George, why can't they pass this unemployment extension? I don't understand. The Republicans say spending cuts should pay for this, the

Democrats know it's emergency spending. It seems like this is something where there could be a compromise.

WILL: Well, partly because they believe that when you subsidize something, you get more of it. And we're subsidizing unemployment, that is the long-term unemployment, those unemployed more than six months, is it at an all-time high and they do not think it's stimulative because what stimulates is the consumer and savers' sense of permanent income. And everyone knows that unemployment benefits are not permanent income.

TAPPER: Rajiv, I'm going to let you have the last word, we only have a minute left.

CHANDRASEKARAN: Both sides in this town have an incentive to let this drag out longer. The Republicans certainly playing to their base don't want to be seen as adding to the debt issues in a midterm election year. The Democrats I think are trying to sort of push the Republicans and trying to make them look like the party that's denying 1.2 million people an extension of these benefits.

And so, this is going to play out for several more weeks, and both sides are going to try to use it for their -- unfortunately, for their political gain, as we head toward the November midterms.

TAPPER: All right. Well, the roundtable will continue in the green room on abcnews.com. Hopefully they'll talk about Wall Street reform. We didn't get a chance to talk about that today. And at abcnews.com, you can also later find our fact checks of our newsmakers, courtesy of the Pulitzer Prize-winning Politifact.

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# Exhibit 8

## To the Declaration of Colin Wicker

U.S. DEPARTMENT OF THE TREASURY

# Press Center

## Treasury Designates Anwar Al-Aulaqi, Key Leader of Al-Qa'ida in the Arabian Peninsula

7/16/2010

TG-779

***Treasury Targets al-Qa'ida Leader with Ties to Umar Farouk Abdulmutallab***

**WASHINGTON** -- The U.S. Department of the Treasury today designated Anwar al-Aulaqi, a key leader for al-Qa'ida in the Arabian Peninsula (AQAP), a Yemen-based terrorist group. Aulaqi was designated pursuant to Executive Order 13224 for supporting acts of terrorism and for acting for or on behalf of AQAP. Since its inception in January 2009, AQAP has claimed responsibility for numerous terrorist attacks against Saudi, Korean, Yemeni and U.S. targets. Executive Order 13224 freezes any assets Aulaqi has under U.S. jurisdiction and prohibits U.S. persons from engaging in any transactions with him.

"Anwar al-Aulaqi has proven that he is extraordinarily dangerous, committed to carrying out deadly attacks on Americans and others worldwide," said Under Secretary for Terrorism and Financial Intelligence Stuart Levey. "He has involved himself in every aspect of the supply chain of terrorism -- fundraising for terrorist groups, recruiting and training operatives, and planning and ordering attacks on innocents."

Aulaqi has pledged an oath of loyalty to AQAP emir, Nasir al-Wahishi, and plays a major role in setting the strategic direction for AQAP. Aulaqi has also recruited individuals to join AQAP, facilitated training at camps in Yemen in support of acts of terrorism, and helped focus AQAP's attention on planning attacks on U.S. interests.

Since late 2009, Aulaqi has taken on an increasingly operational role in the group, including preparing Umar Farouk Abdulmutallab, who attempted to detonate an explosive device aboard a Northwest Airlines flight from Amsterdam to Detroit on Christmas Day 2009, for his operation. In November 2009, while in Yemen, Abdulmutallab swore allegiance to the emir of AQAP and shortly thereafter received instructions from Aulaqi to detonate an explosive device aboard a U.S. airplane over U.S. airspace. After receiving this direction from Aulaqi, Abdulmutallab obtained the explosive device he used in the attempted Christmas Day attack.

Aulaqi was imprisoned in Yemen in 2006 on charges of kidnapping for ransom and being involved in an al-Qa'ida plot to kidnap a U.S. official but was released from jail in December 2007 and subsequently went into hiding in Yemen.

"Aulaqi has sought to encourage his supporters to provide money for terrorist causes. Those who provide material support to Aulaqi or AQAP violate sanctions and expose themselves to serious consequences," continued Levey.

Today's action supports the international effort to degrade AQAP's capabilities to execute violent attacks and to disrupt, dismantle, and defeat its financial and support networks. The U.S. Government will continue to work with allies to identify and take action against persons acting for or on behalf of, or providing financial and other prohibited support to, Aulaqi and AQAP.

Identifying Information

**Individual:**
Anwar al-Aulaqi
**AKA:**
Anwar al-Awlaki
**AKA:**
Anwar al-Awlaqi
**AKA:**
Anwar Nasser Aulaqi
**AKA:**
Anwar Nasser Abdulla Aulaqi
**AKA:**
Anwar Nasswer Aulaqi
**DOB:**
April 21, 1971
**Alternate DOB:**
April 22, 1971
**POB:**
Las Cruces, New Mexico
**Citizenship:**
United States
**Citizenship:**
Yemen
**Location:**
Shabwah Governorate, Yemen

###

# Exhibit 9

## To the Declaration of Colin Wicker

**Office of the Attorney General**
**Washington, D. C. 20530**

May 22, 2013

The Honorable Patrick J. Leahy
Chairman
Committee on the Judiciary
United States Senate
Washington, DC 20530

Dear Mr. Chairman:

Since entering office, the President has made clear his commitment to providing Congress and the American people with as much information as possible about our sensitive counterterrorism operations, consistent with our national security and the proper functioning of the Executive Branch. Doing so is necessary, the President stated in his May 21, 2009 National Archives speech, because it enables the citizens of our democracy to "make informed judgments and hold [their Government] accountable."

In furtherance of this commitment, the Administration has provided an unprecedented level of transparency into how sensitive counterterrorism operations are conducted. Several senior Administration officials, including myself, have taken numerous steps to explain publicly the legal basis for the United States' actions to the American people and the Congress. For example, in March 2012, I delivered an address at Northwestern University Law School discussing certain aspects of the Administration's counterterrorism legal framework. And the Department of Justice and other departments and agencies have continually worked with the appropriate oversight committees in the Congress to ensure that those committees are fully informed of the legal basis for our actions.

The Administration is determined to continue these extensive outreach efforts to communicate with the American people. Indeed, the President reiterated in his State of the Union address earlier this year that he would continue to engage with the Congress about our counterterrorism efforts to ensure that they remain consistent with our laws and values, and become more transparent to the American people and to the world.

To this end, the President has directed me to disclose certain information that until now has been properly classified. You and other Members of your Committee have on numerous occasions expressed a particular interest in the Administration's use of lethal force against U.S. citizens. In light of this fact, I am writing to disclose to you certain information about the number of U.S. citizens who have been killed by U.S. counterterrorism operations outside of areas of active hostilities. Since 2009, the United States, in the conduct of U.S. counterterrorism operations against al-Qa'ida and its

associated forces outside of areas of active hostilities, has specifically targeted and killed one U.S. citizen, Anwar al-Aulaqi. The United States is further aware of three other U.S. citizens who have been killed in such U.S. counterterrorism operations over that same time period: Samir Khan, 'Abd al-Rahman Anwar al-Aulaqi, and Jude Kenan Mohammed. These individuals were not specifically targeted by the United States.

As I noted in my speech at Northwestern, "it is an unfortunate but undeniable fact" that a "small number" of U.S. citizens "have decided to commit violent attacks against their own country from abroad." Based on generations-old legal principles and Supreme Court decisions handed down during World War II, as well as during the current conflict, it is clear and logical that United States citizenship alone does not make such individuals immune from being targeted. Rather, it means that the government must take special care and take into account all relevant constitutional considerations, the laws of war, and other law with respect to U.S. citizens – even those who are leading efforts to kill their fellow, innocent Americans. Such considerations allow for the use of lethal force in a foreign country against a U.S. citizen who is a senior operational leader of al-Qa'ida or its associated forces, and who is actively engaged in planning to kill Americans, in the following circumstances: (1) the U.S. government has determined, after a thorough and careful review, that the individual poses an imminent threat of violent attack against the United States; (2) capture is not feasible; and (3) the operation would be conducted in a manner consistent with applicable law of war principles.

These conditions should not come as a surprise: the Administration's legal views on this weighty issue have been clear and consistent over time. The analysis in my speech at Northwestern University Law School is entirely consistent with not only the analysis found in the unclassified white paper the Department of Justice provided to your Committee soon after my speech, but also with the classified analysis the Department shared with other congressional committees in May 2011 – months before the operation that resulted in the death of Anwar al-Aulaqi. The analysis in my speech is also entirely consistent with the classified legal advice on this issue the Department of Justice has shared with your Committee more recently. In short, the Administration has demonstrated its commitment to discussing with the Congress and the American people the circumstances in which it could lawfully use lethal force in a foreign country against a U.S. citizen who is a senior operational leader of al-Qa'ida or its associated forces, and who is actively engaged in planning to kill Americans.

Anwar al-Aulaqi plainly satisfied all of the conditions I outlined in my speech at Northwestern. Let me be more specific. Al-Aulaqi was a senior operational leader of al-Qa'ida in the Arabian Peninsula (AQAP), the most dangerous regional affiliate 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. And al-Aulaqi was not just a senior leader of AQAP – he was the group's chief of external operations, intimately involved in detailed planning and putting in place plots against U.S. persons.

In this role, al-Aulaqi repeatedly made clear his intent to attack U.S. persons and his hope that these attacks would take American lives. For example, in a message to

Muslims living in the United States, he noted that he had come "to the conclusion that *jihad* against America is binding upon myself just as it is binding upon every other able Muslim." But it was not al-Aulaqi's words that led the United States to act against him: they only served to demonstrate his intentions and state of mind, that he "pray[ed] that Allah [would] destro[y] America and all its allies." Rather, it was al-Aulaqi's actions – and, in particular, his direct personal involvement in the continued planning and execution of terrorist attacks against the U.S. homeland – that made him a lawful target and led the United States to take action.

For example, when Umar Farouk Abdulmutallab – the individual who attempted to blow up an airplane bound for Detroit on Christmas Day 2009 – went to Yemen in 2009, al-Aulaqi arranged an introduction via text message. Abdulmutallab told U.S. officials that he stayed at al-Aulaqi's house for three days, and then spent two weeks at an AQAP training camp. Al-Aulaqi planned a suicide operation for Abdulmutallab, helped Abdulmutallab draft a statement for a martyrdom video to be shown after the attack, and directed him to take down a U.S. airliner. Al-Aulaqi's last instructions were to blow up the airplane when it was over American soil. Al-Aulaqi also played a key role in the October 2010 plot to detonate explosive devices on two U.S.-bound cargo planes: he not only helped plan and oversee the plot, but was also directly involved in the details of its execution – to the point that he took part in the development and testing of the explosive devices that were placed on the planes. Moreover, information that remains classified to protect sensitive sources and methods evidences al-Aulaqi's involvement in the planning of numerous other plots against U.S. and Western interests and makes clear he was continuing to plot attacks when he was killed.

Based on this information, high-level U.S. government officials appropriately concluded that al-Aulaqi posed a continuing and imminent threat of violent attack against the United States. Before carrying out the operation that killed al-Aulaqi, senior officials also determined, based on a careful evaluation of the circumstances at the time, that it was not feasible to capture al-Aulaqi. In addition, senior officials determined that the operation would be conducted consistent with applicable law of war principles, including the cardinal principles of (1) necessity – the requirement that the target have definite military value; (2) distinction – the idea that only military objectives may be intentionally targeted and that civilians are protected from being intentionally targeted; (3) proportionality – the notion that the anticipated collateral damage of an action cannot be excessive in relation to the anticipated concrete and direct military advantage; and (4) humanity – a principle that requires us to use weapons that will not inflict unnecessary suffering. The operation was also undertaken consistent with Yemeni sovereignty.

While a substantial amount of information indicated that Anwar al-Aulaqi was a senior AQAP leader actively plotting to kill Americans, the decision that he was a lawful target was not taken lightly. The decision to use lethal force is one of the gravest that our government, at every level, can face. The operation to target Anwar al-Aulaqi was thus subjected to an exceptionally rigorous interagency legal review: not only did I and other Department of Justice lawyers conclude after a thorough and searching review that the

operation was lawful, but so too did other departments and agencies within the U.S. government.

The decision to target Anwar al-Aulaqi was additionally subjected to extensive policy review at the highest levels of the U.S. Government, and senior U.S. officials also briefed the appropriate committees of Congress on the possibility of using lethal force against al-Aulaqi. Indeed, the Administration informed the relevant congressional oversight committees that it had approved the use of lethal force against al-Aulaqi in February 2010 – well over a year before the operation in question – and the legal justification was subsequently explained in detail to those committees, well before action was taken against Aulaqi. This extensive outreach is consistent with the Administration's strong and continuing commitment to congressional oversight of our counterterrorism operations – oversight which ensures, as the President stated during his State of the Union address, that our actions are "consistent with our laws and system of checks and balances."

The Supreme Court has long "made clear that a state of war is not a blank check for the President when it comes to the rights of the Nation's citizens." *Hamdi v. Rumsfeld*, 542 U.S. 507, 536 (2004); *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 578, 587 (1952). But the Court's case law and longstanding practice and principle also make clear that the Constitution does not prohibit the Government it establishes from taking action to protect the American people from the threats posed by terrorists who hide in faraway countries and continually plan and launch plots against the U.S. homeland. The decision to target Anwar al-Aulaqi was lawful, it was considered, and it was just.

* * * * *

This letter is only one of a number of steps the Administration will be taking to fulfill the President's State of the Union commitment to engage with Congress and the American people on our counterterrorism efforts. This week the President approved and relevant congressional committees will be notified and briefed on a document that institutionalizes the Administration's exacting standards and processes for reviewing and approving operations to capture or use lethal force against terrorist targets outside the United States and areas of active hostilities; these standards and processes are either already in place or are to be transitioned into place. While that document remains classified, it makes clear that a cornerstone of the Administration's policy is one of the principles I noted in my speech at Northwestern: that lethal force should not be used when it is feasible to capture a terrorist suspect. For circumstances in which capture is feasible, the policy outlines standards and procedures to ensure that operations to take into custody a terrorist suspect are conducted in accordance with all applicable law, including the laws of war. When capture is not feasible, the policy provides that lethal force may be used only when a terrorist target poses a continuing, imminent threat to Americans, and when certain other preconditions, including a requirement that no other reasonable alternatives exist to effectively address the threat, are satisfied. And in all circumstances there must be a legal basis for using force against the target. Significantly,

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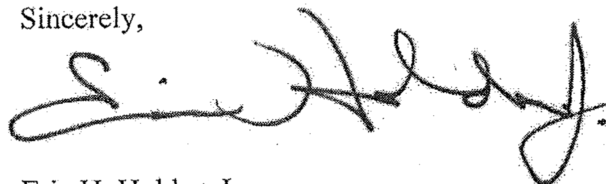
the President will soon be speaking publicly in greater detail about our counterterrorism operations and the legal and policy framework that governs those actions.

I recognize that even after the Administration makes unprecedented disclosures like those contained in this letter, some unanswered questions will remain. I assure you that the President and his national security team are mindful of this Administration's pledge to public accountability for our counterterrorism efforts, and we will continue to give careful consideration to whether and how additional information may be declassified and disclosed to the American people without harming our national security.

Sincerely,



Eric H. Holder, Jr.
Attorney General

cc: Ranking Member Charles Grassley
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# Exhibit 10-A

## To the Declaration of Colin Wicker

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# UNDERSTANDING THE HOMELAND THREAT LANDSCAPE—CONSIDERATIONS FOR THE 112TH CONGRESS

## HEARING

BEFORE THE

## COMMITTEE ON HOMELAND SECURITY
## HOUSE OF REPRESENTATIVES

ONE HUNDRED TWELFTH CONGRESS

FIRST SESSION

FEBRUARY 9, 2011

**Serial No. 112–1**

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# UNDERSTANDING THE HOMELAND THREAT LANDSCAPE—CONSIDERATIONS FOR THE 112TH CONGRESS

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**Wednesday, February 9, 2011**

U.S. HOUSE OF REPRESENTATIVES,
COMMITTEE ON HOMELAND SECURITY,
*Washington, DC.*

The committee met, pursuant to call, at 10:04 a.m., in Room 311, Cannon House Office Building, Hon. Peter T. King [Chairman of the committee] presiding.

Present: Representatives King, Lungren, McCaul, Bilirakis, Broun, Miller, Walberg, Cravaack, Walsh, Meehan, Quayle, Rigell, Long, Duncan, Farenthold, Brooks, Thompson, Sanchez, Harman, Jackson Lee, Cuellar, Clarke of New York, Richardson, Christensen, Davis, Higgins, Speier, Richmond, Clarke of Michigan, and Keating.

Chairman KING [presiding]. The Committee on Homeland Security will come to order. The committee is meeting today to hear testimony from Homeland Security Secretary Janet Napolitano and National Counterterrorism Director Michael Leiter on the homeland threat landscape. I look forward to the hearing, and I now recognize myself for an opening statement.

I want to welcome our returning and new committee Members to this, the first hearing of the 112th Congress. We also welcome back Secretary Napolitano and Director Leiter to the committee and thank them for appearing today, as they have done in the past.

While she is not here yet, let me also take the opportunity to recognize the outstanding service of Representative Jane Harman, who has announced that she will be leaving Congress to run the Woodrow Wilson International Center for Scholars. Jane Harman has been a leader on this committee.

She has been a leader in the Congress. No one since September 11, 2001, and even before that, for that matter, has been more knowledgeable or informed or dedicated to intelligence and homeland security issues, and her departure is a loss to both sides of the aisle. We certainly—we hope everyone, I believe—we certainly wish her well in her new role.

Let me also express my deepest sympathy to the family of David Hillman, a retired CBP officer who was killed by a suicide bomb in Kandahar while working as a boarder mentor and adviser. There are other CBP personnel, Michael Lachowsky, Terry Sherrill, and Vernon Rinus, who were also injured in the attack. Our thoughts and prayers are with them all.

To me that just personifies the level of patriotism that CBP officers demonstrate no matter where they happen to be located. They perform a tremendous service to our country. Also, we should never forget there are members of the DHS family serving all around the world, working to protect the homeland.

Ms. Harman has just arrived.

We said very good things about you, Jane. Again, great to have you here. Thank you.

As we begin the work of the 112th Congress, the goal of the committee today is to get a comprehensive review of the terrorist threats facing our Nation. Today we will be in an open, unclassified session, and so I would ask that the Secretary and the Director if they could report back to us any Members' questions which might require a classified response.

The top priority for the committee is to counter the serious and evolving terrorist threats facing our country. Let's put our work in context. A number of committee Members recently went out to the NCTC and heard from Director Leiter in a classified setting about threats and plots against the United States and our allies.

As we approach the 10th anniversary of September 11, we are constantly reminded that terrorists continue to plot to kill Americans at home and abroad. According to Attorney General Holder, in the last 2 years alone there have been 126 people indicted for terrorist-related activity, including 50 U.S. citizens.

There was the Times Square bomber Shahzad. There was the Fort Hood terrorist, Army Major Hasan. There was the Little Rock recruiting center shooter, the New York City subway bomber, the Mumbai plotter David Headley. There is Jihad Jane, dozens of individuals in Minnesota, and so many other plots and cases—Portland, Oregon; Ashburn, Virginia; Riverdale section of the Bronx; Dallas, Texas; Springfield, Illinois; John F. Kennedy Airport; Fort Dix; Baltimore. We can go through an entire list of cases just in the last several years.

Homegrown radicalization is a growing threat, and one we cannot ignore. This shift, as far as I am concerned, is a game changer that presents a serious challenge to law enforcement and the intelligence community. Indeed, Attorney General Holder said that he loses sleep at night thinking of the young men in this country who were raised in this country who are being radicalized and willing to take up arms against their own Nation.

Just last week, Senator Joe Lieberman and Senator Susan Collins released a bipartisan Senate Homeland Security Committee report examining the events leading up to the terrorist attack at Fort Hood. The report concluded that the Department of Defense should confront the threat of radicalization to violent Islamist extremism amongst service members explicitly and directly, unquote.

I believe this statement is true for the entire Government. We must confront this threat explicitly and directly. That is why I intend to hold a hearing next month examining the threat of domestic radicalization in the Muslim community.

Because of policies the United States has implemented since September 11, the threat from al-Qaeda has evolved, but it is still deadly. Because of the layers of defense that we have set in place that we have put in motion, it is very difficult for al-Qaeda to

launch an attack similar to what happened on September 11. Obviously, it is possible, but it is much more difficult for them, and they have realized that.

They have adapted their strategy and their tactics so they are now recruiting from within the country, and they are looking for people who are under the radar screen, people who are living here legally, people who have green cards, people who are citizens, people who have no known terrorist activity.

Again, probably the classic example of that would be Zazi in New York, who was raised in Queens, went to high school, had a small business in lower Manhattan, and was brought back to Afghanistan for training and came back as a liquid explosive bomber attempting to blow up the New York subways.

So that is the type of person we have to be looking for. The good side of that, I suppose, is that al-Qaeda feels it cannot launch a major attack from the outside, and it also means that they cannot send a type of fully trained and skilled terrorist to this country. The downside of it is that these terrorists are people living under the radar screen, who are very difficult to detect.

On certain issues that I have a particular interest in, one is the threat of chemical and biological weapons, which is why I believe the Securing the Cities Program is so important, because it is very likely that the next attack against a major city in this country will be launched from the suburbs, similar to what happened in Madrid and London.

A nightmare scenario is to have that attack involve a dirty bomb, which would put that metropolitan area basically off-limits, besides the massive loss of human life that would result. So that is a program the Secretary and I discussed. We are particularly interested in pursuing that. But in any event, there can be no doubt that the threat against the United States remains extremely high, and we must remain vigilant and never allow the memories of 9/11 to fade.

With that, I recognize the distinguished Ranking Member of the committee, Mr. Thompson form Mississippi, for any statement he may have.

Mr. THOMPSON. Thank you very much, Mr. Chairman, for holding today's hearing. I want to join you in welcoming Secretary Napolitano and Director Leiter.

But before we hear their testimony on the threat posed by terrorism, I want to encourage my colleagues to remember that our words travel far beyond these four walls. For several weeks we have seen protests across North Africa and the Middle East. In many ways these protests represent a demand for democracy. Yet we know that this is the same region that has been home to some of those who call for jihad.

The United States, the world's only remaining superpower, occupies a providential position. If we take the right action, many of our concerns about a terrorist threat from this region could be significantly reduced. That is why I want to ensure that our examination of the global threat from terrorist activities does not complicate the job being done by the State Department and others in this administration. We must recognize that this predominantly Muslim area of the world is seeking to embrace democracy. Let us

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take care that nothing we do or say here today works to undermine those efforts.

Since September 11, the threat of terrorist attacks has become an undeniable and unsettling feature of American society.

However, combating the terrorist threat depends on accurate intelligence and an unbiased assessment of the size, scope, depth, and breadth of this threat.

The lessons learned from past wars are clear. We cannot defeat an enemy that we do not know. Unreliable information, personal opinions or narrow agendas cannot inform our assessment of a threat to our Nation.

We have seen the results of unreliable intelligence in Iraq. Our examination of a global threat must look at the vulnerabilities within commerce, transportation, and all aspects of our modern lives.

We must find and eliminate these vulnerabilities, focus on what we can do, and keep the Nation safe.

We can secure an airplane. We can secure the border. We can secure Federal buildings. We can secure a chemical plant or a nuclear facility.

We must not become distracted from our basic mission to keep this Nation safe and maintain the security of the people.

Finally, Mr. Chairman, I want to bid farewell to my colleague from California. She has demonstrated her commitment to the security of this Nation by her service on the intelligence committee and this committee.

We will miss her, but we wish her happiness in her new undertaking.

Again, I want to thank you.

I want to thank the witnesses and look forward to hearing their testimony.

[The statement of Ranking Member Thompson follows:]

PREPARED STATEMENT OF RANKING MEMBER BENNIE G. THOMPSON

I want to encourage my colleagues to remember that our words travel far beyond these far walls.

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We can secure an airplane. We can secure the border. We can secure a Federal building.We can secure a chemical plant or a nuclear facility. We must not become distracted from our basic mission to keep this Nation safe and maintain the security of the people.

Chairman KING. Thank you, Mr. Thompson.

Now we ask unanimous consent to recognize the gentlelady from California, Ms. Harman, 1 minute or as much time as she——

Ms. HARMAN. Thank you, Mr. Chairman, and thank you, Ranking Member Thompson. Welcome to our witnesses.

This is probably my last hearing on this committee. As all of you know, I know this, including the new Members, I have worked my heart out for many years in this Congress to keep our homeland safe.

It has been an honor to be one of the initial Members of this committee and to have chaired its Intelligence Subcommittee for 4 years.

I just want to thank all the Members, and I want to thank all the staff for the effort we have made so far together.

To these two witnesses, who are both dear friends of mine, I want to thank you for the effort you make.

Finally, let me urge that the best present you could all give me is to find a way to get more jurisdiction in this committee, which ought to be—and I know the Secretary agrees with this—the central point in the House of Representatives for oversight and focus on this critical subject of keeping our homeland safe.

So, once again, thank you all for your good wishes. I am just moving down the street. I am really not leaving this place. Thank you very much.

I yield back.

Chairman KING. Thank you, Jane.

I remind the Members of the committee that opening statements may be submitted for the record.

[The statement of Hon. Richardson follows:]

PREPARED STATEMENT OF HON. LAURA RICHARDSON

I would like to thank Chairman King and Ranking Member Thompson for convening this hearing today focusing on the ever-evolving threat of terrorist attacks against the homeland and the current state of America's efforts to counter these threats. I would like to thank our distinguished panel of witnesses for appearing before the committee today to discuss what progress has been made in this area and what else needs to be done.

The events that occurred on the morning of September 11, 2001 had a profound impact on the lives of every American. The terrifying images of commercial airliners flying into the World Trade Centers are engraved in people's hearts and minds forever.

Even though the attacks occurred nearly 10 years ago, we are constantly reminded of the effects of that day. Whether we're going through airport security to board a plane to see our family for the holidays or we're reuniting with a loved one who just returned from Afghanistan, possible threats and attacks continue to loom large over each and every aspect of our lives. For example, the events of that tragic morning forced us to recognize that we now live in a new world, with new threats, and that in order to combat these threats we must be willing to change and improve our tactics.

After these devastating events, our Government initiated a number of unprecedented changes to our National security infrastructure in order to address these new threats. For instance, in 2002 the Department of Homeland Security was created with the stated goal of preparing, preventing, and responding to domestic emergencies, specifically terrorism. Additionally, we initiated sweeping improvements to our transportation security and made great strides in securing our Na-

tion's borders and ports. And in the hills and valleys of Afghanistan, our soldiers continue to fight against al-Qaeda and its allies to ensure that those who wish to do or train others to do America harm are brought to justice.

However, as we will discuss today, terrorism has become an ever-evolving threat. We no longer face a threat from just one group of people or even from just one ideology. From Joe Stack, who flew a plane into an IRS building to Faishal Shazhad, the American citizen who attempted to blow up a car bomb in Times Square, we have learned that we must constantly be changing our tactics to ensure we have the ability to effectively combat and neutralize the changing methods of terrorists.

As the representative of the 37th district, I understand the need for law enforcement to constantly modify and assess anti-terror strategies in order to protect potential targets in their communities. My Congressional district abuts the Nation's largest ports, contains oil refineries that produce more than 1 million barrels per day, and is home to a number of gas treatment and petrochemical facilities that present a target-rich environment for those seeking to do us harm. These challenges represent a new and emerging need for us to be increasingly more vigilant in understanding and combating the ever-evolving threat of terrorism.

Finally, in the pursuit of these counterterrorism efforts, we must constantly be aware of the fact that these strategies must not undercut the very principles they are attempting to defend. In our zeal to combat terrorism and protect our country, we must be careful not to wrongly accuse our people because of how they look, where they live, or their cultural background. To be safe, it is necessary that we also be smart. It is my hope and belief that my fellow colleagues will remain mindful of these important principles of which this great country was founded upon.

Thank you again Mr. Chairman, Ranking Member Thompson, for convening this very important hearing today. I look forward to hearing from our distinguished panel of witnesses on these issues. I yield back my time.

Chairman KING. As I mentioned, we are pleased to have two very distinguished witnesses today on this topic most important in the entire Government as Secretary Napolitano, who is third Secretary of the Department of Homeland Security, overseeing over 200,000 employees.

I have to say, on the record, that she has worked very closely with us. She does not let partisan lines divide us and she probably meets with us more than she wants to, but she meets on a regular basis.

She is always on the phone, both with compliments and criticisms. I never know when I am going to get a call from the Secretary. But, again, she is totally dedicated. Whatever differences we have, are ones of policy and no one has ever questioned her dedication or her ability.

Similarly, Mike Leiter has served as the head of National Counterterrorism Center for 3½ years under two Presidents, done a truly outstanding job in that capacity.

Prior to that, he was in the military. He was assistant to the U.S. attorney and, again, absolutely dedicated to combating international terrorism and protecting the homeland.

So I would ask that the witnesses, your entire statements will appear in the record. I have asked you to summarize the testimony but because of the importance of it, obviously, I am not going to cut you off.

But I just ask you to keep in mind that many Members here today do have questions for you. With that, I now recognize Secretary Napolitano.

Secretary Napolitano.

## STATEMENT OF HON. JANET NAPOLITANO, SECRETARY, DEPARTMENT OF HOMELAND SECURITY

Secretary NAPOLITANO. Well, thank you, Chairman King, Ranking Member Thompson, Members of the committee, for the opportunity to appear before you today to testify on the terrorist threat to the United States and what the Department of Homeland Security and the NCTC are doing to combat it.

I also have to echo the thoughts about Representative Harman. You will be missed. You have been totally dedicated to this effort. That effort has been producing results in terms of safety of the American people.

I also have to echo your thoughts about the amount of Congressional oversight of this department. We added up the 111th Congress, and our Department testified over 285 times. I testified over 20 times myself.

I think that was the most of any Cabinet official. That, of course, requires a lot of preparation and work. We provided over 3,900 substantive briefings to different committees of the Congress.

So Chairman King, Ranking Member Thompson, you and I have all discussed this. But that amount of oversight does have impact. So I thought I would just mention that.

So let me turn now to the subject and the very important subject of today's hearing. There is no question that we have made many important strides in securing our country from terrorism since 9/11.

But the threat continues to evolve. In some ways, the threat today may be at its most heightened state since the attacks nearly 10 years ago. In addition to the core al-Qaeda group, which still represents a threat to the United States, despite its diminished capabilities, we now face threats from a number of al-Qaeda associates that share its violent extremist ideology.

Among these groups, we are also seeing an increased emphasis on recruiting Americans and Westerners to carry out attacks. These groups are trying to recruit people to carry out attacks.

They have connections to the West, but who do not have strong ties to terrorist groups that could possibly tip off the intelligence community.

They are also encouraging individuals in the West to carry out their own small-scale attacks, which require less of the coordination and planning that could raise red flags and lead to an attack disruption.

This means that the threat has evolved in such a way that we have to add to our traditional counterterrorism strategies, which, in the past, have looked at the attack as coming from abroad.

The realities of today's threat environment also means that State and local law enforcement officers will more often be in the first position to notice the signs of a planned attack.

So our focus must be on aiding law enforcement and helping to provide them with the information and resources they need to secure their own communities from the threats they face.

To this end, the Department of Homeland Security is working to counter violent extremism here at home by helping law enforcement use many of the same techniques and strategies that have proven successful in combating violence in Americans communities.

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DHS is moving forward in this area, based on the recommendations provided to us by the experts on the Homeland Security Advisory Council.

We are releasing the first iteration of a community-oriented policing curriculum for front-line officers, which is aimed at helping them to counter violent extremism in their communities.

That curriculum is being focus grouped right now down at FLETC. We are sharing among State and local officers unclassified case studies about the size of violent extremism. We are helping communities to share with each other best practices about forming productive community partnerships.

This way, law enforcement across can better know what works and what does not.

We are helping law enforcement to reach out to American communities, to include them as partners in the effort to combat the presence of violent extremism in our country.

Americans of all stripes resoundingly reject violence, which we must use as an important tool in countering violent extremism here at home.

DHS is also expanding our own outreach to communities, and conducting these initiatives in a way consistent with Americans' rights and liberties.

At the same time, we are building a new homeland security architecture that guards against the kinds of threats we are seeing right here at home.

There are four major parts of this architecture I want to mention here today.

The first are the joint terrorism task forces, which are led by the FBI. These task forces bring together agencies and jurisdictions to jointly investigate terrorism cases.

DHS has hundreds of personnel supporting the 104 JTTFs across the country.

The second is the network of State-and locally-run fusion centers that bring together agencies and jurisdictions to share information about the threat picture and what it means for our communities.

This information sharing and analytical work complements the investigative work done by the JTTFs.

DHS is intent on helping these fusion centers to develop their core capabilities to share and analyze information and to provide State and local law enforcement with useful, actionable information they can use to better protect their own communities.

We are supporting fusion centers in many ways. Among them, we are providing DHS personnel to work in them and are providing properly cleared law enforcement personnel with classified threat information.

The third is the Nation-wide Suspicious Activity Reporting initiative, or the SAR initiative. We are working closely with our partners at the Department of Justice on this project.

The SAR initiative creates a standard process for law enforcement to identify, document, vet and share reports of suspicious incidents or behaviors associated with specific threats of terrorism.

The reports then can be used to identify and share a broader trend.

To date, the SAR initiative is under various stages of implementation at 33 sites that cover two-thirds of the American population. It should be fully implemented across the country by September.

We are also working with DOJ and major law enforcement associations to provide SAR training to all front-line enforcement officers in the country. They will learn how to properly make, vet, share, and analyze reports in accordance with best practices and with regard to civil rights and civil liberties. Thousands of officers have already been trained, and we expect to train virtually all front-line officers in the country by this fall.

The pilots of the SAR program have proven its tremendous value to law enforcement, and I believe it will be a critical tool in strengthening the ability of law enforcement to protect our communities from acts of terrorism.

The fourth piece of the new homeland security architecture that I want to mention is the "If You See Something, Say Something" campaign. This campaign focuses on the positive role Americans can play in our own security. It focuses on fostering the kind of public vigilance that we know is critical to the success of community-oriented policing.

We constantly see examples of why this sort of vigilance is so important, not just in the attempted Times Square bombing last May, but also just last month in Spokane, Washington, when city workers noticed a suspicious backpack and notified police before an MLK Day parade.

DHS is rolling out this campaign across the country and in many important sectors, including passenger rail, Amtrak, sports stadiums—you may have seen it in the stadium at the Super Bowl—retail stores, and more.

Now, on top of these four pieces, last month, I also announced changes to the National Terrorism Advisory System. We are replacing the old system of color-coded alerts with a new system that aims to provide more useful information to the public and to those who need it.

This new system was developed collaboratively by a bipartisan group and with the consultation of law enforcement. It reflects our need to be ready, while also promising to tell Americans everything we can when new threat information affects them.

In addition, to what I have mentioned here today, there are numerous other areas of action I have detailed in my written statement, Mr. Chairman, and ask that that statement be included in the record.

Now, thank you again for inviting me to testify today. I look forward to working with this committee and its leadership in this new Congress as we continue to make progress in securing our Nation. I will be happy to take your questions once you have heard from Director Leiter.

[The statement of Secretary Napolitano follows:]

PREPARED STATEMENT OF JANET NAPOLITANO

FEBRUARY 9, 2011

Chairman King, Ranking Member Thompson, and Members of the committee: Thank you for the opportunity to testify today about the changing terrorist threat that the United States faces, and how the Department of Homeland Security is re-

sponding. I am glad to be here today with my colleague, Director Leiter. I look forward to continuing to work with this committee and its leadership in this new Congress, and I expect that, working together, we will continue to make great strides in securing our country.

THE RESPONSE TO A CHANGING THREAT

Since 9/11, the United States has made important progress in securing our Nation from terrorism. Nevertheless, the terrorist threat facing our country has evolved significantly in the last ten years—and continues to evolve—so that, in some ways, the threat facing us is at its most heightened state since those attacks. This fact requires us to continually adapt our counterterrorism techniques to effectively detect, deter, and prevent terrorist acts.

Following 9/11, the Federal Government moved quickly to build an intelligence and security apparatus that has protected our country from the kind of large-scale attack, directed from abroad, that struck us nearly 10 years ago. The resulting architecture yielded considerable success in both preventing this kind of attack and limiting, though not eliminating, the operational ability of the core al-Qaeda group that is currently based in the mountainous area between Afghanistan and Pakistan.

Today, however, in addition to the direct threats we continue to face from al-Qaeda, we also face growing threats from other foreign-based terrorist groups that are inspired by al-Qaeda ideology but have few operational connections to the core al-Qaeda group. Perhaps most crucially, we face a threat environment where violent extremism is not defined or contained by international borders. Today, we must address threats that are homegrown as well as those that originate abroad.

One of the most striking elements of today's threat picture is that plots to attack America increasingly involve American residents and citizens. We are now operating under the assumption, based on the latest intelligence and recent arrests, that individuals prepared to carry out terrorist attacks and acts of violence might be in the United States, and they could carry out acts of violence with little or no warning.

Over the past 2 years, we have seen the rise of a number of terrorist groups inspired by al-Qaeda ideology—including (but not limited to) al-Qaeda in the Arabian Peninsula (AQAP) from Yemen, al-Shabaab from Somalia, and Tehrik-e Taliban Pakistan (TTP)—that are placing a growing emphasis on recruiting individuals who are either Westerners or have connections to the West, but who do not have strong links to terrorist groups, and are thus more difficult for authorities to identify. We saw this, for instance, in the case of Umar Farouk Abdulmutallab, who is accused of attempting to detonate explosives aboard a Detroit-bound plane on December 25, 2009; and Faisal Shahzad, who attempted to detonate a bomb in Times Square in May of last year. These groups are also trying to inspire individuals in the West to launch their own, smaller-scale attacks, which require less of the advanced planning or coordination that would typically raise red flags. The logic supporting these kinds of terrorist plots is simple: They present fewer opportunities for disruption by intelligence or law enforcement than more elaborate, larger-scale plots by groups of foreign-based terrorists.

This threat of homegrown violent extremism fundamentally changes who is most often in the best position to spot terrorist activity, investigate, and respond. More and more, State, local, and Tribal front-line law enforcement officers are most likely to notice the first signs of terrorist activity. This has profound implications for how we go about securing our country against the terrorist threat, and requires a new kind of security architecture that complements the structure we have already built to protect America from threats coming from abroad.

Over the past 2 years, the Department of Homeland Security has been working diligently to build this new architecture in order to defend against this evolving threat. There are two dimensions of this architecture that I will discuss today before I detail other major developments in our defenses against terrorism over the past year.

The first part of our effort is working directly with law enforcement and community-based organizations to counter violent extremism at its source, using many of the same techniques and strategies that have proven successful in combating violence in American communities. Law enforcement at the State, local, and Federal levels are leveraging and enhancing their relationships with members of diverse communities that broadly and strongly reject violent extremism.

Second, DHS is focused on getting resources and information out of Washington, DC and into the hands of State and local law enforcement, in order to provide them with the tools they need to combat the threats their communities face. Because State and local law enforcement are often in the best position to first notice the signs of a planned attack, our homeland security efforts must be interwoven in the

police work that State, local, and Tribal officers do every day. We must make sure that officers everywhere have a clear understanding of the tactics, behaviors, and other indicators that could point to terrorist activity. Accordingly, DHS is improving and expanding the information-sharing mechanisms by which officers on the beat are made aware of the threat picture and what it means for their communities. DHS is doing so in alignment with the vision of Congress and the direction the President has set for a robust information sharing environment. These efforts include providing training programs for local law enforcement to help them identify indicators of terrorist activity, as well as our work with our partners at the Department of Justice (DOJ) on the Nationwide Suspicious Activity Reporting Initiative, which has created a standardized system for reporting suspicious activity so that this information can be analyzed against National trends and shared across jurisdictions. And we are encouraging Americans to alert local law enforcement if they see something that is potentially dangerous through the "If You See Something, Say Something" campaign. The kind of vigilance that this campaign promotes has helped to foil terrorist plots in the past, including last month in Spokane, Washington.

Taken together, these steps lay a strong foundation that police and their partners across the country can use to protect their communities from terrorism and violence. While many kinds of violent motivations threaten our security,[1] these initiatives are helping to build a strong foundation of preparedness that will be embedded in the fabric of cities and towns across the Nation. Indeed, what we are building to secure America from every type of attack is a homeland security architecture that helps law enforcement everywhere protect their communities from any type of attack. This homeland security architecture will be paired with efforts to better understand the risk confronting the homeland, and to protect the privacy rights and civil liberties of all Americans.

COUNTERING VIOLENT EXTREMISM (CVE)

Since 2009, more than two dozen Americans have been arrested on terrorism-related charges. More broadly, a report last month from the New York State Intelligence Center, the fusion center for the State of New York, examining 32 major terrorism cases in the United States related to al-Qaeda-like ideology since 9/11, shows that 50 of the 88 individuals involved in those plots were U.S. citizens at the time of their arrests, and among those citizens, a clear majority of were natural-born.[2]

This report demonstrates why we must confront the threat of homegrown violent extremism in order to truly secure our country. We have a clear path forward to guide our efforts on this front. The Homeland Security Advisory Council's (HSAC) Countering Violent Extremism Working Group—comprised of security experts, elected officials, law enforcement leaders, community leaders, and first responders from around the country—has provided DHS with a number of recommendations on how to support local law enforcement and community-based efforts to identify and combat sources of violent extremism.

One major recommendation was to develop a CVE curriculum for State and local law enforcement that is focused on community-oriented policing, and that would help enable front-line personnel to identify activities that are indicators of potential terrorist activity and violence. We have now developed the first iteration of this curriculum, through partnership with the Major Cities Chiefs Association, the International Association of Chiefs of Police, the Department of Justice, the Counter Terrorism Academy, and the Naval Postgraduate School. The first training with this CVE curriculum will take place this month at DHS' Federal Law Enforcement Training Center (FLETC). Law enforcement from New York, Detroit, the Twin Cities, Chicago, Washington DC, and Los Angeles are invited to participate. This curriculum will continue to be developed and refined in consultation with our partners, and it will become widely available through regional policing institutes, in addition to FLETC. The eventual goal is to include this curriculum in the basic and in-service training that is provided to all new law enforcement personnel.

In forming these kinds of community-based partnerships, it is important that communities learn from each other about what works in countering violent extremism. To support this effort, we work closely with a diverse collection of religious, ethnic, and community organizations. As the President said in his State of the

[1] An examination of 86 terrorist cases in the United States from 1999 to 2009 by the Institute for Homeland Security Solutions ("Building on Clues: Examining Successes and Failures in Detecting U.S. Terrorist Plots, 1999–2009," October 2010) shows that nearly half of those cases were related to al-Qaeda or al-Qaeda-inspired ideology, with the remainder due to a number of other violent extremist motivations.

[2] New York State Intelligence Center, "The Vigilance Project: An Analysis of 32 Terrorism Cases Against the Homeland," December 2010.

Union address, in the face of violent extremism, "we are responding with the strength of our communities." A vast majority of people in every American community resoundingly reject violence, and this certainly includes the violent, al-Qaeda-style ideology that claims to launch attacks in the name of their widely rejected version of Islam. We must use these facts as a tool against the threat of homegrown violent extremism. In conjunction with these communities and with the Department of Justice and the Program Manager for the Information Sharing Environment, we have published guidance on best practices for community partnerships, which has been distributed to local law enforcement across the country. DHS also holds regular regional meetings—which include State and local law enforcement, State and local governments, and community organizations—in Chicago, Detroit, Los Angeles, and Minneapolis. These regional meetings have enabled participants to provide and receive feedback on successful community-oriented policing and other programs aimed at preventing violence.

DHS has also issued, and continues to compile, unclassified case studies that examine recent incidents involving terrorism so that State and local law enforcement, State and local governments, and community members can understand the warning signs that could indicate a developing terrorist attack. These case studies focus on common behaviors and indicators regarding violent extremism to increase overall situational awareness and provide law enforcement with information on tactics, techniques, and plans of international and domestic terrorists.

DHS has also conducted "deep dive" sessions with the intelligence directors of major city police departments and with the leadership of State and major urban area fusion centers. DHS leaders meet with these individuals to discuss case studies, terrorist techniques, and current or novel indicators of terrorism, so that these leaders can inculcate these lessons in their own institutions.

The United States Government as a whole is also working with our international allies who have experience with homegrown terrorism. The State Department has the lead for these international activities, but DHS is also working with foreign governments that share many of our security concerns. In the past several months, DHS has participated in bilateral conferences with partners in Canada and the United Kingdom on countering violent extremism, and these and additional conversations will continue to leverage lessons our partners have learned that may benefit law enforcement in the United States.

We will also leverage grant programs to support training and technical assistance in building community partnerships and local participation in the SAR Initiative. Pending our fiscal year 2011 appropriation, DHS, the Office of Community Oriented Policing Services (COPS) within DOJ, and the DOJ Bureau for Justice Assistance within the DOJ are working together to develop a joint grant resource guide for State and local law enforcement that leverages relevant funds and programs for community-oriented policing. At the same time, DHS is expanding engagement through our Privacy Office and our Office for Civil Rights and Civil Liberties to help DHS personnel and law enforcement on the ground better understand and identify threats and mitigate risks to our communities while ensuring these efforts respect the rights enjoyed by all Americans.

## SUPPORTING LAW ENFORCEMENT WITH THE INFORMATION AND RESOURCES THEY NEED

As I mentioned above, a major role of the Department of Homeland Security is to get information and resources out of Washington, DC and into the hands of law enforcement throughout the country. Local law enforcement, community groups, citizens, and the private sector play as much of a role in homeland security as the Federal Government. That is why we emphasize that "homeland security starts with hometown security."

DHS has been working to expand our efforts to build the capacities of State, local, Tribal, and territorial law enforcement over the past 2 years to support four main priorities. First, the information and intelligence provided to States and local authorities should be timely, actionable, and useful to their efforts to protect local communities from terrorism and other threats. Second, we should support State and local law enforcement efforts to recognize the behaviors and indicators associated with terrorism, and incorporate this knowledge into their day-to-day efforts to protect their communities from terrorist acts violent crime. Third, we should ensure that information about terrorism-related suspicious activity is shared quickly among all levels of government, so that information from the front lines can be factored into larger analytic efforts regarding the threat picture across the whole country. Fourth, we should encourage a "whole of Nation" approach to security, where officers on the ground are supported by an informed, vigilant public that plays a key role in helping to secure our country against new and evolving threats.

We have dedicated significant resources to building four major pieces of our new homeland-security architecture to work towards these goals. The four pieces are Joint Terrorist Task Forces (JTTFs), State and major urban area fusion centers, the Nation-wide SAR Initiative, and the "If You See Something, Say Something" campaign.

*Joint Terrorism Task Forces*

A critical piece of the homeland security architecture is the mechanism created to jointly investigate terrorism cases: the Joint Terrorism Task Forces led by the FBI. Hundreds of DHS personnel from eleven DHS components are currently working to support and participate in the 104 JTTFs across the country, all of which marshal resources from a number of sources to jointly conduct terrorism investigations. Our Nation's JTTFs have been successful in mitigating the terrorist threat in a number of instances, including in the investigation of Najibullah Zazi, who was arrested in 2009 for a terrorist plot to attack the New York transit system. In that case, several FBI field offices and their JTTFs (including the New York JTTF) contributed to efforts in identifying Zazi, conducting surveillance of him, and arresting Zazi before he could execute his attack, while also identifying Zazi's associates.

*Fusion centers*

The second element is the network of State and major urban area fusion centers, which serve as focal points for information sharing among all levels of government. While JTTFs are investigative teams that bring agencies together to investigate particular terrorism cases, fusion centers are analytical and information-sharing entities that bring agencies together to assess local implications of threat information in order to better understand the general threat picture. These centers analyze information and identify trends to share timely intelligence with Federal, State, and local law enforcement including DHS, which then further shares this information with other members of the intelligence community. In turn, DHS provides relevant and appropriate threat information from the intelligence community back to the fusion centers. Today, there are 72 State- and locally-run fusion centers in operation across the Nation, up from a handful in 2006. Our goal is to make every one of these fusion centers a center of analytic excellence that provides useful, actionable information about threats to law enforcement and first responders. To do this, we have deployed 68 experienced DHS intelligence officers to fusion centers across the country. We are committed to having an officer in each fusion center. DHS further supports fusion centers through the grants process, and, as fusion centers become fully operational, by deploying the Homeland Security Data Network to provide access to classified homeland security threat information to qualified personnel. Our support for fusion centers is focused on supporting them to fully achieve four baseline capabilities: the ability to receive classified and unclassified threat-related information from the Federal Government; the ability to assess the local implications of threat-related information through the use of risk assessments; the ability to further disseminate to localities threat information, so local law enforcement can recognize behaviors and indicators associated with terrorism; and the ability to share, when appropriate, locally-generated information with Federal authorities, in order to better identify emerging threats. The Department of Justice also work closely with fusion centers to ensure that the analytical work of fusion centers and the investigative work of JTTFs complement each other.

*Nationwide Suspicious Activity Reporting Initiative*

The third piece of our homeland security architecture that I described earlier is the Nationwide Suspicious Activity Reporting, or SAR, Initiative, which DHS is working closely with DOJ in order to expand and improve. The Nationwide SAR Initiative creates a standard process for law enforcement to identify, document, vet, and share reports of suspicious incidents or behaviors associated with specific threats of terrorism. The reports then can be used to identify broader trends. To date, the SAR Initiative is under various stages of implementation at 33 sites that cover two-thirds of the American population, and it should be fully implemented across the country by September of this year.

Importantly, this initiative also trains frontline, analytic, and executive personnel to recognize behaviors and indicators associated with terrorism, and to distinguish them from non-suspicious and legal behaviors. Thus far, more than 13,000 frontline Federal, State, and local law enforcement personnel across the country have received SAR training, and it is expected that virtually all frontline law enforcement personnel in the United States—hundreds of thousands of officers—will receive this training by the autumn of this year, thanks in large part to the partnership of the International Association of Chiefs of Police, the Major Cities Chiefs Association, the Major County Sheriffs' Association, and the National Sheriffs' Association. As part

of the SAR Initiative, we are also installing information-sharing technologies within DHS that enable suspicious activity reports that are vetted by specially trained analysts to be forwarded to JTTFs and to be accessible to other fusion centers and DHS offices. In conjunction with the Nationwide SAR Initiative, DHS is also working to provide reporting capability directly to owners and operators of critical infrastructure.

The initial stages of this program have underscored the value of this initiative. For example, over the 2 years it was involved in the pilot, one major city reported that implementation of the initiative resulted in seventeen reports related to an open FBI terrorism case. Over those same 2 years, a total of 393 reports were accepted by local JTTFs for further investigation, and local investigations resulted in 90 additional arrests for weapons offenses and related charges. Separately, as the media has already reported, a Chicago Police Department officer filed a suspicious activity report in summer 2009 about David Coleman Headley based on observations the officer made in a Chicago park. Headley was subsequently tied to the terrorist attacks in Mumbai in November of 2008 and was arrested on U.S. charges as well. In addition, fusion centers in New York, Florida, and Virginia used suspicious activity reports and other documents to identify associates of both Faisal Shahzad and Najibullah Zazi.

*"If You See Something, Say Something"*

The fourth element of the homeland security architecture I referenced is the effort to spread awareness about the role the public plays in our security. The vigilance of Americans continues to help save lives and aid law enforcement and first responders. We saw this last month in the brave responses of many Americans in the moments after the shootings in Tucson, when members of the public subdued the shooter. We saw how the vigilance of the public can prevent an attack when a potentially deadly bomb was found prior to the start of a Martin Luther King Day parade in Spokane, Washington, after several city workers noticed a suspicious backpack and reported it to police. Of course, we all remember how last May, a street vendor alerted police to smoke coming from a car and helped to save lives during the attempted bombing in Times Square. Time and time again, we see vivid examples of why the American public's vigilance is a critical part of our security.

To foster this vigilance, we have taken a public awareness campaign with a familiar slogan—"If You See Something, Say Something," initially used by New York's Metropolitan Transit Authority and funded in part by DHS—and are spreading it across the country. This program is based on those tenets of community-oriented policing that enable the public to work closely with local law enforcement to protect their communities from crime. The campaign outlines a positive role that Americans can play in our shared security. This public education effort is being expanded to places where the Nationwide SAR Initiative is already being implemented, so we can ensure that calls to authorities will be handled appropriately and in an environment where privacy and civil-liberties protections are in place. The campaign has already been launched in a number of State and local jurisdictions, as well as within several key sectors, including Amtrak, the general aviation community, the Washington Metro, New Jersey Transit, with the NFL and the NCAA, the commercial services sector at hotels and major landmarks such as the Mall of America in Minnesota, and National retailers like Walmart; and at Federal buildings protected by the Federal Protective Service.

In addition to these four major pieces of our homeland security architecture, we are further enhancing our Nation's defenses against threats through reforms we have made to the DHS grants and the grant process. Our State and local partners everywhere are struggling to pay their bills and fund vital services. As a former governor, I know the hard choices they face. But it is critical to our National security that local communities maintain and continue to strengthen their public safety capabilities. In 2010, DHS awarded $3.8 billion to States, cities, law enforcement, and first responders to strengthen preparedness for acts of terrorism, major disasters and other emergencies. We are also changing the grant process to help them stretch these dollars even further. We have eliminated red tape by streamlining the grant process; expanded eligible expenses to fund maintenance and sustainability; and made it easier for fire grants to be put to work quickly to rehire laid-off firefighters and protect the jobs of veteran firefighters.

We also are making significant changes to the National Terrorism Advisory System (NTAS), which will make the system a better tool for disseminating information about threats both to the public and to specific sectors. Last month, I announced the end of the old system of color-coded alerts, and that we are moving forward on a 90-day implementation period in which state and local governments, law enforce-

ment agencies, private and non-profit sector partners, airports, and transport hubs will transition to this new system.

Americans have a stake in our collective security, and we trust them to do their part in our shared responsibility for our Nation's security. The new system is built on the simple premise that when a threat develops that could impact the public, we will tell the public and provide whatever information we can.

The new system reflects the reality that we must always be on alert and ready. When we have information about a specific, credible threat, we will issue a formal alert with as much information as possible. The alert may also be limited; depending on the nature of the threat, alerts may be issued only to law enforcement, or, for example, to a segment of the private sector such as shopping malls or hotels. Alternately, the alert may be issued more broadly to the American people. The alert may ask Americans to take certain actions, or to look for specific suspicious behavior. And alerts will have an end date.

This new system was developed collaboratively. It was largely the work of a bipartisan task force that included law enforcement, former mayors and governors, and members of the previous administration. I look forward to continuing to work with our many partners and with this committee to improve this system as it moves forward.

STRENGTHENING VULNERABLE SECTORS

In addition to building this foundation, DHS has also been at work strengthening sectors that have been—and continue to be—targets of attacks.

*Commercial aviation*

The latest threat information indicates that commercial aviation is still the top target of terrorists, a fact that is underscored by the terrible bombing in Moscow's Domodedovo airport last month. The attempted terrorist attack on Christmas day 2009 illustrated the global nature of the threat to aviation. That incident involved a U.S. plane flying into a U.S. city, but it endangered individuals from at least 17 foreign countries. The alleged attacker, Umar Farouk Abdulmutallab, is a Nigerian citizen educated in the United Kingdom. He received training in terrorist tactics in Yemen, purchased his ticket in Ghana, and flew from Nigeria to Amsterdam before departing for Detroit.

After this attempted terrorist attack, the U.S. Government moved quickly to strengthen security. We took immediate steps to bolster passenger screening, while addressing larger systemic issues on a global scale. We launched a global initiative to ensure international aviation security efforts were stronger, better coordinated, and designed to meet the current threat environment. With the International Civil Aviation Organization (ICAO), the United Nations body responsible for air transport, we held five regional aviation security summits which resulted in five major regional aviation security declarations, and worked closely with U.S. and international airline and airport trade associations and airline CEOs on a coordinated, international approach to enhancing aviation security. These meetings culminated in the ICAO Triennial Assembly at the beginning of October, where the Assembly adopted a historic Declaration on Aviation Security, which forges a historic new foundation for aviation security that will better protect the entire global aviation system from evolving terrorist threats.

DHS coupled these international efforts with significant advances in domestic aviation security. We have deployed additional behavior detection officers, air marshals, and explosives-detection canine teams, among other measures, to airports across the country. Through the Recovery Act, we accelerated the purchase of Advanced Imaging Technology machines for deployment to airports around the country, and currently have 486 deployed. The President's fiscal year 2011 budget request would provide funding for a further 500 AIT machines for deployment to our Nation's airports. We are also purchasing and deploying more portable explosive detection machines, Advanced Technology X-ray systems, and bottled liquid scanners. In addition, in April 2010, the United States implemented new, enhanced security measures for all air carriers with international flights to the United States that use real-time, threat-based intelligence to better mitigate the evolving terrorist threats. And in November, DHS achieved a major aviation security milestone called for in the 9/11 Commission Report, as 100 percent of passengers on flights within or bound for the United States are now being checked against Government watch lists.

*The global supply chain*

In addition to our on-going efforts to enhance international aviation security, last month I announced a new partnership with the World Customs Organization to enlist other nations, international bodies, and the private sector to strengthen the

global supply chain. As illustrated this past October by a thwarted plot to conceal explosive devices onboard cargo aircraft bound for the United States from Yemen, the supply chain is a target for those who seek to disrupt global commerce.

Securing the global supply chain is an important part of securing both the lives of people around the world as well as the stability of the global economy. Beyond the immediate impact of a potential attack on passengers, transportation workers and other innocent people, the longer-term consequences of a disabled supply chain could quickly snowball and impact economies around the world. One consequence, for example, could be that people across the world would find empty store shelves for food, serious shortages in needed medical supplies, or significant increases in the cost of energy.

To secure the supply chain, we first must work to prevent terrorists from exploiting the supply chain to plan and execute attacks. This means, for example, working with customs agencies and shipping companies to keep precursor chemicals that can be used to produce improvised explosive devices (IEDs) from being trafficked by terrorists. We must also protect the most critical elements of the supply chain, like central transportation hubs, from attack or disruption. This means strengthening the civilian capacities of governments around the world, including our own, to secure these hubs; establishing global screening standards; and providing partner countries across the supply chain with needed training and technology. Finally, we must make the global supply chain more resilient, so that in case of disruption it can recover quickly. Trade needs to be up and running, with bolstered security, if needed, as quickly as possible after any kind of event.

I am confident the global community can make great strides on all of these fronts in 2011. Just as the nations of the world were able to make historic progress on enhancing international aviation security in 2010, so too can we make global supply chain security stronger, smarter, and more resilient this year.

*Surface transportation*

DHS has also taken major steps to strengthen security for surface transportation, including passenger rail and mass transit. Many of the steps I have already described are especially important in helping to secure that environment. We conducted the initial launch of the National "If You See Something, Say Something" campaign at Penn Station in New York, in conjunction with Amtrak. The Nationwide SAR Initiative is also geared toward detecting signs of terrorism in mass transit hubs and vehicles like train stations, buses, or rail cars. This initiative includes as law enforcement partners the Amtrak Police Department as well as all police agencies serving rail networks in the Northeast corridor, providing officers to use this upgraded reporting system to refer suspicious activity to DHS and the FBI. This is in addition to the intelligence sharing that the Transportation Security Administration (TSA) conducts with Amtrak on an on-going basis, and the information-sharing work conducted by the Public Transportation Information Sharing Analysis Center. TSA special operation teams, known as Visible Intermodal Prevention and Response (VIPR) teams, work with local partners to support several thousand operations every year. The expansion of the Nation-wide SAR Initiative will continue to include our partners in the transportation sector.

We are moving forward on the implementation of the 20 recommendations made in the Surface Transportation Security Assessment, released in April as part of an administration-wide effort to address surface transportation security. DHS has the lead on 19 of these recommendations; to date we have completed five of the recommendations[3] and are making significant progress toward implementing the remainder. We are also in the rulemaking process to require background checks and security training for public transit employees, and to require vulnerability assessments and security plans for high-risk public transportation agencies, railroads, and bus operators. All of these actions will help to address a landscape where the threats to these systems are clear.

*Cybersecurity*

At the same time that we work to strengthen the security of our critical physical infrastructure, we are also working to secure cyberspace—an effort that requires coordination and partnership among the multitude of different entities in both the Government and private sector that share responsibility for important cyber infra-

[3] The completed recommendations are: Number 1, Cross Modal Risk Analyses; Number 3, Evaluate and Rank Critical Surface Transportation Systems and Infrastructure; Number 12, Gap Analysis of Existing Risk Tools and Methodologies; Number 15, Secure™ and FutureTECH™ Programs; and Number 18, Transportation Research & Development Input Process.

structure. Indeed, in just the last year, we have seen the full spectrum of cyber threats, from denial-of-service attacks and spamming to attacks with spyware. However, we have made—and are continuing to make—substantial progress at building the capability necessary to address cyber incidents on a National level.

DHS has expanded its capabilities to further secure cyberspace. Last year, we entered into a new agreement with the Department of Defense and National Security Agency to enhance our capabilities to protect against threats to civilian and military computer systems and networks. Through this agreement, personnel from DHS and the DOD are now able to call upon the resources from each other and the NSA in order to respond to attacks against our interlinked networks. We also continue to expand the number of cyber experts working for DHS, a number which has increased about fivefold in the past 2 years.

The Cyber Storm III exercise was another milestone in 2010. This exercise simulated a large-scale cyber attack on our critical infrastructure and involved participants from DHS and seven Cabinet-level Federal agencies, but also from 13 other countries and 11 States. It represented an important test for the country's National Cyber Incident Response Plan.

DHS has opened and is now growing the National Cybersecurity and Communications Integration Center (NCCIC), which is a 24/7 watch-and-warning center that works closely with both government and private-sector partners. In 2011, DHS will complete the deployment of the EINSTEIN 2 threat detection system across the Federal space. In addition, the Department will continue to develop, and begin deployment, of EINSTEIN 3, which will provide DHS with the ability to automatically detect and counter malicious cyber activity.

CONCLUSION

The terrorist threat to the homeland is, in many ways, at its most heightened state since 9/11. This threat is constantly evolving, and, as I have said before, we cannot guarantee that there will never be another terrorist attack, and we cannot seal our country under a glass dome. However, we continue to do everything we can to reduce the risk of terrorism in our Nation.

Our efforts are guided by a simple premise: To provide the information, resources, and support that the hardworking men and women of DHS, our Federal partners, and State, local, Tribal, and territorial first responders need to effectively prevent and recover from acts of terrorism and to mitigate the threats we face. This support helps to build the kind of foundation that can guard against—and bounce back from—any kind of attack, from newly emerging threats to specific sectors that have been terrorist targets in the past. Working with our Federal partners, law enforcement across the country, the private sector, and the American public, we are making great progress in addressing today's evolving terrorist threats.

Chairman King, Ranking Member Thompson, and Members of the committee: Thank you for inviting me to testify today. I can now take your questions.

Chairman KING. Thank you, Secretary Napolitano. Your statement will be made part of the record, your full statement.

I will now recognize Director Mike Leiter. Director Leiter.

**STATEMENT OF MICHAEL E. LEITER, DIRECTOR, NATIONAL COUNTERTERRORISM CENTER**

Mr. LEITER. Thank you, Chairman King, Ranking Member Thompson, Members of the committee. Thank you for having me, with Secretary Napolitano.

I hate to sound like a broken record, but I do want to add my personal thanks to Congresswoman Harman, who has been a leader in intelligence and homeland security for many years now.

She has been a staunch supporter of NCTC. The one anecdote I would pass along beyond the laws you have worked on, the oversight you have provided, Congresswoman Harman came out and spent about 2½ hours with a packed room of analysts, about 50 or 60 men and women, to talk to them about what it was like to be a senior woman in National security. Those young analysts came out glowing about their experience. I think it was the personal

touch that you provided which helped, I think, inspire another generation of National security leaders. So thank you very much.

I also want to thank the committee for coming out and visiting NCTC. I think the opportunity to see young analysts and the ways in which NCTC and DHS are so entwined in our work on a daily basis was a great opportunity.

As Chairman King noted, the past 2 years have obviously highlighted the many dangers associated with a geographically and ideologically diverse group of terrorists that seek to harm the United States and our allies. These threats are not only from outside our borders, but increasingly from within.

Although we have made enormous strides in combating and reducing the likelihood of some complex catastrophic attacks by al-Qaeda from Pakistan, we continue to face threats from many other corners.

I will briefly outline those remarks and, again, ask that my full record be made part of the—my full statement be made part of the record. To begin, I will touch on the threats that we face. Today, al-Qaeda and its allies in Pakistan still pose a threat, despite degradation suffered from extensive and sustained counterterrorism operations over the past several years and accelerated over the past 2 years.

Al-Qaeda, we believe in Pakistan is at one of its weakest points in the past decade, and it is continuously being forced to react to a reduced safe haven and personnel losses.

But it remains a very determined enemy. Of course, Osama bin Laden and Ayman al-Zawahiri maintain al-Qaeda's unity and strategic focus on the United States and other Western targets. At least five disrupted plots in Europe during the past 5 years, including the plot to attack U.S. airliners transiting between the United Kingdom and the United States, in addition to disrupted cells in the United Kingdom, Norway, and attacks against newspaper offices in Denmark demonstrate al-Qaeda in Pakistan's steadfast intentions.

We are also concerned about future homeland attacks from one of al-Qaeda's key allies within the Federally Administered Tribal Areas, or the FATA, Tehrik-i-Taliban Pakistan, TTP, the group that trained Faisal Shahzad, the Times Square bomber from May 1 of last year, as well as the potential threat from other al-Qaeda original allies within the Pakistan and Afghanistan region.

Also on Pakistan, we remain focused on Lashkar-e-Taiba, the group behind the 2008 Mumbai attacks, which remains a threat to a variety of interests in South Asia. Although LET has not yet conducted attacks in the West, it does have individuals who have been trained who have been involved in attacks, and it could pose a threat to the homeland and Europe, in addition to destabilizing South Asia more broadly.

Of course, we continue to view Yemen as a key base of operations from which al-Qaeda in the Arabian Peninsula can and has planned and executed attacks. Over the past year, AQAP expanded operations against the homeland, including, of course, the December 2009 attack, and its follow-on effort to down two U.S.-bound cargo planes in October 2010.

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In addition to these specific attacks, A.Q. has made several appeals last year to Muslims to conduct attacks on their own initiative. Specifically, over the past year, AQAP released four issues of its magazine, English magazine Inspire, which attempts to persuade adherence to launch attacks on their own in the West.

East Africa remains a key operating area for al-Qaeda associates, as well. Of course, last year, for the first time, they struck outside of Somalia, killing 74, including one American in Uganda, and they continue to attract violent extremists from across the globe, including from the United States.

Now, these were mostly threats from outside the country. As the Chairman noted, we are extremely concerned with homegrown violent extremists here in the United States. Plots disrupted in Washington, DC, Oregon, Alaska, and Maryland during the past year were indicative of a common cause rallying independent extremists to attack the homeland. Homegrown violent extremists have yet to demonstrate a sophisticated ability, but as Fort Hood demonstrated, attacks need not be sophisticated to be quite deadly.

Now, although time doesn't permit me to go into all of the threats we watch, I would just like to highlight, in addition to these threats, we continue to watch al-Qaeda in North Africa and Iraq, Hezbollah and its targeting of U.S. interests globally, and also other terrorist groups, including Greek anarchists that recently sent letter bombs to embassies in Rome and elsewhere.

In light of this changing dynamic, we have significantly evolved our capabilities to try to reduce the likelihood of a successful attack. Most notably, as you saw last week or 2 weeks ago in your visit, NCTC established a pursuit group that is designed to track down tactical leads that can lead to the discovery of threats and against the homeland. As I hope you saw, the pursuit group has repeatedly identified and passed to our operational partners like DHS key leads which might otherwise have been missed.

We are, of course, also focused on continuing to lead information integration across the U.S. Government for counterterrorism purposes. We have always had access to a plethora of databases, but in conjunction with DHS, FBI, and others, we have further developed over the past year an information technology architecture which aims to improve our ability to detect this new sort of threat.

Finally, as this committee knows quite well, counterterrorism efforts are not just about stopping attacks, but also trying to address the upstream factors that drive violent extremism. Our focus as a general matter is undercutting the terrorist narrative and building safe and resilient communities, not NCTC operationally, but with our partners like DHS, in conjunction with other parts of the U.S. Government.

Specifically, on behalf of the National security staff, we are coordinating interagency planning in partnership with departments and agencies across the U.S. Government. Where appropriate, we are helping to support and coordinate the Federal Government's engagement with American communities where terrorists are already focusing their recruiting efforts.

In my view, while government has an important role in implementing these strategies, we along with DHS view the private-sector and community institutions as key players in countering

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radicalization. We believe strongly that addressing radicalization requires community-based solutions service to local dynamics and needs.

In coordination with FBI and DHS, NCTC developed a community awareness briefing that conveys unclassified information about the realities of current terrorist recruitment to the homeland on the internet so communities can be mobilized to fight the same fight that we are involved in.

Chairman King, Ranking Member Thompson, and all the Members of the committee, thank you very much again for having us here today. As you know well, despite the improvements, perfection in this endeavor is not possible. We are working every day, 24 hours a day, tirelessly to try to stop the next attack, but we cannot guarantee 100 percent safety.

In this regard, I believe we must continue to foster domestic resilience while highlighting the ultimate futility of al-Qaeda's fight. Without your leadership—and, again, without Ms. Harman's leadership—we would not have made the strides that we have. I very much look forward to taking your questions and working with you for years to come. Thank you.

[The statement of Mr. Leiter follows:]

PREPARED STATEMENT OF MICHAEL E. LEITER

FEBRUARY 9, 2011

INTRODUCTION

Chairman King, Ranking Member Thompson, distinguished Members of the committee, thank you for the opportunity today to discuss the current state of the terrorist threat to the Homeland and the U.S. Government's efforts to address the threat. I am pleased to join Secretary of Homeland Security Janet Napolitano here today—one of the National Counterterrorism Center's (NCTC) closest and most critical partners.

The past 2 years have highlighted the growing breadth of terrorism faced by the United States and our allies. Although we and our partners have made enormous strides in reducing some terrorist threats—most particularly in reducing the threat of a complex, catastrophic attack by al-Qaeda's senior leadership in Pakistan—we continue to face a variety of threats from other corners. These of course include those commonly referred to as "homegrown terrorists" who have long-standing ties to the United States and who are often inspired by al-Qaeda's ideology. While these newer forms of threats are less likely to be of the same magnitude as the tragedy this Nation suffered in September 2001, their breadth and simplicity make our work all the more difficult.

In response, and especially since the failed December 25 attack of 2009, the counterterrorism community broadly and NCTC specifically have pursued numerous reforms to reduce the threat to the American people and our allies. These reforms address a wide variety of areas, including prioritizing CT activities across the intelligence community, clarifying counterterrorism analytic responsibilities, and improving information integration. Perhaps most notably, NCTC created a new analytical effort, the Pursuit Group, to help track down tactical leads that can lead to the discovery of threats aimed against the Homeland or U.S. interests abroad. None of these reforms are a panacea, but in combination I believe they reduce the likelihood of a successful attack.

Finally, while defending against current threats we must remain focused on denying al-Qaeda and its affiliates a new generation of recruits—especially in the homeland. In that light, NCTC has remained at the forefront of identifying, integrating, coordinating, and assessing efforts that aim to undercut the terrorism narrative and prevent the radicalization and mobilization of new additional terrorists.

AL-QAEDA AND ITS ALLIES IN PAKISTAN POSE THREAT DESPITE DEGRADATION

While al-Qaeda in Pakistan remains focused on conducting attacks in the West, the group must balance that intent with concerns for its security. Sustained CT

pressure on al-Qaeda in Pakistan has degraded the group's capabilities, leaving it at one of its weakest points in the past decade.

- During the past 2 years, al-Qaeda's base of operations in the Federally Administered Tribal Areas (FATA) has been restricted considerably, limiting its freedom of movement and ability to operate. The group has been forced to react continuously to personnel losses that are affecting the group's morale, command and control, and continuity of operations.

Al-Qaeda continues to prize attacks against the U.S. Homeland and our European allies above all else. We remain vigilant to the possibility that despite the degradation of the organization, al-Qaeda already may have deployed operatives to the West for attacks. Al-Qaeda's senior-most leaders—Usama Bin Ladin and Ayman al-Zawahiri—maintain al-Qaeda's unity and strategic focus on U.S. targets, especially prominent political, economic, and infrastructure targets.

- Europe is a key focus of al-Qaeda plotting. At least five disrupted plots during the past 5 years—including a plan to attack airliners transiting between the United Kingdom and the United States, disrupted cells in the United Kingdom and Norway, and two disrupted plots to attack a newspaper office in Denmark—demonstrate al-Qaeda's steadfast intentions.

We remain concerned about future Homeland attacks from one of al-Qaeda's key allies in the FATA, Tehrik-e-Taliban Pakistan (TTP), the group that trained the bomber who failed in his attempt in 2010 to detonate a bomb in Times Square. TTP is an alliance of militant groups that formed in 2007 with the intent of imposing its interpretation of sharia law in Pakistan and expelling the Coalition from Afghanistan. TTP leaders maintain close ties to senior al-Qaeda leaders, providing critical support to al-Qaeda in the FATA and sharing some of the same global violent extremist goals.

Other al-Qaeda allies in Pakistan, the Haqqani network and Harakat-ul Jihad Islami (HUJI), have close ties to al-Qaeda. Both groups have demonstrated the intent and capability to conduct attacks against U.S. persons and targets in the region, and we are looking closely for any indicators of attack planning in the West.

Lashkar-e-Tayyiba (LT)—another Pakistan-based Sunni extremist group—poses a threat to a range of interests in South Asia. Its previous attacks in Kashmir and India have had a destabilizing effect on the region, increasing tensions and brinkmanship between New Delhi and Islamabad, and we are concerned that it is increasing its operational role in attacks against Coalition forces in Afghanistan. Although LT has not previously conducted attacks in the West, LT—or individuals who trained with LT in the past—could pose a threat to the Homeland and Europe, particularly if they were to collude with al-Qaeda operatives or other like-minded terrorists.

## THE INCREASING THREAT FROM AL-QAEDA'S REGIONAL AFFILIATES

As al-Qaeda's affiliates continue to develop and evolve, the threat posed by many of these groups to U.S. interests abroad and the Homeland has grown. The affiliates possess local roots and autonomous command structures and represent a talent pool that al-Qaeda leadership may tap to augment operational efforts.

*Al-Qaeda in the Arabian Peninsula (AQAP).*—We continue to view Yemen as a key battleground and regional base of operations from which AQAP can plan attacks, train recruits, and facilitate the movement of operatives. We assess AQAP remains intent on conducting additional attacks targeting the Homeland and U.S. interests overseas and will continue propaganda efforts designed to inspire like-minded individuals to conduct attacks in their home countries.

- AQAP has orchestrated many attacks in Yemen and expanded external operations to Saudi Arabia and the Homeland, including the assassination attempt on a Saudi Prince in August 2009, the attempted airliner attack during December 2009, and its follow-on effort to down two U.S.-bound cargo planes in October 2010 using explosives-laden printer cartridges.
- Anwar al-Aulaqi, a dual U.S.-Yemeni citizen and a leader within AQAP, played a significant role in the attempted airliner attack and was designated in July as a specially designated global terrorist under E.O. 13224 by the U.S. Government and the UN's 1267 al-Qaeda and Taliban Sanctions Committee. Al-Aulaqi's familiarity with the West and his operational role in AQAP remain key concerns for us.
- AQAP's use of a single operative using a prefabricated explosive device in their first attempted Homeland attack, and the lack of operatives associated with their second attempted attack, minimized its resource requirements and reduced visible signatures that often enable us to detect and disrupt plotting efforts.

*Al-Qaeda Operatives in East Africa and Al-Shabaab.*—East Africa remains a key operating area for al-Qaeda associates and the Somalia-based terrorist and insurgent group al-Shabaab. Some al-Shabaab leaders share al-Qaeda's ideology, publicly praising Usama Bin Ladin and requesting further guidance from him, although Somali nationalist themes are also prevalent in their public statements and remain one of the primary motivations of rank-and-file members of al-Shabaab. The Somalia-based training program established by al-Shabaab and al-Qaeda continues to attract foreign fighters from across the globe, to include recruits from the United States. At least 20 U.S. persons—the majority of whom are ethnic Somalis—have traveled to Somalia since 2006 to fight and train with al-Shabaab. In June and July 2010, four U.S. citizens of non-Somali descent were arrested trying to travel to Somalia to join al-Shabaab.

- Omar Hammami, a U.S. citizen who traveled to Somalia in 2006 and is now believed to be one of al-Shabaab's most prominent foreign fighters, told the New York Times last year that the United States was a legitimate target for attack. The potential for Somali trainees to return to the United States or locations in the West to launch attacks and threaten Western interests remains a significant concern.
- This past year, al-Shabaab claimed responsibility for its first transnational attack outside of Somalia—the suicide bombings in Kampala, Uganda in July that killed 74 people including one American. Al-Shabaab leaders have vowed additional attacks in the region.

*Al-Qaeda in the Lands of the Islamic Maghreb (AQIM).*—AQIM is a threat to U.S. and other Western interests in North and West Africa, primarily through kidnap-for-ransom operations and small-arms attacks, though the group's recent execution of several French hostages and first suicide bombing attack in Niger last year highlight AQIM's potential attack range. Disrupted plotting against France and publicized support for Nigerian extremists reveal the group's continuing aspirations to expand its influence. Sustained Algerian efforts against AQIM have significantly degraded the organization's ability to conduct high-casualty attacks in the country and compelled the group to shift its operational focus from northern Algeria to the vast, ungoverned Sahel region in the south.

*Al-Qaeda in Iraq (AQI).*—On-going CT successes against AQI—to include the deaths of the group's top two leaders last year in a joint Iraqi/U.S. military operation—have continued to put pressure on the organization. However, despite these on-going setbacks, AQI remains a key al-Qaeda affiliate and has maintained a steady attack tempo within Iraq, serving as a disruptive influence in the Iraqi Government formation process and a threat to U.S. forces. We are concerned that AQI remains committed to al-Qaeda's global agenda and intent on conducting external operations, to include in the U.S. Homeland.

HOMEGROWN EXTREMIST ACTIVITY REMAINS ELEVATED

In addition to threats emanating from outside the country, we also remain concerned that homegrown violent extremists (HVEs) continue to pose an elevated threat to the Homeland. Plots disrupted in Washington, DC, Oregon, Alaska, and Maryland during the past year were unrelated operationally, but indicate that the ideology espoused by al-Qaeda and its adherents is motivating, or being used as a justification by, individuals to attack the Homeland. Key to this trend has been the development of a U.S.-specific narrative, particularly in terrorist media available on the internet that motivates individuals to violence. This narrative—a blend of al-Qaeda inspiration, perceived victimization, and glorification of past Homegrown plotting—addresses the unique concerns of like-minded, U.S.-based individuals. HVEs continue to act independently and have yet to demonstrate the capability to conduct sophisticated attacks, but as Fort Hood shooter Nidal Hasan demonstrated, attacks need not be sophisticated to be deadly.

- Similar to 2009, arrests of HVEs in the United States in 2010 remained at elevated levels, with four plots disrupted in the Homeland. The individuals involved were motivated to carry out violence on the basis of a variety of personal rationales, underscoring the continued intent by some HVEs to take part in violence despite having no operational connections to terrorists overseas.
- Increasingly sophisticated English-language propaganda that provides extremists with guidance to carry out Homeland attacks remains easily accessible via the internet. English-language web forums also foster a sense of community and further indoctrinate new recruits, both of which can lead to increased levels of violent activity.
- The prominent profiles of U.S. citizens within overseas terrorist groups—such as Omar Hammami in al-Shabaab and Anwar al-Aulaqi in AQAP—may also

provide young U.S.-based individuals with American role models in groups that in the past may have appeared foreign and inaccessible. These individuals have also provided encouragement for homegrown extremists to travel overseas and join terrorist organizations.

AL-QAEDA AND AFFILIATES SUSTAIN MEDIA CAMPAIGN

Al-Qaeda senior leaders issued significantly fewer video and audio statements in 2010 than 2009. As previously, public al-Qaeda statements rarely contained a specific threat or telegraphed attack planning, but they continue to provide a window into the group's strategic intentions.

Al-Qaeda spokesmen continued to call for violence against Western targets, including appeals last year for Muslims to conduct attacks on their own initiative, and they reiterated assertions that U.S. outreach to Muslims is deceptive. Bin Ladin, al-Zawahiri, and American spokesman Adam Gadahn also released statements that decried the evils of climate change and expressed sympathy for Muslims affected by severe flooding in Pakistan, probably in an effort to bolster the group's image among mainstream Muslims.

AQAP since September has released three issues of Inspire—the group's English-language on-line magazine produced by its media wing—including a "Special Edition" in November that glorified the group's disrupted 29 October cargo plot.

OUR EVOLVING RESPONSE: LESSONS FROM 12/25 AND BEYOND

In light of this dynamic terrorist landscape, the CT Community has significantly evolved to improve our chances of disrupting terrorist attacks before they occur and reducing the likelihood that attacks will be successful. These reforms address a wide variety of areas, including prioritizing CT reforms across the intelligence community, clarifying counterterrorism analytic responsibilities, improving our ability to develop tactical leads like the identity of a future Umar Farouk Abdulmutallab by creating NCTC's "Pursuit Group," expanding watchlisting resources and modifying watchlisting criteria, accelerating information integration across key interagency data holdings, and continuing to prioritize sharing of intelligence with State, local, and Tribal partners.

With respect to our improved ability to develop tactical leads, 1 year ago I directed the creation of a new "Pursuit Group" within NCTC, which now focuses exclusively on information that could lead to the discovery of threats aimed against the Homeland or U.S. interests abroad. The Pursuit Group's six analytical teams work with our IC partners to identify and examine as early as possible leads that could become terrorist threats; to pursue unresolved and non-obvious connections; and to inform in a timely manner appropriate U.S. Government entities for action. Although I cannot discuss these findings in an unclassified setting, I can inform the committee that the Pursuit Group has repeatedly identified key leads that would have otherwise been missed amidst a sea of uncorrelated data.

We are also continuing to implement revamped watchlisting protocols, and—in conjunction with the FBI and DHS—we have made major improvements to the Terrorist Identities Datamart Environment (i.e., the classified backbone of terrorist watchlisting also known as "TIDE") to better support watchlisting, information sharing, and analysis. In addition, a comprehensive training program has been developed for the counterterrorism community involved in watchlisting and screening to ensure consistent application of watchlisting standards across the U.S. Government. Finally, I restructured NCTC's directorates to bring improved focus to terrorist identities; the new directorate brings additional resources to bear to enhance watchlisting records and fuse biometric and biographic watchlisting data.

Supporting all of these and other NCTC missions, NCTC has continued to lead information integration across the counterterrorism community. NCTC has long had appropriate access to a plethora of databases that span every aspect of terrorism information, but over the past year in conjunction with the ODNI, DHS, CIA, NSA, DOD, and DOJ (including FBI), we have further developed an Information Technology infrastructure to better meet the demands of the evolving threat. Such steps include the enhancement of a "Google-like" search across databases, and the development of a "CT Data Layer" to discover non-obvious terrorist relationships so that analysts can examine potential findings more efficiently. All of these efforts are being pursued vehemently, but they also require careful consideration of complex legal, policy, and technical issues as well as the implementation of appropriate privacy, civil liberty, and security protections.

And as we improve our ability to counter the evolving threat, we remain focused on sharing intelligence outside the "Federal family." Working with and through DHS and FBI, NCTC's Interagency Threat Assessment and Coordination Group

(ITACG) continues to bridge the intelligence information gap between traditional intelligence agencies and State, local, Tribal (SLT) partners, playing a pivotal role in assisting Federal partners in interpreting and analyzing intelligence intended for dissemination to SLT mission partners.

COUNTERING VIOLENT EXTREMISM

As this committee knows well, counterterrorism efforts are not just about stopping plots but must also include addressing "upstream factors" that drive violent extremism. NCTC continues to play a significant role in this realm, both overseas and at home. Pursuant to our authorities under the Intelligence Reform and Terrorism Prevention Act, NCTC helps identify, integrate, coordinate, and assess U.S. Government efforts that aim to counter and prevent the recruitment and radicalization of a new generation of terrorists. Our focus is on both near- and long-term efforts to undercut the terrorist narrative and promote safe and responsive communities, thereby minimizing the pool of people who would support violent extremism.

More specifically, NCTC works with colleagues in Federal, State, local and Tribal governments; with international partners; and with the private sector to integrate all elements of National power to counter and prevent violent extremism. We are coordinating an interagency planning effort to address domestic radicalization. Where appropriate, NCTC is also helping support and coordinate the Federal Government's engagement with American communities where terrorists are focusing their recruiting efforts.

In all of our efforts we work closely with security agencies such as DHS and FBI, as well as non-traditional Federal partners such as the Department of Health and Human Services and the Department of Education. For example, NCTC participated in an event with the Department of Education where five school districts came together to discuss unique challenges facing schoolchildren of Somali descent, including targeted recruitment efforts by al-Shabaab. These non-security partners offer expertise in social services and the capacity to act on the local and community level. By coordinating and integrating a broad community of interest, NCTC ensures a "whole of government" approach that is vital to addressing and preventing radicalization.

While Government has an important role in developing and implementing strategies, we view the private sector and community institutions as key players in directly countering radicalization, and we believe strongly that addressing radicalization requires community-based solutions that are sensitive to local dynamics and needs. In this regard, NCTC has engaged the private sector to provide forums in which to examine these issues. Specifically, we recently participated in an event hosted by a prominent think tank that brought together private technology experts and community members in order to explore ways to counter terrorist narratives on the internet.

NCTC in coordination with FBI and DHS has also worked with community leaders, State and local governments and law enforcement involved in countering violent extremism to understand how governments can effectively partner with their communities. It has become clear that Government can play a significant role by acting as a convener and facilitator that informs and supports—but does not direct—community-led initiatives. Based on this, NCTC has developed a Community Awareness Briefing that conveys unclassified information about the realities of terrorist recruitment in the Homeland and on the internet. The briefing aims to educate and empower parents and community leaders to combat violent extremist narratives and recruitment. NCTC has presented the briefing to communities—including Muslim American communities—around the country, leveraging, when possible, existing U.S. Government engagement platforms such as DHS and FBI roundtables.

CONCLUSION

Chairman King and Ranking Member Thompson, I want to thank you for the opportunity to testify before your committee today. Together we have made great strides in reducing the likelihood of a successful terrorist attack—especially a catastrophic one. But as you know well, perfection is no more possible in counterterrorism than it is in any other endeavor. NCTC and the entire counterterrorism community work tirelessly to reduce the likelihood of attack but we cannot guarantee safety. In this regard, I believe we must continue to foster resilience domestically while highlighting the futility of al-Qaeda's fight.

Without your leadership, the strides we have jointly made to counter the terrorist threat would not be possible. Congress's continued support is critical to the Center's mission to lead our Nation's effort to combat terrorism at home and abroad by analyzing the threat, sharing that information with our partners, and integrating all

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instruments of National power to ensure their coordinated application and thereby maximize our effectiveness at combating the threat. I look forward to continuing our work together in the years to come.

Chairman KING. Thank you, Director Leiter. I thank both witnesses for their testimony.

Secretary Napolitano, 2 years ago, when you made your first statement before this committee, I pointed out the fact that you do not use the word "terrorist" or "terrorism" even once. In today's statement, you used it more than 60 times. Is that a reflection of the growing terrorist threat? Is it a reflection of the changing emphasis within the administration? Or is it just something that happened?

Secretary NAPOLITANO. Well, I think my initial statement before the committee was one of several speeches, and it just happened to be the one that didn't use the word "terrorism."

But the plain fact of the matter is, is that I spend the bulk of my time working on counterterrorism-related activities. It can be in the TSA world. It can be in the CBP world. It can be with intel and analysis and working with our fusion centers with the NCTC and others, but this is a top priority for us.

Mr. Chairman, one area that is really not up to bat today but is a new one and is also one I think we need to watch out for is the whole word of cyber and cybersecurity and how that is going to interconnect with the terrorist——

Chairman KING. Yes. In fact, Chairman Lungren—is going to be working on that extensively during the year. How prepared do you believe the Department is to deal with the threat from biological, chemical, radiological weapons?

Secretary NAPOLITANO. Yes. Now that is an extraordinarily difficult area in the sense that we are still working on—at the science and technology level on things like detection mechanisms that are effective in all areas. Mr. Chairman, I think I would say that we are more prepared now than we were 2 years ago. Two years ago we were more prepared than 2 years before then. But there is still much work to be done.

That is why we have funded and are continuing to fund pilots of different types with laboratories and universities and actually private-sector entities around the country, particularly in the CBRN arena. That is why those things are so important. Securiing the Cities is an example of that.

Chairman KING. Thank you. Director Leiter, with the splintering of these—the development of these various splinter groups, how much control do you see coming from al-Qaeda central to those groups? If there is not control, is that good or bad?

Mr. LEITER. Mr. Chairman, I think there remains certainly ideological inspiration from al-Qaeda's senior leadership but less and less operational control. I think that is in large part due to the offensive pressure that we are applying to al-Qaeda in Pakistan.

I think to some extent that is quite good. It reduces the likelihood again of a large-scale organized attack. I think the negative aspects of it is it allows the franchises to innovate on their own. In the case of al-Qaeda and the Arabian Peninsula in Yemen and folks like Anwar al-Awlaki they have been quite successful at being innovators that make our jobs more challenging.

Chairman KING. Not to be, I guess, grading them, but would say that al-Awlaki is at least a severe threat today as Bin Laden?

Mr. LEITER. I actually consider al-Qaeda in the Arabian Peninsula with al-Awlaki as a leader within that organization probably the most significant risk to the U.S. homeland. I am hesitant to rank them too quickly, but certainly up there.

Chairman KING. Would al-Awlaki be the one who has been the most successful as far as radicalizing through the internet?

Mr. LEITER. I think al-Awlaki is probably—certainly is the most well-known English-speaking ideologue who is speaking directly to folks here in the homeland. There are several others who we are concerned with but I think al-Awlaki probably does have the greatest audience and the like. So in that sense he is the most important.

Chairman KING. How effective do you find Inspire?

Mr. LEITER. It is a difficult question. Mr. Chairman. We obviously look at Inspire. It is spiffy. It has got great graphics and in some sense we think probably speaks to individuals who are likely to be radicalized. Frankly there is very little new information in Inspire. So to that extent it is not I don't think something revolutionary and new in the substance. But again, in the way it conveys the message it is useful and we think it is attractive to English speakers.

Chairman KING. How concerned are you at the possibility of messages or signals being sent through Inspire?

Mr. LEITER. I think I would take that more in a classified setting, but as a general matter I think Inspire is attempting not to build a secret network between AQAP folks in the United States or other English-speaking countries. It is more looking to what the title suggests, inspire them to act on their own.

Chairman KING. Secretary Napolitano, in your State of the Homeland Security speech, you mentioned D-block and the President made reference to it in his State of the Union speech. We don't have the details yet. Can you give us any indication of when it will be formally unveiled or what the specific details of D-block will be?

Secretary NAPOLITANO. I don't know the exact date. We will find that for you, Mr. Chairman. But I know the President is intent on working with the Congress to set aside the D-block for public safety. It is something that both our Department and the Department the Justice advocated very strongly within the administration. But I don't know the exact date when they are going to approach the Congress about the legislative change that will——

Chairman KING. I look forward to working with you and the administration on that.

Secretary NAPOLITANO. Indeed.

Chairman KING [continuing]. Ranking Member, Mr. Thompson.

Mr. THOMPSON. Thank you very much, Mr. Chairman, for holding this hearing. Secretary Napolitano, in your testimony you went to great lengths to describe your involvement in the homeland relative to home-grown terrors. Law enforcement agencies have also talked about neo-Nazis, environmental extremists and anti-tax groups as more prevalent than al-Qaeda-inspired terrorist organizations. Have you looked at this to see if that in fact is the truth?

Secretary NAPOLITANO. Representative Thompson, not in that sense. I mean, we don't have like a scorecard. The plain fact of the matter is, is that from a law enforcement, terrorist prevention perspective we have to prepare law enforcement and communities for both types of acts.

Mr. THOMPSON. Well Mr. Leiter, given what has occurred in the last 2 years here in this country, have you been able to analyze what that threat looks like?

Mr. LEITER. Congressmen, by law the National Counterterrorism Center only looks at international terrorism or that inspired by international terrorism. So my analysts do not actually look at some of the groups that you described in your question to the Secretary.

Mr. THOMPSON. But you do communicate to the people. Am I correct? On the domestic side.

Mr. LEITER. We generally work through the Department of Homeland Security and the FBI, who has the direct operational responsibility.

Mr. THOMPSON. Madam Secretary, could you help me with that?

Secretary NAPOLITANO. In what sense?

Mr. THOMPSON. Relative to the information in terms of individuals who are being a threat to the homeland. I am trying to look at it in a broader sense. Sometimes we tend to narrow the focus. But I think what we have to do in looking at the threat is look at the entire threat. Can you share with the committee some of those other threats that you have deemed necessary to address?

Secretary NAPOLITANO. Well, what we are focused on is helping law enforcement and communities look for the tactics, the techniques, the behaviors that would indicate that a violent act, a terrorist act, is impending. Now, some of those are inspired by Islamist groups, Al-Qaeda and so forth. Others can be inspired by, like, anti-government groups flying a plane into the IRS building, for example.

So the JPTS are the ones on which we have members who case-by-case analyze what was the motivation of a particular actor at a particular time. I would say, Representative Thompson, that we see a variety of different types of motivations in addition to the Islamist motivation that we are here talking about right now.

Mr. THOMPSON. For the sake of the record, give us some of those varieties.

Secretary NAPOLITANO. They can be anti-Federal Government type of motivation. I mentioned the individual who flew the plane into the IRS building. Tim McVeigh. I worked on the Oklahoma City bombing case. Would be another great—I don't want to say great example—another example of that sort of motivation. It can be a variety of other things. As Mike indicated, the FBI works directly on those cases, has operational lead for their investigations.

Mr. THOMPSON. Mr. Leiter, let's take an international situation. The incident that occurred in October with the printer bomb. Were you involved in that?

Mr. LEITER. Yes, we were.

Mr. THOMPSON. Can you share with the committee, if you can, whether or not security gaps like that are being reviewed going forward, so that others hopefully will be closed?

Mr. LEITER. Congressmen, I can. Then I will also defer again to Secretary Napolitano, who has some broader responsibilities for cargo. Actually even before that event we were obviously concerned with the possibility of using cargo in a terrorist attack. You only have to look back at the Lockerbie bombing to know that this is something that could occur.

Since that event, we have worked at NCTC and the intelligence community to find new ways to support DHS to sharpen our ability to find individuals or shippers who we consider high-risk so those packages can be put through further screening. I think as Secretary Napolitano will echo, it is a challenge.

Secretary NAPOLITANO. Yes, Representative Thompson, even prior to October we had assembled an international initiative similar to what we have been doing on passenger air travel with respect to cargo. It involves the World Customs Organization, the International Civil Aviation Organization, and the International Maritime Organization.

What we are doing is working to have international standards requirements, and also working with the private sector who are the main air shippers. This of course was an air shipment. We are now screening 100 of at-risk cargo that is on a passenger plane inbound to the United States, which is something we had not had the capability of doing until the last year. We continue to work across the world, across different nodes of transportation, across different types of cargo, across different types of personnel who handle that cargo to secure the entire supply chain.

Mr. LEITER. Congressmen, if I could just add one point. I think this is an area where the cooperation between DHS and NCTC has really improved and been stellar over the past year. Not just with cargo, but with screened personnel. The movement now of information as we see a threat in the intelligence stream about a country or a name or a region and where we think an attack might be coming to, that movement is moving—that information is moving in real time to DHS so DHS can rapidly adjust their screening protocol. Again, that is happening on an hourly basis.

Chairman KING. The gentleman from Texas, Mr. McCaul.

Mr. MCCAUL. Thank you, Mr. Chairman.

Thank you, Madam Secretary, Director Leiter. In November 2009, I attended the Fort Hood memorial service just north of my district in Texas and saw the 13 combat boots, the rifles, talked to the soldiers who had been shot that day. They described how the Major Hasan said, "Allahu Akbar." It was very dramatic.

Some said that wasn't an act of terrorism. I said it was. I think it is the deadliest attack we have had since 9/11.

Since that time, the Senate has issued a report called, "A Ticking Time Bomb." In that report, it talks about how the Joint Terrorism Task Force in San Diego had information about Major Hasan's contacts with what you described, Director, as the most dangerous threat to the United States' security, and that is Awlaki. Unfortunately, that information was not shared with the commander, General Cone at Ford Hood, who I talked to, and I said, "Wouldn't you have liked to have known that?"

When the attack took place, the FBI agent was quoted as saying, "You know who that is? That is our boy. That is our boy."

Can you tell this committee and the American people what happened that day and what Major Hasan's connections are to the terrorist community?

Mr. LEITER. Congressman, to begin, I would just say at NCTC, within about 48 hours of that attack, we designated that a terrorist attack in what we call the worldwide incident tracking system. So from our perspective, it was—as soon as we had the initial indication of the motivation, we counted it as a terrorist attack. It can always change back; in this case, it hasn't.

With respect to his connection to Awlaki and AQAP—and I want to be very careful here, because obviously this is still a case for prosecution—but we have said publicly it looks to us like inspiration, rather than direction.

Finally, your question about what happened, I want to be careful not to speak for either Director Mueller or the Department of Defense. I think they said quite clearly at the time that information was not shared effectively between the FBI and Department of Defense. They have taken remedial action to address some of that.

I know on—for NCTC's part, since then, we have worked with the FBI to produce improved training materials and training for field offices, so there really is no question for the next special agent when he is investigating a case that he will recognize the telltale signs of radicalization and moving towards mobilization, and not just convey that to the Department of Defense, but probably be more aggressive in following that up.

Mr. MCCAUL. I mean, I think the American people—it is hard to understand—you know, you have to—and we can talk about infiltration of the military and what the threat is there, but it is hard for the average citizen to understand how the FBI could have this kind of information, that you have a major at the biggest installation in the United States in contact with one of the biggest threats to the security of the United States, and yet that information is not shared at all.

I think that is a major breakdown. I hope—and I know that is not totally within your purview and your jurisdiction, but I sure hope we can fix that—fix that problem.

Mr. LEITER. Congressman, I will say, again, I do know that the Department of Defense and FBI now have a much tighter relationship, so that information is shared. During the investigation, it was shared with a Department of Defense agent on the JTTF, but not shared back to the Army. We have also since then expanded NCTC's access to some of that granular information that was the basis for the investigation, so NCTC can help to fill those gaps and make sure the information is properly shared.

Mr. MCCAUL. Okay.

Madam Secretary, you were quoted in the Hill newspaper as saying that, with respect to the border, that the border—it is inaccurate to state that the border is out of control.

We had a briefing with Border Patrol. They said that about 44 percent of the border is under operational control. As you well know, the killings, the violence going on, you know, coming from Arizona, me coming from Texas, I would say my constituents do view it as an out-of-control state.

The special interest aliens have—has increased by 37 percent. Those are persons coming from countries that may have potentially terrorist influences. There was recently a potential terrorist that was found in the trunk of a car, paid a Mexican cartel drug dealer $5,000 to sneak across the border.

Could you just clarify the statement, in terms of your statement that it is not out of control down there?

Secretary NAPOLITANO. Oh, absolutely. First—and I will give you the full talk that I gave at UTEP.

But the border—thanks in part to the bipartisan efforts of the Congress—has more manpower, technology, and infrastructure than ever before. The numbers in terms of seizures that need to go up are going up, and the numbers in terms of illegal immigration are going way down.

The communities that are along the border—San Diego, Nogales, El Paso, and so forth—are among, in terms of violent crime statistics, are among the safest in the United States.

So what I was saying at that—from which I am quoted in part was to the cartels in Mexico: Don't bring your violence that you are doing in Juarez, et cetera, over into the United States. You will be met with an overwhelming response.

It is true that there are crimes on this side of the border. The murder of a rancher in Arizona is one example. But it is inaccurate to extrapolate from that to say that the entire border is out of control.

With respect to the 44 percent number, I think it is important to recognize that operational control is a very narrow term of art in Border Patrol lingo. Basically, it is restricted to where you have individual agents located.

It does not take into account infrastructure. It does not take into account technology, which is a force multiplier, as you know, so that I think it would be inaccurate to take from that number or that phrase to say, well, that means the other percentage of the border, 56 percent, is out of control. That would not be accurate.

Chairman KING. The gentleman's time has expired.

The gentlelady from California, Ms. Sanchez.

Ms. SANCHEZ. Thank you, Mr. Chairman.

Thank both of you for being before us again.

Secretary Napolitano, I am still worried about this whole issue of overstays with respect to visas, in particular because I belong to a couple groups that deal with the Europeans. As you know, the European Union is having a difficult time understanding why we accept some and not some others on Visa Waiver.

So I would like to know 2 things. First, can you discuss the security measures with respect to somebody being able to come from a country where there is Visa Waiver going on and how that might be infiltrated by someone like al-Qaeda to get people over here? Second, what progress are we making on the exit part of US–VISIT?

Secretary NAPOLITANO. Well, in terms of Visa Waiver, what we have is ESTA. What ESTA does is that it gives us advanced information on someone traveling to the United States on a visa waiver——

Ms. SANCHEZ. Is it working? Have we seen any places where someone or some cell group might be, in fact, trying to come in that particular way?

Secretary NAPOLITANO. Well, let me just say that it is working in terms of smoothly identifying individuals coming across. You know, we deal with so many passengers every day. So, from a systemic point of view, it is working.

However, I think it important to say that there is—no system, no matter how well working, is a 100 percent guarantee that someone will not be able, ultimately, to infiltrate it. It may be somebody about whom we have no advance information; it may be somebody who has managed to steal an identity of someone else.

This is, unfortunately, a business in which we cannot give guarantees. What we can do and what we are doing is maximizing our ability to catch somebody ahead of time and minimize the risk that they will be infiltrated.

In terms of visa overstays, in addition to U.S. Exit, let me just suggest that one of the most effective investments the Congress can make is in ICE investigative agents, because they are the ones that really find the visa overstays and get them into proceedings.

So one of the things we are looking at doing as we move forward in the budget process is being able to staff ICE appropriately in that regard.

Ms. SANCHEZ. You stated earlier, in response to one of my colleague's questions, that you believe that all this technology that we have been using at the border, in particular with respect to Mexico, is a force multiplier.

The entire time that I was the chair of the Border Subcommittee, we would get both GAO and Border Patrol saying they didn't know if some of this technology was actually going to require that we have more people or that we actually get that savings that we intuitively think should come from that.

Do you have a new study, do you have new numbers, do you have something that is showing that relationship? Because the entire time that I was the chair, which was for about 3 years, we have on record people saying that maybe it doesn't lower the amount of body power that we need.

Secretary NAPOLITANO. Well, you still need manpower. I mean, technology is no substitute for manpower. But you are never going to have enough money to put a Border Patrol agent every 100 yards along the thousands of miles of border.

So you have to have technology and infrastructure as a three-legged stool as part of a system. Then you have to have interior enforcement inside the country to back that up.

One of the reasons that I stopped the SBInet program was so that we could redeploy those moneys into technologies that we know work, that we know are force multipliers, that enable, for example, a small forward-operating base near the Tohono O'odham nation in Arizona to be a deterrent and be able to cover a larger distance than otherwise they would be able to do.

Ms. SANCHEZ. Last—and this would be to our other guest—I represent a very large Arab Muslim community in our Nation, have the second-largest community mosque, if you will. We have had a lot of situations with FBI probes and local infiltration, et cetera.

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# Exhibit 10-B

## To the Declaration of Colin Wicker

What are the safeguards that we now have in place so that we aren't sending people into mosques and trying to elicit proactively somebody to create some sort of terrorist attack?

Mr. LEITER. Well, Congresswoman, I want to be a bit careful, because although I am familiar with them, I am certainly no expert on the FBI domestic intelligence operating guidelines and the attorney general guidelines.

What I can tell you is the FBI, approved by the attorney general, has very strict guidelines on the level of intrusiveness and what they can do based on specific information about individuals not having radical thoughts, but moving to action, which should be terrorist actions.

One of the key requirements is that no investigations can be predicated on the exercise of first amendment rights. There always has to be additional evidence on which to predicate an investigation that would then lead to some of the tools that you referenced.

Ms. SANCHEZ. Has that always been the case? Because we have documented cases, of course, even out in the press and out in the public where the fact of the matter was there was instigation of these things within the mosque by our own undercover.

Mr. LEITER. I can tell you that the current attorney general guidelines were developed during the end of the Bush administration and ultimately approved under the Obama administration and signed by the current attorney general.

The key piece here, if I may, is that you have to—obviously, there are going to be places where you have to do law enforcement investigations. In my view you have to have a balanced approach, not just those law enforcement investigations, but you have to engage with those communities, with other non-law enforcement elements of the U.S. Government to make clear that this is not an adversarial situation. In fact, this is a partnership.

As you know well, many of our tips to uncover active terrorist plots in the United States have come from the Muslim community. So we have to make quite clear that the communities are part of the solution and not part of the problem. You do that through using a variety of tools, not just law enforcement.

Chairman KING. The time of the gentlelady has expired.

Dr. Broun of Georgia.

Mr. BROUN. Thank you, Mr. Chairman.

Secretary, Director, appreciate you all being here today. I have several pressing questions for both of you, and in my limited amount of time, it will allow for only one or two, and I trust that you will send a prompt response to my written questions.

My first question is for both of you, but I would like the Director to give me a written response, but I would like to address this particularly here in this hearing.

Secretary, most terrorist experts believe that given the list of incidents of homegrown radicals—and trained terrorist recruits, the United States is now a little different from Europe in terms of having a domestic terrorist problem involving the immigrant as well as indigenous Muslims as well as converts to Islam.

However, in April 2010 the Obama administration announced that it intended to remove religious terms such as "Islamic extremism" from the National security strategy. Moreover, in a May

2010 speech at the Center for Strategic and International Studies, the deputy national security adviser for homeland security and counterterrorism, John Brennan, stated that the administration would not "describe our enemy as jihadist or Islamist."

Do you believe that by disregarding the ideological factor behind the recent rise in domestic and international terrorism mainly by Islamic extremism the administration is inhibiting our ability to address and combat this dangerous trend?

Secretary NAPOLITANO. Representative, without having seen John Brennan's speech or having recently reviewed the National security strategy, let me, if I might, respond to that in writing. I would venture to say that what the concern was is that in addition to Islamist terrorism or Islamist-inspired terrorism, we not overlook other types of extremism that can be homegrown and that we indeed have experiences with, as I described to Representative Thompson.

But as our testimony here today indicates, we understand full well that Islamist-inspired, al-Qaeda-inspired, however you want to call it terrorism, be it coming from abroad were now being homegrown, it is part and parcel of the security picture that we now have to deal with in the United States.

Mr. BROUN. Well, I appreciate that—I went through security TSA not long ago, and I went through it. There was a guy who followed me that obviously was of Arabian and or Middle Eastern descent. Both of us were not patted down. There was a grandma who followed me, and she was patted down. There was a small child with her. He was patted down. I have yet to see a grandma try to bomb any U.S. facility with chemicals in her bloomers, so I think we need to focus on those who want to do us harm.

Secretary NAPOLITANO. Representative, if I might respond to that, because that is a common complaint that I——

Mr. BROUN. I saw it myself.

Secretary NAPOLITANO. Well, I know. Let me just suggest, first of all, that when we add random screening to whatever we are doing, it has to be truly random. Otherwise, you use the value of unpredictability.

Second, I would be happy to have you briefed in a classified setting about how when we set firm rules about we won't screen this kind of person or that kind of person, that our adversaries, they know those rules, and they attempt to train and get around them.

Mr. BROUN. Well, thank you. I would appreciate that briefing.

We have to focus on those people who want to do us harm. This administration and your Department are seen to be very adverse to focusing on those entities that want to do us harm and have even at times back when your spokesman came and testified before this committee, he would not even describe that Fort Hood massacre as a terrorist threat and talked about an alleged attack.

I think this is unconscionable. We have to focus on those people who want to harm us. The people who want to harm us are not grandmas, and it is not little children. It is the Islamic extremist. There are others, and I want to look into those, too, but your own Department has described people who are pro-life, who are—who believe in the Constitution, and military personnel as being potential terrorists.

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Now, come on. Give me a break. We do need to focus on the folks who want to harm us. I encourage you to maybe take a step back and look and see how we can focus on those people who want to harm us. We have to profile these folks. You all have not been willing to do so, in my opinion. I hope that you will look at this issue, because I think it is absolutely critical for the safety of our Nation and for the American citizens.

I will submit the other questions for written comment. Thank you both for being here.

Secretary NAPOLITANO. Mr. Chairman, may I make a response to that?

Chairman KING. Yes.

Secretary NAPOLITANO. First of all, Representative, there are hundreds of thousands of men and women in my Department. They come to work every day to protect the American people. The writing or the document I think you are referencing was something that was actually drafted at the end of the Bush administration and issued by mistake at the beginning of this administration. I would point out that we just established that in the Hasan matter, he is a terrorist, and he was an active duty military individual.

Chairman KING. The time of the gentleman has expired.

The gentleman from New York, my colleague, Mr. Higgins.

Mr. HIGGINS. Thank you, Mr. Chairman.

Chairman KING. New Member of the committee. Good to have you aboard, Brian.

Mr. HIGGINS. Thank you very much, Mr. Chairman.

Madam Secretary, the Peace Bridge connects my community, western New York, to southern Ontario. It is the busiest passenger crossing at the northern border and is a vital economic asset to western New York and to the country and of profound National security importance.

We are advancing a project to reduce congestion at the Peace Bridge by building a new span and customs facilities, but our progress has been slowed in part due to ambiguous and sometimes conflicting communications from the Department of Homeland Security. Specifically, confusion exists about whether the project would include pre-clearance, a shared border management strategy, but would locate the American customs plaza on the Canadian side of the bridge.

On August 20, 2009, you wrote to me that pre-clearance was not possible, because it would require the United States accept a lower level of security at the Peace Bridge than at any other U.S. port of entry or require Canada to accept actions contrary to its charter of rights and freedoms.

Mr. Chairman, I would like to enter that letter into the record.

Chairman KING. Without objection.

[The information follows:]

SUBMITTED FOR THE RECORD BY HON. BRIAN HIGGINS

AUGUST 20, 2009.

The Honorable BRIAN HIGGINS,
*U.S. House of Representatives, Washington, DC 20515.*

DEAR REPRESENTATIVE HIGGINS: Thank you for your March 26, 2009 letter regarding land preclearance for border crossings between Buffalo, New York, and Fort Erie, Ontario. Public Safety Canada Minister Peter Van Loan, Secretary of State

Hillary Clinton, and Representatives Louise Slaughter and John McHugh have also asked me to personally look into the shared border management issue.

The United States and Canada negotiated in good faith on a pilot program for land preclearance between 2005 and 2007. Although our two governments were able to reach agreement on some key issues, negotiations ended in 2007 when a mutually acceptable framework could not be reached due to sovereignty issues for both the United States and Canada.

Implementing the proposed land preclearance framework would have required the United States to accept a lower level of security at a land preclearance crossing than at any other U.S. port of entry or required Canada to accept actions contrary to its Charter of Rights and Freedoms. U.S. Government concerns included limited U.S. law enforcement authority, the right of individuals to withdraw applications, limitations on fingerprint collection and sharing, and potential future interpretations of the Charter. The Department of Homeland Security (DHS) subsequently developed a concept that would have deployed U.S. Customs and Border Protection officers to Canada to perform primary inspection and reserved all authority to conduct secondary inspections on U.S. soil, but Canada was not interested in pursuing that option and suggested that attention shift to other efforts to facilitate low-risk commercial traffic.

Since the beginning of the land preclearance negotiations, there have been significant improvements at the Peace Bridge that have facilitated travel and trade, and more are planned. These include an expanded number of truck lanes, a redesign of the plaza, the creation of a new pedestrian lane and expanded passenger processing terminal, the creation of a dedicated NEXUS lane and opening of a second enrollment center, and the installation of radio frequency identification (RFID) technology. Current plans to redesign the U.S. plaza at the Peace Bridge, long term plans to build a companion bridge, and the expected saturation of the traveling public with WID-enabled Western Hemisphere Travel Initiative-compliant documents, are expected to address long-standing challenges of limited capacity and outdated infrastructure. These improvements will lead to the relief sought through land preclearance well before it would have been possible to implement land preclearance.

Having reviewed the significant legal and sovereignty issues that were at the heart of the decision to terminate negotiations, as well as the current situation on the ground, I have decided DHS will not be reopening negotiations on land preclearance at the Peace Bridge. However, DHS will continue to engage with Canada on preclearance issues more generally and will continue to explore new ideas for creating additional efficiencies at our shared ports of entry. I welcome your input, as well as the input of public and private sector stakeholders, in these endeavors to further enhance the flow of legitimate trade and travel at the Peace Bridge and the U.S.-Canadian border more generally.

Thank you again for your interest in homeland security, and your commitment to the physical security and economic well-being of the United States and Canada. A similar response was sent to Representative Christopher J. Lee, who cosigned your letter. Should you need additional assistance, please do not hesitate to contact me.

Yours very truly,

JANET NAPOLITANO.

Mr. HIGGINS. Yet in response to recent media inquiries on the issue, the Department of Homeland Security officials have issued vague responses that have caused confusion about the status of the pre-clearance proposal.

Madam Secretary, we need clarity from the Department of Homeland Security on this issue in order for this important project to proceed, so can you please tell us does the position of the Department of Homeland Security remain consistent with your letter that due to security and constitutional obstacles that cannot be overcome, the Peace Bridge project will not include locating the American customs facilities in Canada?

Is it your position that the Department of Homeland Security will not reopen negotiations on pre-clearance at the Peace Bridge and that the pre-clearance proposal is for the purposes of this project dead?

Secretary NAPOLITANO. Representative, I will be very clear. We have looked into pre-clearance on the Canadian side. We cannot do it. The position has not changed. When and if the bridge and the facilities are expanded on the U.S. side, we are fully prepared to provide the staffing and support for that on the U.S. side.

We understand the importance of the span for trade and tourism and so forth, but we are not going to be able to resolve the pre-clearance issues in Canada.

Mr. HIGGINS. Okay.

I yield back. Thank you.

Chairman KING. The gentlelady from Michigan, Mrs. Miller.

Mrs. MILLER. Thank you, Mr. Chairman. I think I will follow up a bit of my colleague from New York, who raised sort of a northern border issue.

If I could talk a bit, Secretary and Director—and, first of all, thank you both for coming, and we appreciate your service to the Nation sincerely—we have a lot of people on the committee that talk about the southern border, and, believe me, I am not minimizing. I recognize the challenges that we have on the southern border and the safety of our Nation. But I do sometimes think we forget, almost, about the northern border.

One of my colleagues said there was 44 percent of operational control on the southern border. According to the GAO report that came out last week, we have less than 2 percent under operational control of our 4,000-mile—with our wonderful, wonderful trading partner—our biggest trading partner is not Mexico, it is Canada by a huge, huge margin. As you mentioned, the Peace Bridge in Buffalo, which is, I think we have always thought, sort of the third-busiest crossing, I think the first in passenger.

But in my district and my colleague from Detroit, Mr. Clarke, where he has the Ambassador Bridge, which is the busiest commercial artery on the northern tier, the Windsor Tunnel there, and the Blue Water Bridge in my district, which is 30 minutes, 30 miles to the north, it is the second-busiest border crossing. The Canadian national rail tunnel runs under the St. Clair River there, as well.

We were very concerned about what the GAO said about essentially no operational control, for all practical purposes, along the northern border. I would just like to address that a bit, because as we think about our wonderful trading partner, our neighbors of Canada, there are several Islamic terrorists, extremist groups that are represented there, as you are well aware.

I thought it was interesting, with the GAO report coming out, on the heels of that, President Obama and Prime Minister Harper came out with a U.S.-Canadian agreement, which was a wonderful step forward—they are going to put this working group together, but talking about some of the various unique challenges, dynamics along our shared border, how we can have interagency cooperation, sharing of intelligence, et cetera, et cetera.

So from a high-tech perspective of the kinds of resources that I think we—are necessary along the—obviously, we are not going to build a 4,000-mile-long fence along the northern border. So certainly the kind of technology that we need to be utilizing there, as well as low-tech—low-tech, K9s. There are about 60 K9s, as I un-

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derstand it, at El Paso. There are zero at the Blue Water Bridge and maybe one at the Ambassador Bridge.

So, believe me, I am not minimizing what is happening on the southern border, but for everything to be going on the southern border at the expense of the northern border, I think we need to have a bit of a balance.

Even the UAV missions, which I am heavily an advocate of, now with a ground mission at Corpus Christi—and I know we do have one along the more northern part of our border, but I think in the Detroit—certainly, Michigan, New York sector, having those kinds of—we need those kinds of technologies, off-the-shelf hardware, essentially, that has worked extremely well in theater that the taxpayers have already paid for, that we can utilize along the northern border.

So I just raise this as a concern. Perhaps when we think about threats from abroad, et cetera, they are not all going to come on an airplane from Amsterdam. Of course, as the terrorists think to cripple our Nation, and they think about doing it economically, just to use the Blue Water again as an example, at that, as it comes into the United States, that is the genesis for I–69, I–94, two of the most major trade routes that we have.

As my colleague talked about, what we consider to be reverse inspection, that is another thing we have been trying to advocate for. Could we have reverse inspection so that we are inspecting things before they start coming across our major infrastructure, as well?

So I raise some of these questions. I am not sure who I am directing them all to.

Secretary NAPOLITANO. I think they are mine. Mike is going like this.

Mr. LEITER. All yours.

Mrs. MILLER. Thanks, Secretary.

Secretary NAPOLITANO. I will be brief, Mr. Chairman.

First of all, again, on the GAO report, we are—I encourage the committee, the term "operational control" is a very narrow term of art. It does not reflect the infrastructure and technology and all the other things that happen at the border, and so it should not be used as a substitute for an overall border strategy.

One of the most significant things that has happened in the last month, quite frankly—or even in the last year—was Prime Minister Harper, President Obama signing the shared security strategy, border strategy between our two countries.

It is our No. 1 trading partner. Canada is now beginning to do or conducting some of the same kinds of things around its perimeter that we used to be concerned about coming across inland on the border. We will be working more in light of this shared vision statement on an integrated northern border strategy. Indeed, we have prepared one. It is in review right now at the OMB.

Because as you recognize, Representative, borders are—they are law enforcement jurisdictions, and you have to protect the borders in that regard, but they are also huge trade jurisdictions, and you have to be able to move legitimate trade and commerce.

We are very much in favor of looking at ways to pre-clear certain things before they—cargo, for example, before it gets to the border so that we can relieve the pressure on the lines. The technology for

being able to do that kind of thing gets better all the time. So that is one of the things we will be, I am sure, working on and implementing over the coming months and years.

Mrs. MILLER. Thank you. I know my time has expired, but I would just also point out, in regards to the TIDE list, without quantifying it, it is much higher—there are much higher hits on the northern border than they are on the southern border with the TIDE list, much higher.

Mr. LEITER. Congresswoman, I will just say that I have been working extremely closely, going up to Ottawa since 2005. It is a very different set of challenges on that border, but it is one that we are acutely engaged on with the Canadians who are an excellent partner in information-sharing and the like.

So although we talk about it less than the southern border quite often, that—I don't want to leave anyone with the impression that it is not a very high priority for us and the Canadians.

Mrs. MILLER. Thank you, Mr. Chairman.

Chairman KING. Now to the other side of the aisle, one of the more enthusiastic new Members, Mr. Clarke of Michigan.

Mr. CLARKE of Michigan. Thank you, Mr. Chairman. Thank you for calling this meeting.

Thank you, Secretary Napolitano, Director Leiter. You know, I want to make sure that I address you directly, but I have to speak into this mic.

Secretary NAPOLITANO. That is okay.

Mr. CLARKE of Michigan. All right. Okay.

Secretary NAPOLITANO. We are good.

Mr. CLARKE of Michigan. I want to thank Chair Miller for outlining the importance of the busiest international border crossing in North America, which is in the city of Detroit, and also the fact that we have a large airport, which is an international hub.

This makes this area at high risk of attack and also high impact, in case of a natural disaster or other emergency. In the event of such an emergency, it will be local police, local firefighters, our local emergency medical providers that will be the first to respond. My concern, though, is with the security of those first responders. I realize that this Department cannot be the local law enforcement or first responders.

Last week, I visited a police precinct in Detroit, which a few hours earlier had been attacked by a lone gunman who tried to kill virtually every officer in that precinct, to find out that that precinct needed a metal detector that would have cost $5,000, but because of the city's budget restraints, couldn't afford that.

I am aware that many of the grant programs are awarded on a competitive basis or based by formula. There are some districts, some areas that will get resources, some that won't.

In your written testimony, Madam Secretary, you rightfully say that homeland security starts here with hometown security. What types of resources in addition to the grants are available to protect our first responders so they can be in a good position to protect our citizens in case of an attack or other emergency?

Secretary NAPOLITANO. Representative, I would suggest, in addition to the grants, some of which are formula-driven, others of which are based on analysis of risk and threat, one of the—or two

of the things that are of direct assistance to our first responders are, A, training.

That is why as we do our countering violent extremism curricula, we are testing it at FLETC with representatives of the chiefs' association, the sheriffs' associations, and others who would have to implement this on the ground.

The second is information sharing, so that they have maximum access to actionable intelligence.

Now, the latter probably would not help much in the case of a lone wolf gunman. Those are—and I will ask Director Leiter of his comments on that. But the lone wolf-type situation is almost impossible to prevent from a law enforcement perspective.

So when you deal with the first responders, you deal with maybe early tips that somebody is getting ready to come in and then the ability to respond very effectively. That is SWAT training and equipment and the like.

Mr. LEITER. Congressman, what I would say is, immediately after the Mumbai attacks in November 2008, we started working with DHS and FBI to look at the techniques that were used in India and how U.S. law enforcement and Homeland Security would be able to respond.

Out of that, we created a scenario that has been used in Chicago and other cities by the local authorities in conjunction with the Federal authorities to see what kind of response could be brought.

Recently, we combined with FEMA, and we now have a program for each of—I think it is the eight FEMA sectors. The last one, the first one was run in Philadelphia just several weeks ago, involved over 300 people, including the Philadelphia police chief, DHS, FEMA, FBI, again, running through a scenario like Mumbai with multiple shooters.

Because you are absolutely right: It is going to be the Detroit police or the Philadelphia police that are there first. How do they respond? What specialized tools can the U.S. Government bring to bear? Certainly we would be happy to work with—I think it is Sheriff Bouchard or the Detroit Police Department or others to get that sort of training in conjunction with DHS and FBI to Detroit.

Chairman KING. The gentleman from Pennsylvania is recognized, Mr. Meehan.

Mr. MEEHAN. Thank you, Mr. Chairman. I appreciate the opportunity to be with you here today.

I have noticed that the gentlewoman from California has departed, but I did want to take a moment on the record to express my regret that I will not have the opportunity to work so directly with her, having been given the opportunity to chair the Subcommittee on Counterterrorism, and it would have created that chance. I think—I spoke to my staff—it is a little bit like finally making it to the Yankees and realizing that they just traded away Derek Jeter.

I am very grateful for your presence here today and for helping us set the table.

Let me ask both Madam Secretary and Director Leiter, I came on to this issue just 5 days after September 11, like many of each of us did in different capacities, as United States Attorney.

But we are sitting here now 10 years later. We have done a lot. We have done a lot right. I think the gravest marker of what we have done right is the incredible record of safety in the American homeland in that 10-year period.

But we have also spent a lot of money. As you said, Madam Secretary, we have had hundreds of thousands of people deployed in this—we have—right.

What are we doing now to begin to look back at what we are doing and say, hey, where are we going wrong?

Where are we creating redundancies? What does our process now, 10 years later, for asking some tough questions about whether we could be doing something better?

Or if we are doing something that—you know, the institution keeps moving forward because it is there. But maybe it is not the best expenditure of dollars, making tough choices.

Secretary NAPOLITANO. I will take that one first, Representative—say we are always asking those hard questions. It—I begin every morning with an intel briefing and I think my briefers will tell you, it begins with hard questions, why, where, how, what could have been done to prevent, what is needed, et cetera.

With respect to those dollars, we all appreciate the fiscal discipline needed by our Department, even—you know, even though it is security and everyone says they want to protect security, we still have a duty to really protect dollars and use them in the wisest possible fashion.

So it is everything from procurement reform that we have undertaken, acquisition management, which sounds really governmentese.

But I will tell you, it is those kinds of things that help find projects before they get too far along, that are not really going to work or be value added to the process.

Then, the third—and we have literally found hundreds of millions of dollars, that we have built into our budgets now, of cost avoidances, using some of those just plain old management techniques.

Lastly, I think that our ability and the—just the—and I have seen it just even over the last 2 years, the increasing integration and leveraging of the data resources that NCTC has with its pursuit teams, with our incredible data resources that we collect on the customs and the TSA side.

The ability to leverage those resources together is a Homeland Security kind of architecture that we just plain didn't have before, and allows us to make maximum use of the dollars we do get.

But I ask the Director if he has anything to——

Mr. LEITER. Congressman, I have three quick points. But I will open with the fact that the Yankees have traded a lot of greats. They keep on winning, so——

Yes, but it is much to my chagrin.

Chairman KING. I share the Director's chagrin.

Mr. LEITER. The Mets keep making a lot of trades and not winning.

Three quick points, Congressman. First, the amount of change that already goes on is really quite incredible.

Ms. Sanchez asked about the visa waiver program. The way in which we screen—ask the travelers today, compared to how we screened them a year ago, is radically different.

So it really has not been a steady state in the first place. There have been lots of twists and turns. Unless you are kind of in the counterterrorism trenches, you don't necessarily know that is going on. Second, we, of course, try to learn lessons from our failures. But we also do a lot of gaming to try and figure out what the next attack will be and how we have to shape things.

Now, that is an imperfect science, and you are going to end up going down some wrong paths.

But there are significant things like that, as I said to Congressman Clark about gaming here domestically of about a Mumbai-style attack, when you look at that, do we have the right resources, do we have the right communications, what could we buy, even though we haven't seen that event here in the United States yet.

The third is, Congressman, NCTC has a statutory responsibility to do net assessments, and that is looking both at the changed enemy, our U.S. capabilities and the changed global environment, including here in the United States.

We provide that annual net assessment along with targeted net assessments to the White House. We also work closely with the Office of Management and Budgets to try to look across all of these expenditure centers and see which are being the most effective.

I will tell you that that is a huge challenge, because simply identifying what satisfies part of a counterterrorism purpose, as you can imagine, is very difficult. The Department of Homeland Security is a perfect example.

It is not just counterterrorism what CBC does. It is immigrant smuggling, it is drugs, it is all of these pieces.

So trying to parse this out remains a challenge, but one that I think—especially over the last 2 years—we have made some good progress on.

Mr. MEEHAN. I agree with the—I am not looking at it just from—although in this day and age, we are paying particular attention to how the dollars are spent—but some—also technique as well.

I mean, at what point in time do we reach a tipping point? While I ascribe to the belief that we are doing the right things—hear people say, hey, when I have to walk through an airport screener and make the decision about whether I am groped or photographed, you know, are we going too far along?

We keep pushing where—I went to that UPS terminal. The impact of trying to push off further and further the screening of the packages, at some point, it is going to have an impact on their ability to do business.

I mean, where do we make those analyses? They are tough choices. But we say, hey, maybe we are overcompensating in order to try to create some sense of safety.

Or is it necessary?

Chairman KING. The gentleman's time has expired. We can answer the question.

Secretary NAPOLITANO. Well, thank you, Congressman.

Well, first, with respect to the AITs and the pat-downs, it was very interesting, but between Thanksgiving and Christmas, that

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heavy travel season, fewer than 1 percent of travelers opted out of using the AITs.

As you may have seen, we are now piloting the next software, which will be even less invasive and will allow us to do fewer pat-downs.

But the plain fact of the matter is, we do that because, from a security and intelligence perspective, and just looking at what Abdulmutallab did, going into Detroit in Christmas 2009, we know they try to hire non-metallic-based explosives to get on a plane.

We know that aviation, be it cargo or passenger, continues to be a target.

So that is something that we have, you know, had to deal with. The TSA administrator, who is the former Deputy Director of the FBI, has to deal with it on a daily basis.

We are working with UPS and FedEx and the other major shippers on how we secure cargo. We are moving toward kind of a trusted shipper regime so that cargo can move and we can meet the needs of real-time inventory.

That is part of the global cargo supply chain initiative I was describing earlier. They are part and parcel of how we are devising that strategy.

So we are not just sitting here, as the Government, figuring this out. We have the private sector, who has to move those planes and move that cargo, helping us.

Mr. LEITER. Because, I will simply add, I think, almost everything we do in counterterrorism, there is a second-order effect. If we increase screening, that is going to affect people's perceptions.

If we increase investigations domestically, that is going to affect the community.

We have to build into those required and necessary preventive steps additional programs to address those second-order effects so you are not worsening the situation inadvertently.

Again, that applies to screening. It applies to homegrown extremism. It applies to overseas efforts.

Chairman KING. Virgin Islands.

Mrs. CHRISTENSEN. Thank you, Mr. Chairman. Welcome and thank you for the great job you are doing with these tremendous challenges that the country faces, to both of you.

My first question is to both of you. I want to focus on another part of the southern border that I don't think gets enough attention.

As the representative from the U.S. Virgin Islands, where a district where I even seek acts, I am always concerned that not enough attention is being paid to the Caribbean, either in assessing the risks or in building strong partnerships that we need in that region.

So do you feel comfortable that the Department and the Center are seeking and getting adequate information from the Caribbean, and even from South and Central America, where there are countries that are friendly with areas in the world that have radical Islamic extremism?

Or are there any efforts, for example, to prevent radicalization, reduce the likelihood of radicalization or to help the governments in those countries to strengthen their capabilities to do so?

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Secretary NAPOLITANO. Representative, I have myself asked somewhat similar questions, in part because of the increase in special interest aliens that we are seeing get up to the Mexican border, what are the routes, how are they getting across.

It is a terrorism issue. It can be a human trafficking issue, a drug trafficking issue——

Mrs. CHRISTENSEN. All of this.

Secretary NAPOLITANO [continuing]. And all of the above. In this open setting, I would prefer not to give more of a detailed answer except to say that I share your concern to make sure that we not lose sight of this part of the world as we plan our protection strategies.

We will be happy to sit with you in a classified setting to give you more information.

Mrs. CHRISTENSEN. Thank you.

Mr. LEITER. Representative, I would largely say the same thing. I think there actually are some interesting pieces that I can't go into in open setting, with a particular focus to radicalization and movement of travelers.

Mr. LEITER. We do spend significant time on the Caribbean.

I will also tell you that there has been good cooperation in the past, for example, I believe it was 2007, the Cricket World Cup, it was held in the Caribbean.

That provided an opportunity to help the region develop more effective screening of travelers. So there are some steps that the U.S. Government has taken to enable them.

Of course, more towards South America, we have on-going concerns about the influence of terrorist states, sponsors of terrorism in that region and their presence.

Mrs. CHRISTENSEN. Thank you.

I have also been away from the committee for a while. But while I was here before, I did put a lot of pressure on the then Secretary to beef up the Office of House Affairs and to make sure that lines of authority and response were clear between them and the Department of Health and Human Services and that they work seamlessly together.

Given your response to the question about biological threats, what role does this office play, and are they adequately staffed, resources and placed to be effective?

Secretary NAPOLITANO. We are working very closely with the Department of Health and Human Services on a number of scenarios, pandemic planning being one, but also medical countermeasures, in the light of—if there were to be a biologic attack.

We have been working with them on protocols, who would do what, when, and where? Do we have the surge capacity to handle, say, if there were to be an anthrax attack? We have been table-topping some of these things.

So, Representative, the work between our departments, I think, has been very good. I am not able right now at the table to say, do they have enough resources? All I can say is that we believe the biologic threat is real, and we believe it is something that we need to keep maturing our efforts about.

Mrs. CHRISTENSEN. Thank you.

Director Leiter, from some of the reading that I did in preparation for this, it seems that there are still some turf battles and disalignment, I guess I would call it, regarding lines of authority and some stove-piping within the intelligence community, which would be very dangerous if it does exist.

So where is the communication and the integration and the collaboration? Is it where it needs to be in the intelligence community?

Mr. LEITER. Like every Government official, I will say, it is good. It can always get better. But now I do want to give you some perspective, having been doing this since 2004, and where we are today, it is night and day.

Secretary Napolitano and I sit on what is called the Counterterrorism Resource Council, which is chaired by Jim Clapper. It includes Bob Mueller, the Director of the FBI, the Director of DIA, Leon Panetta, Director of CIA. Over the past year, we have met every 2 weeks to delve in as senior leaders for hours on end about how we can integrate our missions better.

That is night and day, again, from where we were in 2004 or 2005. Frankly, it is night and day from where we were in 2009. So I think there are always some tensions when organizations are trying to do the right thing and think they are trying to do the right thing and someone else disagrees. Not all of that tension is bad.

On the terrorism issue, I think—I have never seen it better integrated than it is today.

Just one other point about integration, you mentioned the Health and Human Services. We are integrated with them and DHS. They are in charge of refugee resettlement. They play a critical role in helping us work with new immigrant communities to reduce the likelihood of radicalization.

Again, that sort of partnership between the counterterrorism community and an organization that is responsible for refugee resettlement, 4 years ago, never existed at all.

Chairman KING. Time of the gentlelady has expired.

The gentleman from Arizona, Mr. Quayle.

Mr. QUAYLE. Thank you, Mr. Chairman, and thank you to Madam Secretary and Director Leiter for being here and giving us the testimony on a very important subject.

Madam Secretary, while I was reading your testimony and listening to your opening statement, the one thing that I was a little puzzled—and it surprised me—was the lack of emphasis on the southern border and how we are going to continue to protect the southern border.

The reason that I was a little surprised by that is because the rise and the escalation of the violence between the drug cartels and the Mexican government as they continue to try to tamp down on the various drug cartels that are really ravaging the various areas along our southern border.

So the reason I was sort of—and that was the reason I was surprised. Was it left out of there just because—do you think that we have operational control of the southern border? Or was it just not part of this particular testimony?

Secretary NAPOLITANO. Well, thank you, Representative. It was not emphasized in this testimony, because I didn't think it was within the scope of this particular hearing.

I will send you the speech I gave in El Paso about a week-and-a-half ago specifically to the southwest border. In the major point I made there, a major point, was that, while we are working with Mexico on the unprecedented level of violence there, as the cartels fight for territory, separate, terrible crimes aside—and there have been some—but we have not seen systemically that violence come across the border.

What I have told and been very public about to these cartels is don't bring that over our border into the United States. We will respond very, very vigorously.

The communities along the border themselves, you can talk to Mayor Sanders in San Diego or the mayor of El Paso and others, and they will say themselves, they are—from a safety standpoint—among the safest in the country. We want to keep it that way.

Then, last, you referenced operational control. I think you are the third member now. As I have said before and I will say again, that is a very narrow term of art in Border Patrol lingo and doesn't—and should not be construed as kind of an overall assessment of what is happening at the border.

Mr. QUAYLE. Okay. I understand that. You mentioned El Paso. You mentioned Yuma. You mentioned San Diego. These are areas where the Border Patrol agents have been actually beefed up, and we actually have barriers, and these are the areas that have actually had the expenses put down there. We have seen the apprehensions—and you had stated in your statement over in El Paso about the apprehensions going down.

But do you know how many illegal immigrants have crossed the border, the southern border, in the last 2 years or year?

Secretary NAPOLITANO. Well, it is an estimate. It used to be that the estimate was that we were catching 1 in 3. I think the commissioner would testify, if he were here today, that that number—we are catching a much higher percentage.

It is a combination of things, of the Congress, what it has invested in this border, the manpower, the technology, the infrastructure. The area that is my top focus down there is the Tucson sector. We do have some fencing in Nogales, as you know, but we are continuing to basically surge manpower and technology into that sector to shut it down.

Mr. QUAYLE. Well, and from that, if you look at the—what has been happening, where the National Guard troops are going to be taken out, starting June through August, is that correct?

Secretary NAPOLITANO. Well, their current term ends in, I believe, June. I don't know that a decision has been made as to whether they will continue or not. That will be an interagency process with the Department of Defense and also the White House involvement.

Mr. QUAYLE. Now, when we talk about statistics—and statistics can always be skewed a different way—how well do you think that it actually represent what is going on, on the southern border, when most of the statistics revolve around apprehension and not a really good understanding of what is going on in the rural parts

of the border, where there is not as much enforcement and a lot of ranchers and the like are getting inundated from what the reports that they give with drug smugglers and human smugglers across their properties?

Secretary NAPOLITANO. Yes, I think you are talking about the rural areas of the Tucson sector. As I have said before, that is where we are really flooding resources now, shut some of that down. We are in constant touch through my office with the sheriffs along the entire border.

The sheriffs tend to have the—you know, the rural areas, because they have the areas outside of municipalities. We are working directly with them and—on where we need to put resources, what they need.

For example, one of the needs they had last year was help paying overtime, and we did move overtime money—Representative Miller is not here, so I think I can say it—from the northern border down to the southern border to help cover some of that overtime.

We keep looking for efforts like that, but I can guarantee you, Representative, that this is something that gets daily attention at the department.

Mr. LEITER. Thank you, Madam Secretary.

Chairman KING. The gentleman from Massachusetts is recognized for 5 minutes.

Mr. KEATING. Mr. Chair, thank you. Thank you, Ranking Member Thompson.

Chairman KING. Welcome aboard.

Mr. KEATING. Thank you, Secretary Napolitano, for being here. I am a new Member, but I am coming from a decade of law enforcement experience, dealing with a lot of these issues as a prosecutor. In fact, one of my last cases just a few months ago dealt with an issue that really called into very serious question the issues of aviation and transportation security. It is a situation—dealing with the 100 percent you had in November for successfully checking everyone that is on the watch list and making sure on inbound U.S. travels, as well as within the country, that they are checked.

But in my case, it wasn't involving a person that had a ticket. It wasn't even involving a person that had a false identification. What occurred in that case is a young man, 16-year-old young man, Delvonte Tisdale from North Carolina, had stowed himself into the wheel well of that plane. It departed from Charlotte, and his body was found in Milton, Massachusetts, when the landing gear of that plane was coming down.

Despite the tragedy of losing a young man like that, it raised enormous questions about tarmac security. His video never showed up with investigations, to my knowledge, in the airport, and it didn't even show up near the perimeter.

So what really I am concerned about is: What is being done by Homeland Security for safety on the tarmac that is vital for our aviation security? What other agencies are you working with in that respect?

Because if it wasn't this young man that just stowed himself for his own reasons, if that had been a person with more nefarious motivation, think of what would have happened to that 737 commer-

cial airliner or any of the other airliners that were there at that time. It really raised enormous concerns about aviation safety, and I would like you to address what is being done on the tarmac, as well.

Secretary NAPOLITANO. Well, a couple of things. One is, I will— I am going to ask TSA to respond directly to your question, Representative. The question of who controls what part of the airport, it is a combination.

We work with the local airport authority on the areas of—and we set standards and requirements for things like the perimeter. They are to carry out those standards and requirements.

Clearly, if somebody, a 16-year-old, is able to circumvent those standards and requirements and get into the wheel well of a plane, there has been a breakdown. So I can't sit here, tell you what the after-action analysis was as to how that happened and what corrective action has been taken, but I can share with you that I suspect that that already has occurred and we will get it to you.

Mr. KEATING. I appreciate that.

Mr. Leiter, were you aware of this incident at all? You know— and, really, the concern is not just which agency is catching the ball at a certain time. It is, there has to be a seamless way for the agencies to deal with this locally or all the invasive procedures are there when you are getting a ticket are for naught.

Mr. LEITER. Congressman, I was aware, but only through the press reports. I remember it took some time to figure out that he was actually set away on the plane when the body was first found. What we have been concerned about for quite some time, not just here in the United States but overseas, the insider threat to aviation.

Those individuals who, even if they are not sneaking in, have credentials either to restricted areas of an airport or work for an airline, understand the watchlisting procedures, understand the screening procedures. I know DHS and NCTC work together with the airline industry to discuss those vulnerabilities, screen individuals and the like. But we will certainly continue to work with Secretary Napolitano on this case to see whether or not there is a broader perimeter issue.

Mr. KEATING. I would welcome that information. I can speak for myself and I think for the members of the committee. This is an area that we will work with you on because these are really serious questions, not just in the Boston area but also in the Charlotte area.

Secretary NAPOLITANO. In the Charlotte area, yes, right.

Mr. KEATING. Thank you.

Chairman KING. The gentleman from Virginia. Mr. Rigell is recognized for 5 minutes.

Mr. RIGELL. Thank you, Mr. Chairman. Secretary Napolitano, thank you for being here and Director Leiter.

Last night the House fell short of the votes necessary to extend certain parts of the Patriot Act. Could you just comment on that please? The ramifications if those provisions are not extended.

Mr. LEITER. Congressmen, as I testified before several years ago when this was up, the Patriot Act remains a very important tool, especially with respect to home-grown extremists. So from my per-

spective, to have the Patriot Act expire on February 28 would be extremely problematic and would reduce our ability to detect terrorists.

Mr. RIGELL. Many of my constituents, and I share their view, I have a deep concern about abuse of these powers. I would like to know, and my constituents would like to know, what specific practical steps are being taken to properly balance this tension that does exist between our freedom and our security? So if you could unpack that a bit, I would appreciate it.

Mr. LEITER. Absolutely, Congressmen. I think it is a more-than-reasonable concern. There are significant authorities and there need to be protections. There are three basic provisions. The business records provision, the lone wolf, and the roving wiretap.

First of all, I would say that in almost all cases there are very, very similar tools already being used in the criminal context. But in fundamentally all of these provisions there is a rigorous set of oversight both within the Executive Branch but also through the FISA court, the Foreign Intelligence Surveillance Act court. So in the case of business records, a showing has to be provided to the FISA court of the appropriateness of the order. They then also can do oversight of those records and the like.

So I think this is, in the words of Ronald Reagan, this is trust and verify. It is trusting it will do it right but then it is verifying that we are doing it right through independent means, such as the FISA court.

Mr. RIGELL. Are there examples within the Department where you have identified an abuse where an employee has abused his or her power and you have actually taken action and——

Mr. LEITER. Congressmen, I apologize. I am not quite the right witness for that. I really have to defer to the Department of Justice. I know in other contexts NCTC has had situations where, for example, U.S. person information was not protected to the way we expect it to and require it. We have disciplined those individuals and we have submitted those findings back to the Department of Justice, our inspector general and our civil liberties protection officer. So——

Mr. RIGELL. Director, that is a fair answer. I have the privilege of representing Virginia's Second District, home to a beautiful port entrance to the Chesapeake Bay. So port security is a great concern to me. I notice that again it wasn't really listed in the opening statement as a high-level concern. So please address where on the order of threat assessment does port security come in.

Secretary NAPOLITANO. I will take that one, Representative. Again, it was not in the statement because of the title of the hearing and what we thought the scope of the hearing was. But port security is keenly important for a whole number of reasons.

Our ports are where we—around our ports are where we have a lot of our chemical facilities. The safety of containers bringing cargo into the United States and how they are handled, the ability of the Coast Guard to protect the ports. They serve as the captains of the ports. So we have major initiatives underway in all of those areas.

In particular, we are working globally on the security of the supply chain, which really—with the International Maritime Organiza-

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tion. Because that affects how cargo is actually brought across the seas and into the United States.

Mr. RIGELL. Thank you. I yield back.

Chairman KING. It is almost time to expire. I would just add to that that there has been close cooperation between the committee and the Department for at least 5 years in both administrations on the issue of port security. It is a major, major issue and it will definitely be addressed throughout the next 2 years. I can assure you of that. Also, not to speak for the Secretary, but—Department takes it very seriously.

The gentlelady from California, Ms. Speier, is recognized for 5 minutes.

Ms. SPEIER. Thank you, Mr. Chairman. Thank you Madam Secretary and Director Leiter. You know, I think at the outset I would like to say I think you have the toughest jobs around. It is easy for us to sit here and poke holes but you always have to be anticipating where the next threat is coming from.

We have porous borders. We have a system where, if I understand it correctly, waiver programs could easily allow a terrorist to come to this country. I realize that we probably have it because we have comity between our countries and the like. I worry about the lack of exit tracking of visas.

I worry also about cargo surveillance. I had a briefing last week in my district from local mechanics who are concerned about all of the repair work being done offshore now. They showed me pictures in El Salvador of a repair facility where you just showed your ID as you came in. There was no tracking. You could have phony ID. No one would know.

You can anticipate that there are lots of holes still out there and that al-Qaeda and any number of other terrorists are seeing those same holes. From your perspectives, each of you, what do you think is the biggest hole that we have to close?

Secretary NAPOLITANO. Well, Representative, thank you for your kind words. I have gotten out of the business of ranking because it is fluid. It evolves. It changes based on what the current intel is. It requires us to react to what has occurred and also to be thinking ahead.

With respect to the situation you referenced in El Salvador, one of the things that I—to me that illustrates is the absolute importance of good intel gathering and sharing. Not just within the United States, but abroad.

When something is—significant is trying to infiltrate a port and get something like a radioactive or biological weapon inside a cargo container, say for example our ability to know ahead of time to be tipped off to know what to look for, as what happened in October with the air cargo plane, absolutely critical. So as we move forward, strengthening and enlarging those intelligence-gathering relationships is also very important.

Mr. LEITER. Congresswoman, I first of all also thank you and I will say Secretary Napolitano has a harder job than I do. I am also loathe to actually give you what our greatest vulnerabilities are because I know al-Qaeda and other terrorists are listening to what we are seeing, and I don't want them to know what I think are our

greatest vulnerabilities. I am happy to talk to you about that in a closed setting.

What I will say is we have to look at both our greatest vulnerabilities in terms of likelihood and consequences. There are a lot of things that could happen where we have weaknesses, but the consequences of an attack along that angle really might not be that significant. So we have to balance trying to stop the most common attack or the most likely attack with the one that has the greatest consequences.

In that respect, the Chairman raised chemical, biological, radiological, nuclear weapons. I don't think that is remotely the most likely avenue of al-Qaeda or al-Qaeda inspired terrorists to attack this country, but the consequences of that would be so great we have to invest very significant resources to guard against it.

Ms. SPEIER. To follow up on the El Salvador issue, shouldn't we be requiring American airlines—not American Airlines but American airlines—to make sure they have strong kinds of security systems in place when they are doing the work offshore? It appears they do not and we don't require them to.

Secretary NAPOLITANO. Representative, I need to know more about the El Salvador situation, but as I testified earlier we are now requiring 100 percent screening of all in-bound, high-risk cargo that is on a passenger plane. Those are terms that would—that meet—require certain levels be met. We actually do work with the American flag carriers on those. They are part and parcel of this system, even from international ports.

Mr. LEITER. Congresswoman, I will simply add if I could the challenge you identify is unique neither to El Salvador nor to aviation. The counterterrorism effort is truly a global effort and it is why we spend so much time with our overseas partners on aviation security, port security, intelligence, information sharing. We are very reliant on our partners doing what we think needs to be done to keep the homeland safe.

Chairman KING. The gentlelady's time has expired. The gentleman from South Carolina, Mr. Duncan, is recognized.

Mr. DUNCAN. Thank you, Mr. Chairman.

Madam Secretary and Director Leiter, thank you for being here today.

I wanted to first off thank the gentleman from the Virginia Tidewater for mentioning the PATRIOT Act and asking a line of questionings to ensure there are constitutional rights as free Americans aren't trampled.

I consider myself a Tea Party congressman, and many of my colleagues here in the freshman class feel the same way. So during the course of getting to this office, we were questioned a lot about certain things that the United States were doing with regard to patriotic Americans, who may label themselves as Tea Party folks, who peacefully assemble and petition the Government for redress of grievances, all the first amendment rights that we have.

So I am concerned, and they are concerned in South Carolina, about a report of April 2009 from your Department titled "Right Wing Extremism: Current Economic and Political Climate Fueling Resurgence in Radicalization and Recruitment." We understand that the House has passed a resolution of inquiry in the last Con-

gress, and this committee held hearings on it. To my knowledge that document has never been retracted or corrected.

So the question for you today is: Does your Department consider military veterans or groups dedicated to single issues, patriotic Americans, a threat to homeland security and high risk to engage in extremist activity?

Secretary NAPOLITANO. I think that is for me. As I said earlier in this hearing, Representative, that was a report that was begun under the prior administration and issued by mistake by our Department before it had been properly edited.

Now, to the point, of course, we don't consider patriotic Americans to be terrorism threats. Of course, we work closely with our military. My Department—we have now—we have had aggressive hiring within military and veterans coming back, and we have now almost 50,000 veterans in my Department, not to mention active-duty Coast Guard. So we are heavily military reliant, dependent and interconnected.

Mr. DUNCAN. Thank you for that, by the way.

Secretary NAPOLITANO. There you go. Now, I think a larger point is that as we do our work, we cannot categorize by ethnicity or religion or any of those sorts of things. We have to make decisions based on intelligence and intelligent sharing and risk about particular individuals.

That is the way that we have directed it be done in our Department. That is what is required under the United States Constitution. While the FBI is not here today and the Department of Justice is not here, they have very strict standards in that regard.

Mr. DUNCAN. What can you do or what steps have you taken to ensure this type of reporting as demonstrated doesn't happen again? Because in my opinion we have targeted a quote in that report, and we never retracted that. So I just don't want that to happen again.

Secretary NAPOLITANO. Well, that report is no longer available. Congressman, I would simply say that I have been the Secretary for almost 2 years since then, and you have not seen a similar report come out of the Department.

Mr. DUNCAN. Thank you very much.

I yield back the balance of my time, Mr. Chairman.

Chairman KING. The gentlelady from California, Ms. Richardson, is recognized for 5 minutes.

Ms. RICHARDSON. Yes. Thank you so much, Mr. Chairman.

Thank you to our two witnesses who are here today for your frankness and efforts to work with this committee.

Just a couple of questions that I have. One is there is much discussion here in the House in terms of reducing budgets back to 2008 levels. Madam Secretary, I would like to hear your opinion. If in fact that were to go into effect, how would that impact your Department? What would you specifically see might need to be cut, since we are not provided any of that direction?

Secretary NAPOLITANO. Well, that is a very difficult question to answer, but this Congress in a bipartisan way has been building this Department. It put 22 some-odd the agencies together. It gave us probably the most varied group of missions of any Department,

and they touch directly on the safety and security of the American people.

They have asked us to protect our ports. They have asked us to protect our borders. They have asked us to protect our communities against terrorists, whether international or homegrown. They have asked us to protect our cyber walls. We have been building to meet those missions. That is what we do. So we are going to be, and the President is going to be, I think, very careful in his request. We are under the same fiscal discipline demand as every other department, and we ought to be. There are some places where I think we can eliminate redundancies and save, and we are constantly looking for those.

But to simply take a big old thing and say we will go back to 2008 without understanding operational impacts for this kind of work would probably not be what I would advise from a budgetary standpoint.

Ms. RICHARDSON. Thank you for that comment. I think it is very helpful to us all.

My second question is we have several trade agreements that are on the horizon. Korea is here—probably soon Colombia and Panama coming. You have heard several questions having to do with the ports. When we asked the question, when you first became Secretary, about implementing the 9/11 recommendations, one of your responses was, well, in order for us to do that, we would have to do all these new agreements.

How involved have you been with the current trade agreements that are on the table, if at all? If you have, do you see the possibility of us implementing some of these 9/11 recommendations with those possible trading partners?

Secretary NAPOLITANO. Representative, I have not personally been involved in negotiating those trade agreements. We will have to get back to you as to whether individuals and the Department may have been. So I am just going to delete my answer at that for now.

Ms. RICHARDSON. Okay. I would say in particular Korea is of great concern. It is my understanding it is coming, and we want to make sure that for any future agreements, that Mr. Kirk is keeping in mind what we need to achieve for this committee.

My second question, building upon previous questions of my colleagues, in this particular committee we will be having an upcoming hearing about looking at the potential radicalization of Muslims in this country. As I just heard your response, your department, you don't evaluate based upon race or religion and so on. You are basing your decisions on intelligence.

So if that is the case, what percentage, if you have one, could you say occurs in terms of people that we need to be concerned about. Would you say 50 percent Muslim? Would you say 50 percent, you know, if you could give us kind of a general idea?

Mr. LEITER. It is a absolutely tiny percentage of the U.S. Muslim population and, frankly, the global Islamic population are those that we are concerned with at the National Counterterrorism Center. If you look at the numbers, they are significant in terms of number of attacks we have, but in terms of the broader Muslim

community within the United States, it is a minute percentage of that population.

Ms. RICHARDSON. Thank you.

With my remaining 49 seconds, I have been doing some work looking at cogs in continuity of government. I think the Department has done an amazing job of coordinating various agencies and being prepared.

I think, though, the last ones that are ready happen to be us as elected officials, and so I just wanted to say, Madam Secretary, I plan on working with your folks to really explore how can we better prepare from the local, State, and Federal level as elected officials when we have to step forward when that disaster occurs, that we know who to call, we know where to go, and we know how to be helpful and not a hindrance in the process.

Secretary NAPOLITANO. Thank you.

Ms. RICHARDSON. Thank you very much.

Thank you, Mr. Chairman.

Chairman KING. Time of the gentlelady has expired.

The gentleman from Texas, Mr. Farenthold, is recognized for 5 minutes.

Mr. FARENTHOLD. Thank you, Mr. Chairman.

At the risk of being redundant, I am probably the fifth or sixth person here who is going to express some concern over the 44 percent operational control number. I think you have done an admirable job defining that as a term of art.

What I would like to ask is let's take the word "operation" out of there and define "control" as what the average American would say. What percentage control do you think we have of either of our borders now—or both of our borders?

Secretary NAPOLITANO. Well, I think in terms of manpower, technology, infrastructure, we have the effective control over the great majority of both borders, particularly at the ports. Then we are using manpower and new technologies to help us between the ports.

It is a project that is never ending. We are relentless in it. We recognize that when you are a country as large as ours with that kind of land borders we have, that you are never going to seal those borders. That is an unrealistic expectation.

But I would say my top priority in terms of the effective control is the Tucson sector of the southwest border.

Mr. FARENTHOLD. You also mentioned that you didn't feel like some of the violence from Mexico is spilling over into the United States annual crime. Just as a personal aside, I would like to take issue with that, because I really do believe that what we have is a very effective distribution network of narcotics that come into this country that I am very concerned could be exploited by terrorists and used for bringing in the tools of the terrorist trade.

The easy availability of drugs in this country I think is an indication that we really don't have the level of control that we would all like to hold. That is——

Secretary NAPOLITANO. Indeed. One of the things that—all I will say in open setting is that we have for some time been thinking ahead about what would happen if, say, al-Qaeda were to unite with the Zetas, one of the drug cartels. I will just leave it at that.

Mr. LEITER. Congressman, if I could just add, one of the things we did post-December 2009 attack in looking at other possible avenues is we embed it for the first time several DEA agents and analysts within NCTC to try to make sure that counter narcotics and counterterrorism information was being shared effectively.

Mr. FARENTHOLD. Great.

Then just, kind of, jumping over to the TSA—and I realize this is probably outside of the scope of this hearing or something that we might want to take in a more classified environment—but where are we with respect to implementing a trusted traveler program that might mitigate the impact of law-abiding Americans of having to undergo these intrusive TSA searches?

My 21-year-old daughter had the misfortune of having a false positive display on one of the body scanners just last weekend and was subjected to a search that I think would rise to the level of sexual assault in most States. The Trusted Traveler Program seems like a way that it would pay for itself by user fees to alleviate that burden on at least the people who chose to take advantage of it.

Secretary NAPOLITANO. Absolutely. We are moving as swiftly as we can, trusted shippers, trusted travelers. We have well over 100,000 Americans signed up for trusted traveler air programs, like Global Entry. I would be happy to sign your daughter up, by the way.

But I think that is the way to go. I mean, we need to have some way to effectively separate passengers and cargo that we need to pay specific attention to from those we don't. We will always have to do some random searches. Unpredictability always has to be a tool in the toolbox. But we need to—we need to be working toward a system where we have better ways to tier and focus on who needs to go through what kind of screening or what needs to go through what kind of screening. That is what we are working toward, Representative.

Mr. FARENTHOLD. Do you think it might be a cost-effective way to use Global Entry also for domestic flights, use something very similar to that infrastructure, and maybe a cost-effective way to implement it?

Secretary NAPOLITANO. Yes, we are looking at that right now as a possibility.

Mr. FARENTHOLD. Thank you.

Chairman KING. The gentlelady from Texas, Ms. Jackson Lee.

Ms. JACKSON LEE. Mr. Chairman, thank you very much. I am very grateful for this hearing and welcome, Secretary and Director Leiter, for what I think is an important discussion.

Let me lay a premise for a series of questions very quickly. The people of Mexico, many of us who live on the border view them as our friend. But I do believe that there is a war going on. For us to ignore that—it is a drug war. It is a violent war. It is human smuggling. It is a war.

When you have two young teenage boys, high school, leave to cross the border for what is perceived as an innocent activity at this juncture and wind up dead, this is—and you can count thousands who have died. We have a vicious and violent war.

So my first question—and I am just going to ask a series—is, as we look to the border, is the Homeland Security Department—and,

of course, Customs and Border Protection as the agency—able to decipher the—and I think our flow of undocumented individuals coming across the border, I think, has actually gone down.

But the point is—and I think you might confirm that—to that kind of war, versus individuals who have come to reunite with family members, whether you agree or disagree to come to work. Has the administration moved away from a concept of comprehensive immigration and border security as being partners in trying to fix the problem for us? That is the first question.

The other question is to compliment TSA for the progress it has made. I still think—even though I am a proponent of ensuring our rail is safe, and I hope that the administration will look at the legislation we had last year that did not move—and I am hoping to work with this majority and this committee to do it again, H.R. 2200, with my colleague, Ranking Member Thompson, and I and Republican Members of this committee joined in on.

Aviation still seems to be the most attractive target. In your perspective, are we where we need to be in aviation security? Can you affirmatively tell me that we are not going to go through the battle of 2001, which is to expand privatization of airport security, when we are making enormous progress, and I think we are being responsible?

We have a new and enriched democracy with diverse persons of many different faith. So I will ask the question that I have heard that has been answered before on dealing with our friends of the Muslim faith, specifically, Madam Secretary—and I will provide you with a letter—I would like to have an investigation on a Houston imam who was a family person and had a religious visa approved. Shortly thereafter, it was either disapproved and that person was deported. We all know that, once deported, it is a complicated process, leaving his family destitute, and we can't imagine the circumstances of that. I think that is very harsh.

I will ask the broader question as to how we address the policies of religious visas. Are we going to see the Muslim community unfairly targeted? Because they have a right to their faith, as well, though we are aware that we all must be diligent.

Last, I would be interested in an answer—is about our cultural competency and the reach in that Department to be diverse and whether or not we have a diverse leadership, which would be under your ship, Director Leiter, you, Madam Secretary, and that includes African-Americans, Hispanics, Asians, Anglos, and, of course, the faith represented by Muslims.

Secretary NAPOLITANO. Representative, let me take some of those in order, and we can respond more fully.

Chairman KING. Secretary, if you would try to keep the answers about 3 or 4 minutes.

Secretary NAPOLITANO. Yes, I will try to keep it short. I am sorry, Mr. Chairman.

Ms. JACKSON LEE. Thank you, Mr. Chairman.

Secretary NAPOLITANO. TSA privatization, the administrator has concluded not to expand privatization for a number of reasons, some of which are security-related, some of which are cost-related. He has announced that policy. As you know, the administrator is the former Deputy Director of the FBI.

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With respect to the Mexican border and the drug war in Mexico, we are highly cognizant of the amount of violence going on in Mexico, the number of deaths associated with that violence, particularly in the northern states of Mexico. We are working very closely with the Calderón administration on that.

We have individuals in Mexico themselves working on these issues, but—and we are being very, very vigilant about that war being brought across our border. I will say it again to the cartels: Do not bring that war into the United States. But we need to work with Mexico to end the war.

The administration remains committed to immigration reform and looks forward to working with——

Ms. JACKSON LEE. That includes comprehensive and border security?

Secretary NAPOLITANO. Indeed. Then, last, with respect to the particular case of the religious visa that you referenced, why don't I simply get that from you and I will respond in writing?

Ms. JACKSON LEE. I would appreciate it. Just the cultural diversity issue and including Muslims at the Department of Homeland Security.

Secretary NAPOLITANO. I would be happy—why don't I respond in writing to that?

Ms. JACKSON LEE. Mr. Chairman, could I just raise an inquiry to you, please? I would appreciate it if we could have a classified briefing on the border, on the southern border, particularly as it relates to drug cartels and the intermeshing between issues of terrorism or the porousness that is created and the distinction—and that would be my perspective—separating out undocumented persons that may be coming for work—these people.

Chairman KING. I will work with our staff to make sure we do that. There is bipartisan interest in that, I can assure you.

Ms. JACKSON LEE. Thank you, Mr. Chairman. Thank you very much.

Chairman KING. The time of the gentlelady has expired.

The gentleman from Missouri, you are up next, if you want. Okay. Then I will yield to the—not yield, I will—yes, yield to the gentleman from Florida, Mr. Bilirakis for 5 minutes.

Mr. BILIRAKIS. Thank you, Mr. Chairman, I appreciate it.

Madam Secretary, we have previously discussed the importance of the Visa Security Program and the need to expand ICE's visa security units to additional high-risk areas around the world. I understand that recent budget guidance to DHS for fiscal year 2012 from the Office of Management and Budget does not propose additional funding for the Visa Security Program and directs ICE to reconsider its deployment of personnel overseas for this purpose. I find this recommendation, of course, very troubling.

The ICE personnel that are deployed overseas to high-risk visa issuing posts are uniquely qualified to review visa applications and to identify individuals who might be attempting to enter the United States to do us harm. Do you agree with the OMB recommendation, the guidance regarding the Visa Security Program?

Secretary NAPOLITANO. Well, let me—if I might, Representative—the President's budget request is not yet out. It will be out on Monday. I believe my first hearing on the budget is next Thurs-

day—yes, next Thursday. I think if I might ask your forbearance and respond to budget-related questions at that time.

Mr. BILIRAKIS. Okay. But I would like to keep in touch with you on this vital issue——

Secretary NAPOLITANO. Duly noted.

Mr. BILIRAKIS. Thank you.

Secretary NAPOLITANO. Yes, sir.

Mr. BILIRAKIS. One more question. As you are aware, terrorists involved in both the 1993 and 2001 World Trade Center attacks entered the United States on student visas, later violating their terms. I have long been concerned that there are inadequate security controls in the student visa issuance process. I have similar concerns about the process to monitor visa holders' compliance once they enter the United States. How concerned are you about the fraudulent use of student visas, or any visas for that matter?

Mr. LEITER. We look at all types of visas. But, Congressman, I think you are absolutely right. There is a history with student visas. There is an on-going interest in student visas. So we have built in some extra protections on student visas, both for monitoring and cooperation with the countries that often sponsor those students for additional counterterrorism screening.

Mr. BILIRAKIS. I would like to get with you—I have some recommendations of my own, as well.

Mr. LEITER. Very happy to do that.

Mr. BILIRAKIS. Okay. Thank you very much.

Chairman KING. The gentleman from Louisiana, Mr. Richmond, is recognized.

Mr. RICHMOND. Thank you. Thank you, Mr. Chairman.

We heard several points about our port security. As we talk about trade deals, I guess my question to you, Madam Secretary, is that, is there a way to evaluate or to inform us of, for example, South Korea and their port security? Because our security is based on how well they do their job over there.

So as these trade agreements come up and as they are negotiated, I think it is very important for people in my district, which has the port of New Orleans and all the trade down there, to get some information on that.

Secretary NAPOLITANO. Congressman, yes. We will respond to you in writing on that. I know one of our six international locations for our maritime cargo scanning technology was in Busan in the Republic of Korea. So we will get some information to you.

Mr. RICHMOND. Second, watching what happened down in Louisiana with the B.P. Horizon incident, how safe are our rigs?

Give me an assessment on, for example, our LOOP, which supplies a lot of oil and stuff for the rest of the country.

So looking at how long it would take to get a backup or to potentially stop the flow of oil, how safe are our German rigs that are off the coast of all of our Gulf States?

Secretary NAPOLITANO. Congressman, I have been on the LOOP and met with those individuals. There are extensive security precautions that are taken around that area.

So there are no guarantees in this business. I think the Director and I would both agree on that.

But do I think they are taking all reasonable security precautions? I feel that they are.

Mr. RICHMOND. Thank you, Mr. Acting Chairman. I yield back the remainder of my time.

Mr. BILIRAKIS. Thank you. Thank you.

Congressman Davis.

Mr. DAVIS. Thank you very——

Mr. BILIRAKIS. You are recognized.

Mr. DAVIS. Thank you very much, Mr. Chairman.

Madam Secretary, Mr. Leiter, thank you both very much for being here and for your patience.

As a new Member of this committee, let me just ask if you would quickly help me sharpen my understanding of what we define and designate as being terrorism or acts of terror.

Mr. LEITER. Congressman, there are numerous definitions within Federal law about what terrorism is.

The National Counterterrorism Center uses one of those, which is premeditated, politically-motivated violence by a non-state actor.

So the key piece there—key pieces, it usually comes down to is politically motivated violence.

Mr. DAVIS. Madam Secretary, I am very interested and very concerned about the impact of illegal narcotics on life in our country and, indeed, throughout the world.

We know that Afghanistan supplies about 90 percent of the opium trade. There are also questions about its relationship to funding the Taliban and its relationship with al-Qaeda.

Could you tell me what our goals are there from a DHS vantage point? I mean, what are we attempting to do in that region?

Secretary NAPOLITANO. Well, Congressman, I think a better person to address that question to you would be the Secretary of Defense.

But what our goal is at DHS, working with the government of Afghanistan—I was just there between Christmas and New Year's—is to assist them in building their civilian capacity to have control of their own borders, particularly their ports of entry, and to be able to have the infrastructure, the technology, and the trained and vetted units necessary to do that.

Mr. LEITER. Congressman—I am sorry—if I could just add, is, as you know, the Drug Enforcement Agency has a significant presence in Afghanistan and works—and part of this is important from the terrorism perspective, because, as you say, some of those funds do go to support the Taliban and could effectively go to al-Qaeda if they are not already.

I think it is an important piece to note, because it simply highlights the moral depravity on this front, too, and really the hypocrisy of the organization, al-Qaeda and the Taliban, of pursuing what they are viewing as a vision of Islam while still maintaining and shipping heroin and opium overseas.

Mr. DAVIS. Of course, I come from Chicago, which is considered to be by many, and certainly those of us who are there, the transportation capital of the world.

We place a great deal of focus and interest on airline security, airline safety.

But I also have some concern about what we are doing in relationship to truck transport, buses, the large numbers of people who make use of them, and, of course, rail.

Could you elaborate a bit on what we are doing in those areas to make sure that there is security and safety?

Secretary NAPOLITANO. Indeed, Congressman, and we have a whole surface transportation program and strategy that we will make available to you now.

It is a little bit different because so much of it is controlled locally, bus systems, subway systems and the like.

I think Chicago is fortunate because they have built now some extensive security in this, at least in the—within the municipal limits that come into a hub area so there could be some effective monitoring of surface transportation.

But we have added so-called VIPER teams, which are intermodal transportation security teams, dogs, explosive trace detection equipment in the surface transportation environment.

We have made grants and grant guidance available to localities for things of this nature as well.

Mr. DAVIS. Well, let me just thank you very much and let me, again, as other Members have done, commend you for what I think the outstanding work is that you do. I certainly look forward to working more closely with both of you.

Secretary NAPOLITANO. Thank you, sir.

Mr. DAVIS. I thank you, Mr. Chairman, and I yield back the balance of my time.

Mr. BILIRAKIS. Thank you, sir. It doesn't appear that anyone else is here.

So I thank the witnesses. Thanks for the extra time, for your valuable testimony, and the Members, of course, for their questions.

The Members of the committee may have some additional questions for the witness. We will ask you respond to these questions in writing, please.

The hearing record will be held open for 10 days.

Without objection, the committee stands adjourned. Thank you.

[Whereupon, at 12:31 p.m., the committee was adjourned.]

# APPENDIX

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QUESTIONS FROM RANKING MEMBER BENNIE G. THOMPSON FOR JANET NAPOLITANO

*Question 1.* Madam Secretary, in your testimony you stated that "in some ways, the threat facing us is at its most heightened state" since 9/11. This statement was given with little context and seems to imply an added security threat, yet the committee was not provided any new threat information. Moreover, there was no change to the National Threat Advisory System that is still on the DHS website or the new threat advisory pilot program you have announced to replace the color-coded system. Why is the threat facing the Nation at its "most heightened state," since 9/11?

Answer. The terrorist threat facing our country has evolved significantly in the last 10 years, and continues to evolve. We face a threat environment where violent extremism is not defined or contained by international borders as evidenced by the Times Square bomber as well as the individual recently arrested in eastern Washington State for allegedly placing a bomb along the route of a Spokane parade in January. Today, we must address threats that are homegrown as well as those that originate abroad. As former Secretaries of Homeland Security have noted on several occasions, the threat of terrorism will never be completely eliminated and therefore, we will continue to operate under a heightened state of security. The Secretary's annual Congressional testimony on the homeland threat landscape (February 9, 2011), the Director of National Intelligence Annual Threat Assessment (February 10, 2011), and other such vehicles will inform this baseline. The new advisory system will only be initiated for terrorist threats to the homeland that rise above and beyond this baseline.

- From December 2009 through 2010, there were seven attempted terrorist attacks or disrupted plots in the homeland. Two of these operations were linked to al-Qaeda affiliates, one to an al-Qaeda ally, and four to homegrown violent extremists. Most did not reach the execution phase or the intended target, all were operational failures, and none resulted in significant casualties. Nevertheless, al-Qaeda and its affiliates almost certainly perceive the failed attacks as both valuable propaganda opportunities and radicalization and recruitment tools that further its anti-Western narrative.
- Mohamed Osman Mohamud's failed attempt in November 2010 to allegedly bomb a Christmas celebration in Portland, OR represents a recent example of the increasing threat from homegrown violent extremists—Americans radicalized in the United States, acting independently of foreign terrorist organizations like al-Qaeda.

The United States and our allies also face a threat from Westerners who have traveled overseas to receive terrorist training—with the intention of returning to conduct attacks at home. This presents numerous challenges as the individuals' status as Westerners provides a simpler method for terrorists to infiltrate the homeland while also increasing the groups' operational planners' knowledge of Western targets and security practices.

- Since 2008, U.S. persons, including confessed al-Qaeda operatives Najibullah Zazi and David Headley—the Chicago-based individual who also confessed to being a Lashkar-e-Taiba (LeT) operative—as well as confessed failed Times Square bomber Faisal Shahzad, have traveled to Pakistan for terrorist purposes and, upon their return to the United States, were able to operate under the radar of law enforcement, in some cases for long periods of time.

The past 18 months have also featured the emergence of Western ideologues—particularly American citizens like Anwar al-Awlaki, Omar Hammami, and Adam Gadahn—publishing increasingly sophisticated English-language propaganda on behalf of al-Qaeda and its affiliates. The increasing availability on the internet of their materials espousing violent extremism and providing practical operational advice, combined with social networking tools that facilitate violent extremist communication, complicates the challenge of addressing the threat to the homeland.

- These violent extremist ideologues—al-Awlaki in particular—have also spearheaded recent efforts to provide Americans and other Westerners with the ability to independently plan and execute their own terrorist attacks—without the need to travel overseas for training—through English-language propaganda.

Finally, we are currently witnessing an evolution in terrorist tactics. Terrorist attacks targeting the United States are trending towards smaller-scale operations executed on a compressed planning cycle that are perceived as successes, regardless of whether they caused physical damage. Violent extremist propaganda praised even operational failures in the West, spinning them as successful in causing economic damage, defeating existing security measures, and forcing the West to spend billions in security upgrades, while highlighting the operations' relatively low cost and ease of planning and execution. We are concerned that the perceived successes of such smaller-scale attacks portends that these operations will occur with greater frequency and offer fewer opportunities for disruption.

- Al-Qaeda in the Arabian Peninsula's (AQAP's) English-language propaganda magazine—referencing the disrupted October 2010 plot to send explosive-laden packages on aircraft—boasted: "To bring down America we do not need to strike big . . . it is more feasible to stage smaller attacks that involve less players and less time to launch and thus we may circumvent the security barriers America worked so hard to erect."
- In the same edition, AQAP noted that the October 2010 plot was part of its "strategy of a thousand cuts"—intending to "bleed the enemy to death" and noted that despite the West's success in intercepting the parcels, the $4,200 operation would force the United States and its allies to spend "billions" on security upgrades.

*Question 2.* The latest Moscow airport suicide attack underscores what seems to be a troubling new trend: Terrorist attacks on soft targets in transportation infrastructure, such as pre-security baggage claims and subways. As you know, in other airports across the world, it is not uncommon to be inspected as soon as you enter the premises. What can we take away from the Moscow attack for our own airport security here at home? What strategy does DHS have in place to address terrorist attacks on soft targets, including shopping malls, pre-security baggage claims, and mass transit?

Answer. One of the Department of Homeland Security's (DHS) primary strategies is to work with our partners in the intelligence community and in Federal, State, and local law enforcement to identify and prevent threats before they are carried out. Simultaneously, we work with airport authorities and other stakeholders to implement a layered security approach to mitigate the threat of terrorist attacks against soft targets.

The terrorist attack at Moscow's Domodedovo International Airport demonstrates the importance of having an effective security plan in place at our Nation's airports. There are various layers of security at U.S. airports designed to help prevent or deter this type of an attack. The primary responsibility for security outside of the checkpoints rests with the airport operator, as detailed in the airport security plan that each airport operator submits to the Transportation Security Administration (TSA). Additionally, TSA personnel, including Behavior Detection Officers, Transportation Security Inspectors, and Federal Air Marshals, are engaged and trained to look for anomalies as they provide security, with local airport police, throughout both the public and secure areas of our Nation's airports or any other venue where they are dispatched. I also cannot overstate the importance of public awareness and engagement in alerting law enforcement and security personnel to unusual behavior or activities by individuals. It is why I have placed so much emphasis on the "If You See Something, Say Something" program to solicit assistance from the public and further enhance security in airports and elsewhere.

In light of the Moscow Domodedovo International Airport attack, TSA has increased security in the public areas of all airports both by conducting visible and covert operations. TSA has also developed the tactical response plan (TRP), which details the actions necessary at the field level to support the overall TSA operational response to various scenarios. All of our measures augment the existing security measures employed in all modes of transportation and may be used in combination with each other.

Additional information regarding TSA's mitigation strategy and response plans for a similar attack are considered sensitive security information and can be discussed during a thorough briefing on this topic at your convenience.

Following the Moscow Domodedovo International Airport attack, the DHS Office for Bombing Prevention (OBP) released a Quick Look Report on TRIPwire that provided details on the device and the tactics used to State, local, Tribal, and territorial law enforcement to inform domestic prevention and deterrence efforts. TRIPwire is

DHS's 24/7 on-line, information-sharing network of current terrorist IED tactics, techniques, and procedures, including design and emplacement considerations.

DHS's Office of Infrastructure Protection (IP) has a variety of programs to prepare for and address the threat of terrorist attacks on soft targets, including shopping malls, airports, hotels, sports venues, and other public gathering facilities.

- IP has developed and provided to State, local, Tribal, and territorial agencies a series of reports, known collectively as the Infrastructure Protection Report Series (IPRS), that provide information on characteristics and common vulnerabilities of various types of critical infrastructure, potential indicators of terrorist activity, and associated protective measures to mitigate risks. IP has developed 360 IPRS reports, including reports for airports, shopping malls, hotels, sports venues, and other public gathering facilities.
- IP's OBP provides Surveillance Detection and Soft Target Awareness Training to State and local law enforcement officers and private sector facility security personnel to develop awareness of terrorist threats to critical infrastructure and educate participants on strategies for detecting and mitigating these threats.

IP's field-deployed Protective Security Advisors (PSAs) have conducted numerous outreach efforts to raise awareness of terrorist threats to soft targets and provide tools and resources to mitigate the threat. These outreach efforts included joint Office of Intelligence and Analysis and IP briefings on the terrorist threats, attacks, tactics, and potential protective measures. Notably, and to cite just two examples, these efforts reached 490 hotel, lodging, and major retail facilities in 2009, and 338 sports league venues in 2010.

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# Exhibit 11

## To the Declaration of Colin Wicker

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**The White House**

Office of the Press Secretary

For Immediate Release September 30, 2011

# Remarks by the President at the "Change of Office" Chairman of the Joint Chiefs of Staff Ceremony

Fort Myer, Virginia

11:41 A.M. EDT

THE PRESIDENT: Thank you very much. (Applause.) Secretary Panetta, thank you for your introduction and for your extraordinary leadership. Members of Congress, Vice President Biden, members of the Joint Chiefs, service secretaries, distinguished guests, and men and women of the finest military in the world.

Most of all, Admiral Mullen, Deborah, Michael, and I also want to also acknowledge your son Jack, who's deployed today. All of you have performed extraordinary service to our country.

Before I begin, I want to say a few words about some important news. Earlier this morning, Anwar al-Awlaki -- a leader of al Qaeda in the Arabian Peninsula -- was killed in Yemen. (Applause.) The death of Awlaki is a major blow to al Qaeda's most active operational affiliate. Awlaki was the leader of external operations for al Qaeda in the Arabian Peninsula. In that role, he took the lead in planning and directing efforts to murder innocent Americans. He directed the failed attempt to blow up an airplane on Christmas Day in 2009. He directed the failed attempt to blow up U.S. cargo planes in 2010. And he repeatedly called on individuals in the United States and around the globe to kill innocent men, women and children to advance a murderous agenda.

The death of al-Awlaki marks another significant milestone in the broader effort to defeat al Qaeda and its affiliates. Furthermore, this success is a tribute to our intelligence community, and to the efforts of Yemen and its security forces, who have worked closely with the United States over the course of several years.

Awlaki and his organization have been directly responsible for the deaths of many Yemeni citizens. His hateful ideology -- and targeting of innocent civilians -- has been rejected by the vast majority of Muslims, and people of all faiths. And he has met his demise because the government and the people of Yemen have joined the international community in a common effort against Al Qaeda.

Al Qaeda in the Arabian Peninsula remains a dangerous -- though weakened -- terrorist organization. And going forward, we will remain vigilant against any threats to the United States, or our allies and partners. But make no mistake: This is further proof that al Qaeda and its affiliates will find no safe haven anywhere in the world.

Working with Yemen and our other allies and partners, we will be determined, we will be deliberate, we will be relentless, we will be resolute in our commitment to destroy terrorist networks that aim to kill Americans, and to build a world in which people everywhere can live in greater peace, prosperity and security.

Now, advancing that security has been the life's work of the man that we honor today. But as Mike will admit to you, he got off to a somewhat shaky start. He was a young ensign, just 23 years old, commanding a small tanker, when he collided with a buoy. (Laughter.) As Mike later explained, in his understated way, when you're on a ship, "colliding with anything is not a good thing." (Laughter.)

I tell this story because Mike has told it himself, to men and women across our military. He has always understood that the true measure of our success is not whether we stumble; it's whether we pick ourselves up and dust ourselves off and get on with the job. It's whether -- no matter the storms or shoals that come our way -- we chart our course, we keep our eye fixed on the horizon, and take care of those around us -- because we all we rise and fall together.

That's the story of Mike Mullen. It's the story of America. And it's the spirit that we celebrate today.

Indeed, if there's a thread that runs through his illustrious career, it's Mike's sense of stewardship -- the understanding that, as leaders, our time at the helm is but a moment in the life of our nation; the humility, which says the institutions and people entrusted to our care look to us, yet they do not belong to us; and the sense of

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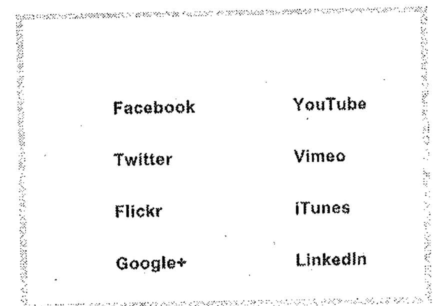

responsibility we have to pass them safer and stronger to those who follow.

Mike, as you look back as your four consequential years as chairman and your four decades in uniform, be assured our military is stronger and our nation is more secure because of the service that you have rendered. (Applause.)

Today, we have renewed American leadership in the world. We've strengthened our alliances, including NATO. We're leading again in Asia. And we forged a new treaty with Russia to reduce our nuclear arsenals. And every American can be grateful to Admiral Mullen -- as am I -- for his critical role in each of these achievements, which will enhance our national security for decades to come.

Today, we see the remarkable achievements of our 9/11 generation of service members. They've given Iraqis a chance to determine their own future. They've pushed the Taliban out of their Afghan strongholds and finally put al Qaeda on the path to defeat. Meanwhile, our forces have responded to sudden crises with compassion, as in Haiti, and with precision, as in Libya. And it will be long remembered that our troops met these tests on Admiral Mullen's watch and under his leadership.

Today, we're moving forward from a position of strength. Fewer of our sons and daughters are in harm's way, and more will come home. Our soldiers can look forward to shorter deployments, more time with their families, and more time training for future missions. Put simply, despite the stresses and strains of a hard decade of war, the military that Admiral Mullen passes to General Dempsey today is the best that it has ever been.

And today, thanks to Mike's principled leadership, our military draws its strength from more members of our American family. Soon, women will report for duty on our submarines. And patriotic service members who are gay and lesbian no longer have to lie about who they are to serve the country that they love. History will record that the tipping point toward this progress came when the 17th Chairman of the Joint Chiefs of Staff went before Congress, and told the nation that it was the right thing to do.

Mike, your legacy will endure in a military that is stronger, but also in a nation that is more just. (Applause.)

Finally, I would add that in every discussion I've ever had with Mike, in every recommendation he's ever made, one thing has always been foremost in his mind -- the lives and well-being of our men and women in uniform. I've seen it in quiet moments with our wounded warriors and our veterans. I saw it that day in the Situation Room, as we held our breath for the safe return of our forces who delivered justice to Osama bin Laden. I saw it at Dover, as we honored our fallen heroes on their final journey home.

Mike, you have fulfilled the pledge you made at the beginning -- to represent our troops with "unwavering dedication." And so has Deborah, who we thank for her four decades of extraordinary service, her extraordinary support to our military families, her kindness, her gentleness, her grace under pressure. She is an extraordinary woman, Mike. And we're both lucky to have married up. (Applause.)

Now the mantle of leadership passes to General Marty Dempsey, one of our nation's most respected and combat-tested generals. Marty, after a lifetime of service, I thank you, Deanie, Chris, Megan and Caitlin for answering the call to serve once more.

In this sense, today begins to complete the transition to our new leadership team. In Secretary Panetta, we have one of our nation's finest public servants. In the new Deputy Secretary, Ash Carter, we will have an experienced leader to carry on the work of Bill Lynn, who we thank for his outstanding service. And the new Vice Chairman, Admiral Sandy Winnefeld, will round out a team where -- for the first time -- both the Chairman and Vice Chairman will have the experience of leading combat operations in the years since 9/11.

Leon, Marty, Ash, Sandy, men and women of this department, both uniformed and civilian -- we still have much to do: From bringing the rest of our troops home from Iraq this year, to transitioning to Afghan lead for their own security, from defeating al Qaeda, to our most solemn of obligations -- taking care of our forces and their families, when they go to war and when they come home.

None of this will be easy, especially as our nation makes hard fiscal choices. But as Commander-in-Chief, let me say it as clearly as I can. As we go forward we will be guided by the mission we ask of our troops and the capabilities they need to succeed. We will maintain our military superiority. We will never waver in defense of our country, our citizens or our national security interests. And the United States of America --and our Armed Forces -- will remain the greatest force for freedom and security that the world has ever known.

This is who we are, as Americans. And this is who we must always be -- as we salute Mike Mullen as an exemplar of this spirit, we salute him for a life of patriotic service; as we continue his legacy to keep the country that we love safe; and as we renew the sources of American strength, here at home and around the world.

Mike, thank you, from a grateful nation. (Applause.)

END
11:52 A.M. EDT

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# Exhibit 12

## To the Declaration of Colin Wicker

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

UNITED STATES OF AMERICA,

Plaintiff,

-vs-

D-1 UMAR FAROUK ABDULMUTALLAB,

Defendant.

_______________________________________/

CASE NO. 2:10-cr-20005

HONORABLE NANCY G. EDMUNDS

## GOVERNMENT'S SENTENCING MEMORANDUM

## INTRODUCTION

As noted by the Court at the time of his plea, and as found by the Probation Department in its Presentence Investigation Report, Defendant Abdulmutallab faces mandatory life sentences as to Counts Four and Six, and a mandatory minimum sentence of thirty years as to Count Two.[1] Defendant also faces up to a life sentence as to Counts One and Seven. The remaining charges, which are Counts Three, Five and Eight, each carry sentences of up to twenty years imprisonment. A summary of the charges, maximum sentences, mandatory minimum sentences, requirement of consecutive sentences, and the government's recommendation as to each is contained in the Sentencing Appendix attached to this Memorandum. The government asks that the Court impose the maximum sentence as to each count.

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[1]Although Count 2 carries a mandatory minimum sentence of 30 years imprisonment, it carries a maximum sentence of up to life imprisonment.

SENTENCING FACTORS

As applicable to the present case, the Court is required to consider the following factors in imposing sentence:

(1) the nature and circumstances of the offense and the history and characteristics of the defendant;

(2) the need for the sentence imposed --

(A) to reflect the seriousness of the offense, to promote respect for the law, and to provide just punishment for the offense;
(B) to afford adequate deterrence to criminal conduct;
(C) to protect the public from further crimes of the defendant; and
(D) to provide the defendant with needed educational or vocational training, medical care, or other correctional treatment in the most effective manner;

(3) the kinds of sentences available;

(4) the sentencing guidelines applicable to the offense; and

(5) the need to avoid unwarranted sentence disparities among defendants with similar records who have been found guilty of similar conduct.

18 U.S.C. § 3553(a).

A. The Nature and Circumstances of the Offense and the History and Characteristics of the Defendant

The "nature and circumstances of the offense" are straightforward: defendant maliciously attempted to murder 289 innocent people of all nationalities and ethnicities, and, but for a technical problem with his bomb, he would have succeeded. As detailed extensively in the Presentence Investigation Report at ¶¶ 13-24 and in the Supplemental Factual Appendix,[2] defendant was deeply

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[2]Defendant, through his standby counsel, objects to those paragraphs of the presentence report. *See* Defendant's Objections, ¶ 1. Defendant states that the objected-to paragraphs contain "information obtained during plea negotiations in this matter and can not at this stage be used against him, for sentencing purposes." Assuming *arguendo* that the debriefings at which
(continued...)

committed to his mission, seeking out and finding Al Qaeda and Anwar Awlaki, volunteering for a martyrdom mission, and then becoming involved in planning and training for a significant amount of time. Never did defendant falter in his resolve or reconsider his decision to commit mass murder. Indeed, as of the date that he entered his guilty plea, defendant stated to this Court that he believes that the Koran obliges "every able Muslim to participate in jihad and fight in the way of Allah, those who fight you, and kill them wherever you find them, some parts of the Koran say, an eye for an eye, a tooth for a tooth." (October 12, 2011, Tr. Vol. 5, page 26.) Defendant added that "participation in jihad against the United States is considered among the most virtuous of deeds in Islam and is highly encouraged in the Koran." (*Id.* at 27.) In explaining his offense, defendant stated that "I attempted to use an explosive device which in the U.S. law is a weapon of mass destruction, which I call a blessed weapon . . ." (*Id.* at 28.) In short, defendant is an unrepentant would-be mass

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[2](...continued)
the statements were made were in fact "plea negotiations," defendant's argument precisely misses the point. The admissibility of plea negotiations is controlled by Federal Rule of Evidence 410, which is inapplicable at sentencing. Fed. R. Evid. 1101(d)(3); *see also* 18 U.S.C. § 3661 ("No limitation shall be placed on the information concerning the background, character, and conduct of a person convicted of an offense which a court of the United States may receive and consider for the purposes of imposing an appropriate sentence.").

Defendant further objects that "the statements made during plea negotiations were protected by Kastigar." Presumably, by using the term "Kastigar" stand-by counsel is referring to a proffer agreement, sometimes referred to as a Kastigar letter, rather than *Kastigar v. United States*, 406 U.S. 441 (1972), as that case involved a grant of immunity under 18 U.S.C. §§ 6002-6003, which was never extended to Defendant Abdulmutallab. However, no proffer agreement was ever signed by Defendant Abdulmutallab, who, after consultation with his then-counsel, chose to speak to agents without signing such an agreement. There is thus no bar to the Court's consideration at sentencing of statements defendant made during debriefings.

The Supplemental Factual Appendix is included in order to provide the Court with additional information regarding "the nature and circumstances of the offenses," particularly Count One. It provides the Court with relevant details regarding other terrorists with whom defendant interacted overseas as part of this plot, including Anwar Awlaki.

murderer, who views his crimes as divinely inspired and blessed, and who views himself as under a continuing obligation to carry out such crimes.

B. The Need for the Sentence to Reflect the Seriousness of the Offense, To Promote Respect for the Law, and to Provide Just Punishment For the Offense

Had defendant attempted to murder a single individual, he likely would be facing a life sentence. Here, where he attempted to murder two hundred eighty nine individuals, no sentence other than life, as to all the counts which carry such a potential sentence, could possibly reflect the seriousness of defendant's conduct. Under the circumstances of this case, anything less than a life sentence would fail to provide just punishment. Indeed, a life sentence would promote respect for the law.

In order to demonstrate the destructive power of defendant's device as it was designed, the government intends to play for the Court at sentencing a video of the FBI Laboratory's demonstration of PETN explosions. These are the same videos which the Court ruled admissible for trial for the same purpose. Those videos demonstrate explosions of 76 grams of PETN, the amount which was recovered unexploded and unburned from defendant's explosive device, and 200 grams, the amount the FBI has estimated was contained in defendant's device before defendant initiated the explosion.

C. The Need to Protect the Public From Further Crimes Of the Defendant

Defendant poses a significant, ongoing threat to the safety of American citizens everywhere. As noted previously, in pleading guilty, defendant reiterated that it is his religious belief that the Koran obliges "every able Muslim to participate in jihad and fight in the way of Allah, those who fight you, and kill them wherever you find them," and that "participation in jihad against the United States is considered among the most virtuous of deeds in Islam and is highly encouraged in the Koran." Thus, by his own words, defendant has shown that he continues to desire to harm the United States and its citizens, and that he views it as his religious obligation to do so.

In addition, Dr. Simon Perry, Ph.D., who was to have testified on behalf of the government at trial as an expert on the concepts of martyrdom and jihad, has prepared a report analyzing defendant's level of danger. Dr. Perry is a criminologist and co-director of the Program in Policing and Homeland Security Studies at the Hebrew University of Jerusalem. Dr. Perry and a team conducted research into the motivation of forty failed suicide bombers, and developed a psychological profile of such individuals. *See* Exhibit A, Memorandum for the Court, by Simon Perry, Ph.D. In his memorandum, Dr. Perry analyzed the available data on the motivation of suicide bombers, or, to use his preferred term, of an individual engaged in "martyrdom."[3] Dr. Perry also

[3]"Martyrdom" is also the term used by defendant in describing his intended behavior. For instance, on December 25, 2009, during the hospital admissions process, defendant told University of Michigan Hospital nurse Julia Longenecker that he had no history of having attempted to harm himself or others. When Ms. Longenecker disputed that characterization, by asking him whether what he had undertaken on the airplane earlier that day was not harming himself and others, defendant replied: "That was martyrdom."

analyzed the facts of the case, including defendant's extensive debriefing given to the FBI.[4] Dr. Perry's entire report provides a unique analysis of martyrdom bombers in general and Defendant Abdulmutallab in particular; Dr. Perry's conclusion is chilling:

> Since UFAM's [Umar Farouk Abdul Mutallab's] motivation to commit martyrdom appears to be great, I believe there is a high probability that given the opportunity, he would try once again to commit an act of martyrdom, endangering his and other innocent lives.
>
> It is my belief that UFAM fits well the profile of the classic martyr as described above. Therefore his act of martyrdom is the result of his expectation to receive religious, personal/ personality and social benefits. As long as he is of the same state of mind and continues to hold the same set of beliefs, the outcome of this "rational choice" decision making process which evaluates the "cost" and the anticipated "benefits" is expected to lead him to martyrdom.
>
> UFAM stated to Agents that he is committed to Jihad. He claimed that once a decision is made, one remains committed to that decision unless something comes up that requires re-examination.
>
> It seems that even the death of Aulaqi, his source of religious guidance concerning martyrdom, did not change his state of mind and did not require re-examination. If anything, it has made him more determined.
>
> In summary, in addition to the probability that given the opportunity, UFAM will make another attempt at martyrdom, there also exists the likelihood that he will become a role model and proxy of Fundamentalist Islamic Jihadists, assisting them in the recruitment of new martyrs.

In other words, defendant has enormous motivation to carry our another terrorist attack, but lacks the capability because of his incarceration. The Court has no ability to control defendant's motivation, which in any event appears to be unchanged. However, the Court can control

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[4] *See* note 2, *supra*. Even if there were some prohibition on the use of defendant's debriefing statements at sentencing, which there is not, they would still be available for Dr. Perry's use, because they are the type of evidence reasonably relied upon by experts in his fields of criminology and psychology. *See* Fed. R. Evid. 703.

defendant's opportunity to act on those intentions. The Court should use the discretion it has to impose a sentence which ensures that defendant never again has the opportunity to carry out the type of mission he still is highly motivated to conduct.

D. The Need to Provide Defendant With Educational or Vocational Training and Medical Treatment

None of these factors is applicable to the present case. Defendant has a college degree from University College London,[5] and even took post-graduate classes. Defendant has fully recovered from the injuries suffered in his attack, and his health is now excellent.

E. The Kinds of Sentences Available, the Sentencing Guidelines, and the Need To Avoid Unwarranted Sentencing Disparities

In the present case, the Sentencing Guidelines provide for life sentences. As noted above, Counts Four and Six carry statutorily-mandated life sentences. Counts One, Three, Five, Seven and Eight all are subject to the terrorism enhancement of USSG § 3A1.4,[6] which adds twelve levels to

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[5]According to the Times Higher Education World Ratings, University College London is rated the 17th best university in the world for 2011-2012. *See* http://www.timeshighereducation.co.uk/world-university-rankings/2011-2012/top-400.html.

[6]USSG § 3A1.4 applies "[i]f the offense is a felony that involved, or was intended to promote a federal crime of terrorism[.]" "Federal crime of terrorism" has the meaning given in 18 U.S.C. § 2332b(g)(5). *See* USSG § 3A1.4 (comment.), n.1.

A "federal crime of terrorism" is defined under 18 U.S.C. § 2332b(g)(5) as an offense that is "calculated to influence or affect the conduct of government by intimidation or coercion, or to retaliate against government conduct," and which also is a violation of 18 U.S.C. § 2332b (relating to terrorism transcending national boundaries, as is Count One), 18 U.S.C. § 32 (relating to destruction of aircraft, as are Counts Five and Eight), 18 U.S.C. § 2332a (relating to weapons of mass destruction, as is Count Seven), *see* 18 U.S.C. § 2332b(g)(5)(B)(i); and which also is a violation of 18 U.S.C. § 46506 (relating to attempted murder on aircraft, as is Count Three), *see* 18 U.S.C. § 2332b(g)(5)(B)(iii).

The record is replete with defendant's statements that he acted "to retaliate against (continued...)

each of the base offenses and also places defendant in Criminal History Category VI. As a result, each of the non-mandatory counts has an adjusted offense level above Level 43, which is the highest level contained in the guidelines. *See* USSG § 5, Pt. A, comment. (n.2) (an offense level of more than 43 is to be treated as an offense level of 43). An offense level of 43 calls for a life sentence at any criminal history level. The fact that the terrorism enhancement places defendant in the most serious criminal history category merely reinforces the fact that the Sentencing Commission sought to ensure life sentences for individuals who commit the types of offenses of which defendant was convicted.[7]

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[6](...continued)
government conduct." *See* October 12, 2011, Tr. Vol. 5, page 26 (defendant stating he acted "in retaliation for U.S. support of Israel and in retaliation of the killing of innocent and civilian Muslim populations in Palestine, especially in the blockade of Gaza, and in retaliation for the killing of innocent and civilian Muslim populations in Yemen, Iraq, Somalia, Afghanistan and beyond"); *id.* (defendant committed an "act of jihad against the United States for the U.S. killing of my Muslim brothers and sisters around the world"); *id.* at 27 (defendant acted "to avenge"); *id.* (defendant acted "in retaliation"); *id.* at 28-29 (defendant acted "for the U.S. oppression of Muslims," "for U.S. interference in Muslim countries," "for U.S. use of weapons of mass destruction on Muslim populations" in various countries, and "for the U.S. wreckage of Muslim lands and property").

Thus, it is clear that the offenses for which defendant was convicted qualify for the terrorism enhancement, and that defendant acted with the requisite intent to retaliate against the United States government. For purposes of the record, the government asks that the Court make an express finding that the enhancement applies.

[7]The statutory factors also require the Court to avoid unwarranted sentencing disparities among defendants with similar records who have been found guilty of similar conduct. A life sentence in the present case would not create any such disparity. To the contrary, Courts routinely impose very stiff sentences on defendants who are convicted of participating in terror plots. For example, in a case involving similar facts, Richard Reid received three non-mandatory life sentences for attempting to explode a bomb aboard an aircraft in flight in 2001 on behalf of al Qaeda, and the maximum sentence on several other non-mandatory counts. *See United States v. Reid*, 02-10013-WGY (D. Mass. 2003); *also e.g.*, *United States v. Faisal Shahzad*, 10 Cr. 541 (MGC) (S.D.N.Y. 2010) (life imprisonment for attempted bombing in
(continued...)

CONCLUSION

For the reasons stated, the government asks that the Court impose life sentences as to Counts One, Two,[8] Four, Six, and Seven, and twenty year sentences as to Counts Three, Five and Eight.

By

[7](...continued)
Times Square, New York); *United States v. Wadih el-Hage, et al.*, S10 98 Cr. 1023 (LBS/LAK) (S.D.N.Y. 2001 and 2010) (life imprisonment for all convicted participants in al Qaeda bombing of U.S. embassies in East Africa); *United States v. Kassir*, S2 04 Cr. 356 (JFK) (S.D.N.Y. 2009) (multiple terms of life imprisonment for operative who set up jihad training camp in the U.S.); *United States v. Mohammed Mansour Jabarah*, 02 Cr. 1560 (BSJ) (S.D.N.Y. 2008) (life imprisonment upon a guilty plea to conspiring to bomb U.S. Embassies in Singapore and the Phillippines); *United States v. Zacarias Moussaoui*, 01 Cr. 455 (LMB) (E.D. Va. 2006) (life sentence for conspiring in the attacks of September 11, 2001); *United States v. Mohammed Salameh, et al.*, 93 Cr. 180 (KTD) (S.D.N.Y. 1999) (1993 bombing of the World Trade Center, resulting in six deaths — sentences of 240 years, 240 years, 180 years, 117 years, 116 years, 108 years); *United States v. Terry Nichols*, 96 Cr. 68-m (D. Colo. 1998) (life imprisonment for conspiracy to bomb the Oklahoma City federal building — defendant acquitted of murder but convicted of manslaughter); *United States v. Abdul Hakim Murad, et al.*, 93 Cr. 180 (KTD) (S.D.N.Y. 1998) (life imprisonment plus 60 years imposed on each of two defendants for a conspiracy to bomb United States airliners in Southeast Asia); *United States v. Omar Abdel-Rahman*, 93 Cr. 181 (MBM) (S.D.N.Y. 1996) (life sentence for seditious conspiracy); *see also United States v. Timothy McVeigh*, 96 Cr. 68-m (D. Colo. 1997) (death sentence for the bombing of the Oklahoma City federal building, resulting in 168 deaths).

[8]Count Two carries a minimum sentence of 30 years imprisonment, but the maximum sentence can be up to life imprisonment.

statute, the sentences on each of Counts One, Two, Four and Six must run consecutively to any other sentence.

Respectfully submitted,

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Dated: February 10, 2012

SENTENCING APPENDIX

| Count | Charge | Maximum Sentence | Mandatory Minimum? | Mandatory Consecutive? | Government Request |
|---|---|---|---|---|---|
| 1. | Terrorism Trans. Nt'l Boundaries | Life | No | Yes | Life/ consecutive to other counts |
| 2. | Possession Firearm/Dest. Device | Life | 360 months | Yes | Life/ consecutive to other counts |
| 3. | Attempted Murder | 20 years | No | No | 240 months* |
| 4. | Use/Carrying of Dest. Device | Life | Life | Yes | Life, consecutive to other counts |
| 5. | Placing Destructive Device in Aircraft | 20 years | No | No | 240 months* |
| 6. | Possession Destructive Device | Life | Life | Yes | Life, consecutive to other counts |
| 7. | Attempted Use Weapon of Mass Destruction | Life | No | No | Life* |
| 8. | Attempt to Destroy and Wreck Aircraft | 20 years | No | No | 240 months* |

*The government has no objection to these counts being made concurrent to each other.

SUPPLEMENTAL FACTUAL APPENDIX

This Supplemental Factual Appendix is intended to provide additional information regarding "the nature and circumstances of the offenses," particularly Count One of the First Superseding Indictment - Conspiracy to Commit an Act of Terrorism Transcending National Boundaries. Specifically, this Supplemental Factual Appendix is intended to provide the Court with details about Defendant Abdulmutallab's interactions with Al Qaeda in the Arabian Peninsula (AQAP) terrorists in the months leading up to his attack on Northwest Flight 253. As with the Presentence Investigation Report, the bulk of the material provided comes from debriefing statements defendant made to FBI agents from January to April 2010, which may be considered for sentencing. *See* Note 2, *supra*.

In August 2009, defendant left Dubai, where he had been taking graduate classes, and traveled to Yemen. For several years, defendant had been following the online teachings of Anwar Awlaki, and he went to Yemen to try to meet him in order to discuss the possibility of becoming involved in jihad. Defendant by that time had become committed in his own mind to carrying out an act of jihad, and was contemplating "martyrdom;" *i.e.*, a suicide operation in which he and others would be killed.

Once in Yemen, defendant visited mosques and asked people he met if they knew how he could meet Awlaki. Eventually, defendant made contact with an individual who in turn made Awlaki aware of defendant's desire to meet him. Defendant provided this individual with the

number for his Yemeni cellular telephone. Thereafter, defendant received a text message from Awlaki telling defendant to call him, which defendant did. During their brief telephone conversation, it was agreed that defendant would send Awlaki a written message explaining why he wanted to become involved in jihad. Defendant took several days to write his message to Awlaki, telling him of his desire to become involved in jihad, and seeking Awlaki's guidance. After receiving defendant's message, Awlaki sent defendant a response, telling him that Awlaki would find a way for defendant to become involved in jihad.

Thereafter, defendant was picked up and driven through the Yemeni desert. He eventually arrived at Awlaki's house, and stayed there for three days. During that time, defendant met with Awlaki and the two men discussed martyrdom and jihad. Awlaki told defendant that jihad requires patience but comes with many rewards. Defendant understood that Awlaki used these discussions to evaluate defendant's commitment to and suitability for jihad. Throughout, defendant expressed his willingness to become involved in any mission chosen for him, including martyrdom - and by the end of his stay, Awlaki had accepted defendant for a martyrdom mission.

Defendant left Awlaki's house, and was taken to another house, where he met AQAP bomb-maker Ibrahim Al Asiri. Defendant and Al Asiri discussed defendant's desire to commit an act of jihad. Thereafter, Al Asiri discussed a plan for a martyrdom mission with Awlaki, who gave it final approval, and instructed Defendant Abdulmutallab on it. For the following two weeks, defendant trained in an AQAP camp, and received instruction in weapons and indoctrination in jihad. During his time in the training camp, defendant met many individuals, including Samir Khan.[9]

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[9] Khan later came to be involved with AQAP's *Inspire* magazine. Both Khan and Awlaki were killed in September 2011.

Ibrahim Al Asiri constructed a bomb for defendant's suicide mission and personally delivered it to Defendant Abdulmutallab. This was the bomb that defendant carried in his underwear on December 25, 2009. Al Asiri trained defendant in the use of the bomb, including by having defendant practice the manner in which the bomb would be detonated; that is, by pushing the plunger of a syringe, causing two chemicals to mix, and initiating a fire (which would then detonate the explosive).

Awlaki told defendant that he would create a martyrdom video that would be used after the defendant's attack. Awlaki arranged for a professional film crew to film the video. Awlaki assisted defendant in writing his martyrdom statement, and it was filmed over a period of two to three days. The full video was approximately five minutes in length.[10]

Although Awlaki gave defendant operational flexibility, Awlaki instructed defendant that the only requirements were that the attack be on a U.S. airliner, and that the attack take place over U.S. soil. Beyond that, Awlaki gave defendant discretion to choose the flight and date. Awlaki instructed defendant not to fly directly from Yemen to Europe, as that could attract suspicion. As a result, defendant took a circuitous route, traveling from Yemen to Ethiopia to Ghana to Nigeria to Amsterdam to Detroit. Prior to defendant's departure from Yemen, Awlaki's last instructions to him were to wait until the airplane was over the United States and then to take the plane down.

[10] The Court has seen the thirty-four-second excerpt of the video that was subsequently released by AQAP as part of its video *America and the Final Trap*.

**CERTIFICATE OF SERVICE**

I hereby certify that on February 10, 2012, I electronically filed the foregoing document with the Clerk of the Court using the ECF system which will send notification of such filing to Anthony Chambers. I further certify that I have caused a copy of this filing to be delivered and mailed to the defendant, Umar Farouk Abdulmutallab, Register No. 44107-039, Federal Detention Center, East Arkona Road Milan, Michigan.

s/ Darlene Secord
Paralegal Specialist
U.S. Attorney's Office

# Exhibit 13

## To the Declaration of Colin Wicker

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JUSTICE NEWS

## Attorney General Eric Holder Speaks at Northwestern University School of Law

Chicago, IL, United States ~ Monday, March 5, 2012

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*As prepared for delivery*

Thank you, Dean [Daniel] Rodriguez, for your kind words, and for the outstanding leadership that you provide – not only for this academic campus, but also for our nation's legal community. It is a privilege to be with you today – and to be among the distinguished faculty members, staff, alumni, and students who make Northwestern such an extraordinary place.

For more than 150 years, this law school has served as a training ground for future leaders; as a forum for critical, thoughtful debate; and as a meeting place to consider issues of national concern and global consequence. This afternoon, I am honored to be part of this tradition. And I'm grateful for the opportunity to join with you in discussing a defining issue of our time – and a most critical responsibility that we share: how we will stay true to America's founding – and enduring – promises of security, justice and liberty.

Since this country's earliest days, the American people have risen to this challenge – and all that it demands. But, as we have seen – and as President John F. Kennedy may have described best – "In the long history of the world, only a few generations have been granted the role of defending freedom in its hour of maximum danger."

Half a century has passed since those words were spoken, but our nation today confronts grave national security threats that demand our constant attention and steadfast commitment. It is clear that, once again, we have reached an "hour of danger."

We are a nation at war. And, in this war, we face a nimble and determined enemy that cannot be underestimated.

Like President Obama – and my fellow members of his national security team – I begin each day with a briefing on the latest and most urgent threats made against us in the preceding 24 hours. And, like scores of attorneys and agents at the Justice Department, I go to sleep each night thinking of how best to keep our people safe.

I know that – more than a decade after the September 11th attacks; and despite our recent national security successes, including the operation that brought to justice Osama bin Laden last year – there are people currently plotting to murder Americans, who reside in distant countries as well as within our own borders. Disrupting and preventing these plots – and using every available and appropriate tool to keep the American people safe – has been, and will remain, this Administration's top priority.

But just as surely as we are a nation at war, we also are a nation of laws and values. Even when under attack, our actions must always be grounded on the bedrock of the Constitution – and must always be consistent with statutes, court precedent, the rule of law and our founding ideals. Not only is this the right thing to do – history has shown that it is also the most effective approach we can take in combating those who seek to do us harm.

This is not just my view. My judgment is shared by senior national security officials across the government. As the President reminded us in 2009, at the National Archives where our founding documents are housed, "[w]e uphold our most cherished values not only because doing so is right, but because it strengthens our country and it keeps us safe. Time and again, our values have been our best national security asset." Our history proves this. We do not have to choose between security and liberty – and we will not.

Today, I want to tell you about the collaboration across the government that defines and distinguishes this Administration's national security efforts. I also want to discuss some of the legal principles that guide – and strengthen – this work, as well as the special role of the Department of Justice in protecting the American people and upholding the Constitution.

Before 9/11, today's level of interagency cooperation was not commonplace. In many ways, government lacked the infrastructure – as well as the imperative – to share national security information quickly and effectively. Domestic law enforcement and foreign intelligence operated in largely independent spheres. But those who attacked us on September 11th chose both military and civilian targets. They crossed borders and jurisdictional lines. And it immediately became clear that no single agency could address these threats, because no single agency has all of the necessary tools.

To counter this enemy aggressively and intelligently, the government had to draw on all of its resources – and radically update its operations. As a result, today, government agencies are better postured to work together to address a range of emerging national security threats. Now, the lawyers, agents and analysts at the Department of Justice work closely with our colleagues across the national security community to detect and disrupt terrorist plots, to prosecute suspected terrorists, and to identify and implement the legal tools necessary to keep the American people safe. Unfortunately, the fact and extent of this cooperation are often overlooked in the public debate – but it's something that this Administration, and the previous one, can be proud of.

As part of this coordinated effort, the Justice Department plays a key role in conducting oversight to ensure that the intelligence community's activities remain in compliance with the law, and, together with the Foreign Intelligence Surveillance Court, in authorizing surveillance to investigate suspected terrorists. We must – and will continue to – use the intelligence-gathering capabilities that Congress has provided to collect information that can save and protect American lives. At the same time, these tools must be subject to appropriate checks and balances – including oversight by Congress and the courts, as well as within the Executive Branch – to protect the privacy and civil rights of innocent individuals. This Administration is committed to making sure that our surveillance programs appropriately reflect all of these interests.

Let me give you an example. Under section 702 of the Foreign Intelligence Surveillance Act, the Attorney General and the Director of National Intelligence may authorize annually, with the approval of the Foreign Intelligence Surveillance Court, collection directed at identified categories of foreign intelligence targets, without the need for a court order for each individual subject. This ensures that the government has the flexibility and agility it needs to identify and to respond to terrorist and other foreign threats to our security. But the government may not use this authority intentionally to target a U.S. person, here or abroad, or anyone known to be in the United States.

The law requires special procedures, reviewed and approved by the Foreign Intelligence Surveillance Court, to make sure that these restrictions are followed, and to protect the privacy of any U.S. persons whose nonpublic information may be incidentally acquired through this program. The Department of Justice and the Office of the Director of National Intelligence conduct extensive oversight reviews of section 702 activities at least once every sixty days, and we report to Congress on implementation and compliance twice a year. This law therefore establishes a comprehensive regime of oversight by all three branches of government. Reauthorizing this authority before it expires at the end of this year is the top legislative priority of the Intelligence Community.

But surveillance is only the first of many complex issues we must navigate. Once a suspected terrorist is captured, a decision must be made as to how to proceed with that individual in order to identify the disposition that best serves the interests of the American people and the security of this nation.

Much has been made of the distinction between our federal civilian courts and revised military commissions. The reality is that both incorporate fundamental due process and other protections that are essential to the effective administration of justice – and we should not deprive ourselves of any tool in our fight against al Qaeda.

Our criminal justice system is renowned not only for its fair process; it is respected for its results. We are not the first Administration to rely on federal courts to prosecute terrorists, nor will we be the last. Although far too many choose to ignore this fact, the previous Administration consistently relied on criminal prosecutions in federal court to bring terrorists to justice. John Walker Lindh, attempted shoe bomber Richard Reid, and 9/11 conspirator Zacarias Moussaoui were among the hundreds of defendants convicted of terrorism-related offenses – without political controversy – during the last administration.

Over the past three years, we've built a remarkable record of success in terror prosecutions. For example, in October, we secured a conviction against Umar Farouk Abdulmutallab for his role in the attempted bombing of

an airplane traveling from Amsterdam to Detroit on Christmas Day 2009. He was sentenced last month to life in prison without the possibility of parole. While in custody, he provided significant intelligence during debriefing sessions with the FBI. He described in detail how he became inspired to carry out an act of jihad, and how he traveled to Yemen and made contact with Anwar al-Aulaqi, a U.S. citizen and a leader of al Qaeda in the Arabian Peninsula. Abdulmutallab also detailed the training he received, as well as Aulaqi's specific instructions to wait until the airplane was over the United States before detonating his bomb.

In addition to Abdulmutallab, Faizal Shahzad, the attempted Times Square bomber, Ahmed Ghailani, a conspirator in the 1998 U.S. embassy bombings in Kenya and Tanzania, and three individuals who plotted an attack against John F. Kennedy Airport in 2007, have also recently begun serving life sentences. And convictions have been obtained in the cases of several homegrown extremists, as well. For example, last year, United States citizen and North Carolina resident Daniel Boyd pleaded guilty to conspiracy to provide material support to terrorists and conspiracy to murder, kidnap, maim, and injure persons abroad; and U.S. citizen and Illinois resident Michael Finton pleaded guilty to attempted use of a weapon of mass destruction in connection with his efforts to detonate a truck bomb outside of a federal courthouse.

I could go on. Which is why the calls that I've heard to ban the use of civilian courts in prosecutions of terrorism-related activity are so baffling, and ultimately are so dangerous. These calls ignore reality. And if heeded, they would significantly weaken – in fact, they would cripple – our ability to incapacitate and punish those who attempt to do us harm.

Simply put, since 9/11, hundreds of individuals have been convicted of terrorism or terrorism-related offenses in Article III courts and are now serving long sentences in federal prison. Not one has ever escaped custody. No judicial district has suffered any kind of retaliatory attack. These are facts, not opinions. There are not two sides to this story. Those who claim that our federal courts are incapable of handling terrorism cases are not registering a dissenting opinion — they are simply wrong.

But federal courts are not our only option. Military commissions are also appropriate in proper circumstances, and we can use them as well to convict terrorists and disrupt their plots. This Administration's approach has been to ensure that the military commissions system is as effective as possible, in part by strengthening the procedural protections on which the commissions are based. With the President's leadership, and the bipartisan backing of Congress, the Military Commissions Act of 2009 was enacted into law. And, since then, meaningful improvements have been implemented.

It's important to note that the reformed commissions draw from the same fundamental protections of a fair trial that underlie our civilian courts. They provide a presumption of innocence and require proof of guilt beyond a reasonable doubt. They afford the accused the right to counsel – as well as the right to present evidence and cross-examine witnesses. They prohibit the use of statements obtained through torture or cruel, inhuman, or degrading treatment. And they secure the right to appeal to Article III judges – all the way to the United States Supreme Court. In addition, like our federal civilian courts, reformed commissions allow for the protection of sensitive sources and methods of intelligence gathering, and for the safety and security of participants.

A key difference is that, in military commissions, evidentiary rules reflect the realities of the battlefield and of conducting investigations in a war zone. For example, statements may be admissible even in the absence of Miranda warnings, because we cannot expect military personnel to administer warnings to an enemy captured in battle. But instead, a military judge must make other findings – for instance, that the statement is reliable and that it was made voluntarily.

I have faith in the framework and promise of our military commissions, which is why I've sent several cases to the reformed commissions for prosecution. There is, quite simply, no inherent contradiction between using military commissions in appropriate cases while still prosecuting other terrorists in civilian courts. Without question, there are differences between these systems that must be – and will continue to be – weighed carefully. Such decisions about how to prosecute suspected terrorists are core Executive Branch functions. In each case, prosecutors and counterterrorism professionals across the government conduct an intensive review of case-specific facts designed to determine which avenue of prosecution to pursue.

Several practical considerations affect the choice of forum.

First of all, the commissions only have jurisdiction to prosecute individuals who are a part of al Qaeda, have

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engaged in hostilities against the United States or its coalition partners, or who have purposefully and materially supported such hostilities. This means that there may be members of certain terrorist groups who fall outside the jurisdiction of military commissions because, for example, they lack ties to al Qaeda and their conduct does not otherwise make them subject to prosecution in this forum. Additionally, by statute, military commissions cannot be used to try U.S. citizens.

Second, our civilian courts cover a much broader set of offenses than the military commissions, which can only prosecute specified offenses, including violations of the laws of war and other offenses traditionally triable by military commission. This means federal prosecutors have a wider range of tools that can be used to incapacitate suspected terrorists. Those charges, and the sentences they carry upon successful conviction, can provide important incentives to reach plea agreements and convince defendants to cooperate with federal authorities.

Third, there is the issue of international cooperation. A number of countries have indicated that they will not cooperate with the United States in certain counterterrorism efforts — for instance, in providing evidence or extraditing suspects – if we intend to use that cooperation in pursuit of a military commission prosecution. Although the use of military commissions in the United States can be traced back to the early days of our nation, in their present form they are less familiar to the international community than our time-tested criminal justice system and Article III courts. However, it is my hope that, with time and experience, the reformed commissions will attain similar respect in the eyes of the world.

Where cases are selected for prosecution in military commissions, Justice Department investigators and prosecutors work closely to support our Department of Defense colleagues. Today, the alleged mastermind of the bombing of the U.S.S. Cole is being prosecuted before a military commission. I am proud to say that trial attorneys from the Department of Justice are working with military prosecutors on that case, as well as others.

And we will continue to reject the false idea that we must choose between federal courts and military commissions, instead of using them both. If we were to fail to use all necessary and available tools at our disposal, we would undoubtedly fail in our fundamental duty to protect the Nation and its people. That is simply not an outcome we can accept.

This Administration has worked in other areas as well to ensure that counterterrorism professionals have the flexibility that they need to fulfill their critical responsibilities without diverging from our laws and our values. Last week brought the most recent step, when the President issued procedures under the National Defense Authorization Act. This legislation, which Congress passed in December, mandated that a narrow category of al Qaeda terrorist suspects be placed in temporary military custody.

Last Tuesday, the President exercised his authority under the statute to issue procedures to make sure that military custody will not disrupt ongoing law enforcement and intelligence operations — and that an individual will be transferred from civilian to military custody only after a thorough evaluation of his or her case, based on the considered judgment of the President's senior national security team. As authorized by the statute, the President waived the requirements for several categories of individuals where he found that the waivers were in our national security interest. These procedures implement not only the language of the statute but also the expressed intent of the lead sponsors of this legislation. And they address the concerns the President expressed when he signed this bill into law at the end of last year.

Now, I realize I have gone into considerable detail about tools we use to identify suspected terrorists and to bring captured terrorists to justice. It is preferable to capture suspected terrorists where feasible – among other reasons, so that we can gather valuable intelligence from them – but we must also recognize that there are instances where our government has the clear authority – and, I would argue, the responsibility – to defend the United States through the appropriate and lawful use of lethal force.

This principle has long been established under both U.S. and international law. In response to the attacks perpetrated – and the continuing threat posed – by al Qaeda, the Taliban, and associated forces, Congress has authorized the President to use all necessary and appropriate force against those groups. Because the United States is in an armed conflict, we are authorized to take action against enemy belligerents under international law. The Constitution empowers the President to protect the nation from any imminent threat of violent attack. And international law recognizes the inherent right of national self-defense. None of this is changed by the fact

that we are not in a conventional war.

Our legal authority is not limited to the battlefields in Afghanistan. Indeed, neither Congress nor our federal courts has limited the geographic scope of our ability to use force to the current conflict in Afghanistan. We are at war with a stateless enemy, prone to shifting operations from country to country. Over the last three years alone, al Qaeda and its associates have directed several attacks – fortunately, unsuccessful – against us from countries other than Afghanistan. Our government has both a responsibility and a right to protect this nation and its people from such threats.

This does not mean that we can use military force whenever or wherever we want. International legal principles, including respect for another nation's sovereignty, constrain our ability to act unilaterally. But the use of force in foreign territory would be consistent with these international legal principles if conducted, for example, with the consent of the nation involved – or after a determination that the nation is unable or unwilling to deal effectively with a threat to the United States.

Furthermore, it is entirely lawful – under both United States law and applicable law of war principles – to target specific senior operational leaders of al Qaeda and associated forces. This is not a novel concept. In fact, during World War II, the United States tracked the plane flying Admiral Isoroku Yamamoto – the commander of Japanese forces in the attack on Pearl Harbor and the Battle of Midway – and shot it down specifically because he was on board. As I explained to the Senate Judiciary Committee following the operation that killed Osama bin Laden, the same rules apply today.

Some have called such operations "assassinations." They are not, and the use of that loaded term is misplaced. Assassinations are unlawful killings. Here, for the reasons I have given, the U.S. government's use of lethal force in self defense against a leader of al Qaeda or an associated force who presents an imminent threat of violent attack would not be unlawful — and therefore would not violate the Executive Order banning assassination or criminal statutes.

Now, it is an unfortunate but undeniable fact that some of the threats we face come from a small number of United States citizens who have decided to commit violent attacks against their own country from abroad. Based on generations-old legal principles and Supreme Court decisions handed down during World War II, as well as during this current conflict, it's clear that United States citizenship alone does not make such individuals immune from being targeted. But it does mean that the government must take into account all relevant constitutional considerations with respect to United States citizens – even those who are leading efforts to kill innocent Americans. Of these, the most relevant is the Fifth Amendment's Due Process Clause, which says that the government may not deprive a citizen of his or her life without due process of law.

The Supreme Court has made clear that the Due Process Clause does not impose one-size-fits-all requirements, but instead mandates procedural safeguards that depend on specific circumstances. In cases arising under the Due Process Clause – including in a case involving a U.S. citizen captured in the conflict against al Qaeda – the Court has applied a balancing approach, weighing the private interest that will be affected against the interest the government is trying to protect, and the burdens the government would face in providing additional process. Where national security operations are at stake, due process takes into account the realities of combat.

Here, the interests on both sides of the scale are extraordinarily weighty. An individual's interest in making sure that the government does not target him erroneously could not be more significant. Yet it is imperative for the government to counter threats posed by senior operational leaders of al Qaeda, and to protect the innocent people whose lives could be lost in their attacks.

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

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

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

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

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

Of course, any such use of lethal force by the United States will comply with the four fundamental law of war principles governing the use of force. The principle of necessity requires that the target have definite military value. The principle of distinction requires that only lawful targets – such as combatants, civilians directly participating in hostilities, and military objectives – may be targeted intentionally. Under the principle of proportionality, the anticipated collateral damage must not be excessive in relation to the anticipated military advantage. Finally, the principle of humanity requires us to use weapons that will not inflict unnecessary suffering.

These principles do not forbid the use of stealth or technologically advanced weapons. In fact, the use of advanced weapons may help to ensure that the best intelligence is available for planning and carrying out operations, and that the risk of civilian casualties can be minimized or avoided altogether.

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

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

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

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

The unfortunate reality is that our nation will likely continue to face terrorist threats that – at times – originate with our own citizens. When such individuals take up arms against this country – and join al Qaeda in plotting

attacks designed to kill their fellow Americans – there may be only one realistic and appropriate response. We must take steps to stop them – in full accordance with the Constitution. In this hour of danger, we simply cannot afford to wait until deadly plans are carried out – and we will not.

This is an indicator of our times – not a departure from our laws and our values. For this Administration – and for this nation – our values are clear. We must always look to them for answers when we face difficult questions, like the ones I have discussed today. As the President reminded us at the National Archives, "our Constitution has endured through secession and civil rights, through World War and Cold War, because it provides a foundation of principles that can be applied pragmatically; it provides a compass that can help us find our way."

Our most sacred principles and values – of security, justice and liberty for all citizens – must continue to unite us, to guide us forward, and to help us build a future that honors our founding documents and advances our ongoing – uniquely American – pursuit of a safer, more just, and more perfect union. In the continuing effort to keep our people secure, this Administration will remain true to those values that inspired our nation's founding and, over the course of two centuries, have made America an example of strength and a beacon of justice for all the world. This is our pledge.

Thank you for inviting me to discuss these important issues with you today.

**Topic:**
Criminal Justice

**Component:**
Office of the Attorney General

# Exhibit 14

## To the Declaration of Colin Wicker

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BETA ABOUT (/ABOUT) THE CHANNELS

(https://news.vice.com)

Photo via Associated Press

UNITED STATES (/TOPIC/UNITED-STATES)

# An Exclusive Look Inside the FBI's Files on the US Citizen Who Edited Al Qaeda's Official Magazine

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*By Jason Leopold (/contributor/jason-leopold)*

September 22, 2014 | 6:15 am

In 2006, a high priority for the FBI was tracking the owner of a blog called Inshallahshaheed who frequently posted commentary in support of Muslim extremist groups and violent jihad.

The FBI feared that both the shifting tone of the blog entries and the dozens of videos the blogger posted to YouTube depicting terrorist operations indicated that he was planning an attack against the US, or intended to join up with militants in Iraq and Afghanistan to fight the US military.

Five years later, that blogger, Samir Khan, was killed in a CIA drone strike in Yemen alongside radical cleric Anwar al-Awlaki, who the Obama administration had secretly targeted for death, setting off a fierce debate over executive power. Both men were affiliated with al Qaeda in the Arabian Peninsula — and both men were US citizens.

"Together, Aulaqi [Awlaki] and Khan have drawn on their understanding of the United States to craft a radicalizing message tailored to American Muslims," Lauren O'Brien, an intelligence analyst in the FBI's counterintelligence division, wrote (http://www.fbi.gov/stats-services/publications/law-enforcement-bulletin/september-2011/the-evolution-of-terrorism-since-9-11) in September 2011, the month the two men were killed.

**'The Islamic State.' Watch the VICE News documentary here.** (https://news.vice.com/video/the-islamic-state-full-length)

VICE News has exclusively obtained many of Khan's FBI's files [pdf below] in response to a Freedom of Information Act (FOIA) request filed not long after his death. It is extremely rare for files on accused terrorists to be released by the government; historically, they have remained classified. In a letter accompanying the documents, the FBI said more than 250 pages of records were withheld on national security grounds and because they would reveal the identity of confidential sources, law enforcement investigative techniques and pertain to ongoing

investigations into terrorism. The FBI said other documents were referred to separate government agencies (believed to be the CIA and Department of Defense) for review. The bureau said in its letter it expects to release another batch of documents on Khan at a later time.

The documents indicate that the FBI began its probe of Khan based entirely on what the bureau referred to as "jihadist" blog posts to Inshallahshaheed, an Arabic phrase that means "Martyr, God willing." The files do not reveal any active plot by Khan against the US or its interests overseas.

"Samir Khan continues to post violent jihadi blogs on the Internet despite several attempts to silence him," one 2007 FBI file states. "This continual resurgence of his website indicate he is being assisted and or directed by an unknown entity.... Khan clearly is using the Internet, possibly at the direction of the GIMF [Al Qaeda propaganda group Global Islamic Media Front (http://en.wikipedia.org/wiki/Global_Islamic_Media_Front_(GIMF))], to radicalize his readers, and potentially dispatch or direct others."

The FBI files indicate that the bureau believed it was Awlaki, identified by name in jihadi articles included in the files, who inspired and directed Khan.

The hundreds of pages of redacted FBI documents from 2006 through 2010 reveal the genesis of the FBI's probe into Khan, provide a window into how terrorists use the internet to attract recruits, and reveal how the FBI may currently be tracking American citizens sympathetic to the Islamic State (https://news.vice.com/topic/islamic-state). In fact, Khan's FBI files reference the Islamic State — specifically his use of the Islamic State of Iraq flag as an avatar — indicating that the bureau had been collecting intelligence on the group for years.

> *Khan's blog posts suggested he was interested in waging violent jihad against the US, and noted his desire to establish an Islamic caliphate.*

According to the files, some of which are titled "Sunni Extremists" and were generated by numerous field offices and divisions within the agency, the FBI first learned of Khan in November 2006, when the then 20-year-old started posting about his support for an Islamic organization

linked to terrorism and, according to the documents, advocated for the beheading of journalists. Two months later, the FBI had opened a file on Khan and was actively collecting information about him.

Michael German, a former FBI agent whose work at the bureau included infiltrating white supremacist groups, told VICE News that the files on Khan are "interesting," but because of the redactions, it's difficult to know what information the FBI had on Khan beyond his blog posts. German said that certain information contained in the files "suggests it was more than just [Khan's] blog posts" that concerned the bureau, but it's "still not enough to get a clear picture of why the FBI was interested" in Khan.

The files "give us an idea of the [intelligence collection capabilities] the FBI has at its fingertips," said German, now a fellow at the Brennan Center for Justice working on intelligence reform. "They had access to his wage and employment records. It's certainly interesting in terms of shedding light on the type of information the FBI can obtain. It raises more questions than answers."

The records show that the FBI found out Khan had worked at Finish Line, a sporting goods store, in 2004; at One-Stop Cellular and Spherion Atlantic, a temp agency, in 2006; and at a Super 8 Motel in 2007. "He previously applied to be a baggage handler for US Airlines. It does not appear that he got the job," according to the files.

The FBI's Field Intelligence Group (http://www.fbi.gov/about-us/intelligence/field-intelligence-groups) (FIG), which identifies emerging threats, "discovered a WEBLOG" maintained by Khan during "open source research in support of [redacted]," which identified his interest in "the Tanzeem-e-Islami-affiliated, US-based organization, Islamic Organization of North America (IONA), and in jihad." (Tanzeem-e-Islami is a radical Muslim group based in Pakistan.)

Khan started blogging about jihad, according to the files, in 2004, the year he moved with his family to Charlotte, North Carolina from New York City. But he didn't appear to be very tech savvy.

"Khan's first WEBLOG was created on xanga.com. He eventually shut down this WEBLOG due to errors he created in the script that caused it to crash repeatedly," states a May 16, 2007 file on Khan. "After shutting down his WEBLOG on xanga.com, Samir Zafar Khan opened a new WEBLOG on wordpress.com and registered the WEBLOG as inshallahshaheed.wordpress.com."

Khan's blog posts suggested he was interested in waging violent jihad against the US, and noted his desire to establish an Islamic caliphate. But his articles were not terribly specific in identifying any targets. For example in June 2006, he wrote, "My furthest goals are beyond what most individuals look forward to and that is between myself and Allah 'Azza wa Jall.'"

The FBI disagreed.

"The FIG believes that his initial comment about his goals being beyond those of most individuals and the responses to that statement by readers of his WEBLOG indicate that mentally he has moved further towards believing that an act of violent jihad and becoming a martyr would raise him to the highest levels of heaven," the FBI files state. "In support of this assessment, FBI New York source reporting from October 2006 [redacted] reveals [redacted]."

The FBI became concerned when a commenter wrote to Khan and expressed interest in joining the "caravan."

"[Redacted] appears to be expressing his desire to join the fighting abroad against the west in the global war on terrorism (GWOT), possibly in Iraq and Afghanistan. His reference of 'I want to join the caravan...' is a likely reference to the phrase, 'The caravan of martyrs' coined in the 1980s by the now deceased Sheikh Abdullah Azzam," the files state. Azzam was Osama bin Laden's mentor. "The phrase 'The caravan of martyrs' is still used to describe the Mujahideen who die in battle."

The FBI's Charlotte field office urged headquarters to manage the case on Khan, but headquarters balked, stating that there was not enough information to prove Khan had direct ties to terrorist groups. So the Charlotte field office continued to build its case. The Secret Service, however, made contact with Khan after he wrote a blog post deemed to be threatening toward President George W. Bush. FBI agents also later interviewed members of Khan's family; they told the agents that they took their son to see a psychiatrist, who said Khan's posts about violent jihad were simply a sign of teenage rebellion.

The files indicate that the FBI began to suspect Khan was more than just a radical blogger, and that he was actively facilitating the travel of would-be jihadists. Khan told a jihadist commenter that he understood "completely" and offered him some advice [all sic]:

Know that the prophet (s) was absolutely correct when he said Paradise lies under the shade of the sword. Prepare yourself physically by working out fe Sebeelillah; so work harder than the Kafireen [non believer] who train to kill al Muslimeem. Please email me akhee and we can discuss some things, insAllah. My email is the hotmail one.

The FBI believed that Khan's response to the commenter was an indication that he had become increasingly frustrated with living in the United States, and that he was gearing up to "join in combat against the United States and its allies. "Investigation has also indicated Khan has had contact with alleged associates of Al Qaeda and subjects of other ongoing investigations," the files say. "Additionally, unconfirmed source reporting indicates Khan's desire to martyr himself."

Khan's "timely" access to "media releases of videos and speeches of known terrorists and groups" from "international sources" led the bureau to conclude that he had been planning an operation. But of greater concern to the agency at the time, according to the files, was the "content of the conversation that appears to have been intended for the pseudo privacy of Samir Zafar Khan's hotmail account."

"Based on the content of the discussion thread presented above, the FIG has concerns that Samir Zafar Khan is using his email accounts to provide advise [sic], recruit, or facilitate the travel of potential jihadist to the battlefields in Iraq or Afghanistan," the FBI files say.

The FBI was also concerned about another extremist blogger — "an unidentified male who runs his WEBLOG on blogspot.com entitled [redacted]" — who had corresponded with Khan in September 2005.

An FBI file from 2007 said agents identify the blogger, based on comments posted on his blog, as a "30 year old male, black-Muslim convert living in the Southern United States" who "identifies his occupation as 'Mujahid in training.'" The FBI was worried the unnamed blogger's "rhetoric, especially concerning conducting violent jihad in the United States, could encourage Samir Zafar Khan of his path of escalation to actually conduct a terrorist act in the United States."

* * *

In late 2007, Khan was placed under surveillance and became the subject of a formal investigation by the FBI and Justice Department. The FBI was monitoring Khan so closely that the bureau obtained a menu with Khan's handwriting and fingerprints that it planned to use as evidence if he

was indicted. The agency also opened sub files on Khan that were devoted to articles written about him, his finances, surveillance of him, and "technical matters." There was one specifically for material meant for a potential Grand Jury.

One FBI file, identified as an "Internet activity report" from the Counterterrorism/Public Access Center, forwarded to the Charlotte field office, says Khan was "outed" by the *New York Times* and notes that the newspaper was asked not to identify him. A November 7, 2007 file from an FBI analyst in Washington, DC whose name is redacted to an agent in Charlotte states:

> This is concerning 21 year old Samir Khan who is known to you. At least I am pretty sure he is known to the Charlotte, NC office. He was 'outted' [sic] by the New York Times a few weeks ago. I know they were asked not to out him but they did anyway. He lives in Charlotte, NC where he keeps a Blog providing media and a place of communication to his jihadi buddies. He has been heavily involved in assisting The Global Islamic Media Front. We have worked very hard to get his web sites shut down but to no avail. He pops up again in another spot.

The *New York Times* story that the analyst mentions was the first news report (http://www.nytimes.com/2007/10/15/us/15net.html?pagewanted=all&_r=0) written about Khan. It was published on October 15, 2007 and examined his online preachings in the context of how radical jihadists use the Internet to spread their message.

The Washington, DC analyst recommended that the agent in Charlotte read a post (http://mypetjawa.mu.nu/archives/190034.php) contained on an anti-jihad blog called the Jawa Report:

> You will find more information that is new it will all be laid out for you by [redacted]. Please read the comments section if you need to. I am in great hopes you will lock him up once and for all. He is a traitor. He gives aid and comfort to the stated enemies of our government. He is more than just a propagandist as far as I am concerned.

Additionally, the FBI files say the agency relied on confidential informants to gather intelligence on Khan and his movements, and to build a terrorism case against him. Some of the files are tagged "Muslim Community Outreach," which indicates the FBI cultivated informants in the Muslim community in Charlotte. Civil liberties groups have criticized (https://www.aclu.org/blog/national-security/fbis-community-outreach-program-trojan-horse) the FBI's so-called Muslim Community Outreach efforts, arguing that they amount to an intelligence gathering program.

**A Justice Department memo provides the CIA's legal justification to kill a US citizen. Read more here.** (https://news.vice.com/article/a-justice-department-memo-provides-the-cias-legal-justification-to-kill-a-us-citizen)

"A source, who has not agreed to testify and who has provided verified and reliable information in the past, currently operates online with FBI tasking. On 10/09/2007, source reported the following information: On 10/05/2007, user inshallahshaheed posted, on the online blog known as inshallahshaheed, a posting titled, 'Regarding those who say, "And you cannot make Jihaad [sic] unless if you have a separate state,"'" an October 11, 2007 counterterrorism file from the Charlotte field office says.

Khan managed to travel to Yemen in 2009. Once there, he became the editor of al Qaeda's glossy English-language magazine, *INSPIRE*. It included articles like "Make a Bomb in the Kitchen of Your Mom," which reportedly inspired the Boston Marathon bombers. How Khan was able to leave the US and travel to Yemen despite the scrutiny he was under is unexplained in the files.

* * *

In May and June of 2010, according to FBI property files, the bureau acquired a Maxtor 200 gigabyte hard drive containing the contents of Khan's blog and the contents of Khan's iPhone.

The FBI kept its lawyers in the loop on these developments. A file dated January 25, 2007 appears to show that the FBI obtained a warrant from a secret surveillance court that authorized a wiretap on Khan's phone and the seizing of his emails. An October 2007 file sent to deputy general counsel Julie Thomas from FBI special agent Nathan Thomas Gray of the Charlotte field office says the National Security Law Branch "requested to record the appropriate information needed to fulfill the Congressional reporting requirements for the [redacted]."

> *'Samir Khan did not socialize with other mosque attendees... Samir Khan told all of the attendees they were "wussies" for not fighting jihad overseas.'*

The files show that the FBI also tracked Khan's vehicle movement, suggesting that the bureau either placed a GPS tracker on his Honda Civic or that it obtained information about his whereabouts from his E-ZPass.

By 2007, the FBI's North Carolina Joint Terrorism Task Force had briefed a federal prosecutor about Khan's blog posts and noted that he may have been providing material support for terrorism in violation of US laws.

Khan's radical views apparently alienated nearly everyone at his local mosque, the FBI files said, and on one occasion an individual whose identity was redacted took Khan to a shooting range in 2005 to "assess whether his shooting skills matched his rhetoric." The individual, whom the FBI interviewed, could not recall whether it did.

**The NSA has revealed new details about is exhaustive search of Edward Snowden's emails. Read more here.** (https://news.vice.com/article/the-nsa-has-revealed-new-details-about-its-exhaustive-search-of-edward-snowdens-emails)

"During Friday prayer, Samir Khan would leave the masjid [mosque] immediately after prayer ended," says a November 8, 2007 summary. "Samir Khan did not socialize with other masjid attendees... Samir Khan told all of the masjid attendees they were 'wussies' for not fighting jihad overseas."

The State Department made a condolence call to Khan's family after he was killed in the 2011 drone strike. Khan was reportedly not a target, and was instead collateral damage because he was traveling with Awlaki, the intended target.

"It was a pretty quick call," Khan family spokesman Jibril Hough told (http://www.foxnews.com/us/2011/10/11/us-state-department-made-condolence-call-to-family-samir-khan/) Fox News at the time. "They apologized to the family for not reaching out and contacting them sooner."

Neither Jibril nor members of the Khan family responded to VICE News' requests for comment.

*Follow Jason Leopold on Twitter: @JasonLeopold (https://twitter.com/JasonLeopold)*

(b)(5) inter-agency or intra-agency memorandums or letters wl
the agency;

(b)(6) personnel and medical files and similar files the disclosu

(b)(7) records or information compiled for law enforcement pu
information ( A ) could reasonably be expected to interfe
trial or an impartial adjudication, ( C ) could reasonably
reasonably be expected to disclose the identity of confid
institution which furnished information on a confidential
enforcement authority in the course of a criminal investi
investigation, information furnished by a confidential so

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TOPICS: *al qaeda in the arabian peninsula (/topic/al-qaeda-in-the-arabian-peninsula), osama bin laden (/topic/osama-bin-laden), fbi (/topic/fbi), terrorism (/topic/terrorism), jihad (/topic/jihad), anwar al-awlaki (/topic/anwar-al-awlaki), yemen (/topic/yemen), drone strike (/topic/drone-strike), samir khan (/topic/samir-khan), cia (/topic/cia), inshallashaheed (/topic/inshallashaheed), tanzeem-e-islami (/topic/tanzeem-e-islami), americas (/topic/americas), al qaeda (/topic/al-qaeda), defense & security (/topic/defense-security), united states (/topic/united-states), war on terror (/topic/war-on-terror)*

RECOMMENDED

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK
......................................................................x
AMERICAN CIVIL LIBERTIES UNION and
THE AMERICAN CIVIL LIBERTIES UNION
FOUNDATION,

Plaintiffs,

v.

12 Civ. 794 (CM)

U.S. DEPARTMENT OF JUSTICE, including its
component the Office of Legal Counsel, U.S.
DEPARTMENT OF DEFENSE, including its
component U.S. Special Operations Command,
and CENTRAL INTELLIGENCE AGENCY,

Defendants.
......................................................................x

**NOTICE OF MOTION**

PLEASE TAKE NOTICE THAT, upon the Declarations of John E. Bies, Martha M. Lutz, and Rear Admiral Sinclair M. Harris, and the accompanying memorandum of law, as well as the classified declarations and memorandum filed for the Court's *ex parte* and *in camera* review, defendants the Department of Defense and the Central Intelligence Agency, by their attorneys, Preet Bharara, United States Attorney for the Southern District of New York, and Joyce R. Branda, Acting Assistant Attorney General, will move this Court before the Honorable Colleen McMahon, United States District Judge, at the United States Courthouse, 500 Pearl

Street, New York, New York 10007, for an order granting summary judgment in favor of the Department of Defense and the Central Intelligence Agency.

Dated: New York, New York
November 14, 2014

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