

DEPARTMENT OF DEFENSE
JOINT STATEMENT FOR THE RECORD

ON

LAW OF ARMED CONFLICT, THE USE OF MILITARY FORCE AND THE 2001
AUTHORIZATION FOR USE OF MILITARY FORCE

BEFORE THE
COMMITTEE ON ARMED SERVICES
UNITED STATES SENATE

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THE COMMITTEE ON ARMED SERVICES,
UNITED STATES SENATE

Thank you, Chairman Levin, Ranking Member Inhofe, and members of the Committee, for this opportunity to testify about the legal framework for U.S. military operations to defend our nation.

First, we will give an overview of the legal framework governing the use of military force. Second, we will discuss the law governing whom the U.S. military may target with military force in the current conflict against al Qaeda and associated forces. Third, we will discuss the robust process of review that informs legal, policy, and military decisions regarding targeting, and the Administration's continued commitment to transparency.

I. Legal Framework for U.S. Military Operations in the Current Conflict

The Administration has outlined the legal framework for the current conflict in numerous public speeches, including speeches by Attorney General Holder and former Department of Defense General Counsel Jeh Johnson, which should give you some sense of the extraordinary care with which the U.S. military ensures that its efforts to address the threat posed by al Qaeda and its associated forces follow all applicable law in its military operations. That means that U.S. military operations must comply with both U.S. domestic law and international law.

Our legal framework recognizes that the United States remains in a state of armed conflict with al Qaeda, the Taliban, and associated forces. As the September 11, 2001 attacks showed, these organizations are determined to kill U.S. citizens, and we continue to use military force to defend our nation against this enemy.

As a matter of domestic law, all three branches of our Government have recognized that the President may use military force in order to prosecute the conflict against al Qaeda, the Taliban, and its associated forces. The Authorization for the Use of Military Force, enacted one week after the attacks of September 11, 2001, explicitly authorizes the President to direct the use of military force in defending the nation. In "the AUMF," as it is often called, Congress authorized the President "to use all necessary and appropriate force against those nations, organizations, or persons he determines planned, authorized, committed or aided the terrorist attacks that occurred on September 11, 2001." With this authorization, President Obama and President Bush before him, as Commanders-in-Chief, as well as four Secretaries of Defense, have directed military operations against al Qaeda, the Taliban, and associated forces.

The AUMF reflects the recognition that we are in an armed conflict with this enemy. And, the Supreme Court and the Court of Appeals for the District of Columbia Circuit have also repeatedly recognized in a long string of cases that the United States can use military force in its armed conflict with al Qaeda.

Some have questioned whether we may continue to rely on the AUMF nearly 12 years after its enactment. In the National Defense Authorization Act for Fiscal Year

2012, Congress reaffirmed the AUMF with respect to detention authority. In doing so, it mirrored the Administration's interpretation of the AUMF as applying to al Qaeda, the Taliban, and associated forces and implicitly reaffirmed the continued applicability of the armed conflict paradigm that the AUMF represents.

As a matter of international law, the United States may use force in accordance with the laws of war in order to prosecute its armed conflict with al Qaeda, the Taliban, and associated forces, in response to the September 11, 2001 attacks, and the United States may also use force consistent with our inherent right of national self-defense.

Some have also questioned the geographic scope of this conflict. As John Brennan stated in a September 2011 speech, the "United States does not view our authority to use military force against al Qaeda as being restricted solely to 'hot' battlefields like Afghanistan." Indeed, the enemy in this conflict has not confined itself to the geographic boundaries of any one country. To that end, there is nothing in the AUMF that restricts the use of military force against al Qaeda to Afghanistan. Moreover, because "we are engaged in an armed conflict with al Qaeda, the United States takes the legal position that – in accordance with international law – we have the authority to take action against al Qaeda and its associated forces without doing a separate self-defense analysis each time."

Nonetheless, the fact that we are in an armed conflict does not mean that the United States is using military force everywhere the enemy is found. In many countries, we need not contemplate military operations because an al Qaeda presence, once discovered, would be neutralized effectively by the nation's law enforcement apparatus. In other countries, where al Qaeda's presence is more formidable, the foreign State or the United States might consider military action.

Additionally, U.S. military operations on the territory of another State must comply with international law rules, including respect for another State's sovereignty, which do not prevent us from using force against our enemies outside an active battlefield, at least when the country involved consents or is unable or unwilling to take action against the threat.

We believe that our military operations will ultimately degrade and dismantle the enemy's operational capacity and supporting networks. At that point, law enforcement and intelligence operations will be the primary tools in our counterterrorism efforts – against individuals who are the scattered remnants of al Qaeda, or who are part of groups unaffiliated with al Qaeda. Military direct action will always be an option for the President to defend the nation against imminent terrorist attacks.

But that is a point we have not yet reached. For now, the careful use of both unilateral and partnered military force, alongside other counterterrorism tools, remains necessary and appropriate to disrupt, dismantle, and ensure a lasting defeat of al Qaeda, the Taliban, and associated forces. Existing authorities are adequate for this armed conflict.

Should a new group threaten us, the United States can, under both U.S. domestic and international law, respond as necessary. At that point, we would consult with Congress to determine whether additional tools are necessary or appropriate.

II. Targeting: Whom Does the U.S. Military Target and What Legal Rules Apply?

Now, I would like to discuss whom we may target in this war against al Qaeda, the Taliban, and associated forces. We are in an armed conflict and the law of armed conflict applies to our operations. Al Qaeda is an unconventional enemy that, with blatant disregard for the law of armed conflict, targets innocent civilians. We nonetheless refuse to allow this enemy, with its inhumane tactics, to define the legal framework for waging war. Our efforts remain grounded in the law. In this *unconventional* war, we apply *conventional* legal principles – well-established legal principles reflected in treaties and customary international law. We have held fast to our principles, laws, and values, even when facing unconventional threats.

The United States is not at war with an idea, a religion, or a tactic. Instead, we are at war against al Qaeda, the Taliban, and associated forces. The former General Counsel of the Department of Defense, Jeh Johnson, has previously explained publicly the meaning of the phrase “associated force.” A group is an associated force, if, first, it is an organized, armed group that has entered the fight alongside al Qaeda; and, second, it is a co-belligerent with al Qaeda in hostilities against the United States or its coalition partners. Individuals who are part of this recognized enemy may be lawful military targets.

In applying these principles in this armed conflict, we conduct a careful, fact-intensive assessment to distinguish between, on the one hand, a terrorist who effectively becomes part of al Qaeda, the Taliban, or an associated force by training or co-locating with the group, accepting orders from its leaders, and participating in the group’s terrorist plotting, and, on the other hand, the terrorist, who without any direct connection to a member of al Qaeda, embraces extremist ideology found on the internet and self-radicalizes. Both are very dangerous, but the former is part of the congressionally-declared enemy force in a congressionally-authorized armed conflict; the latter, although dangerous, is not part of that enemy force.

Under the law of armed conflict, it is well-established that a State may target the enemy, including known, individual members of the enemy force. For example, during World War II., U.S. Navy forces lawfully shot down the aircraft of Admiral Yamamoto, the commander of the Japanese navy. Today, just as in 1943, the use of lethal force against a particular leader of the enemy force in an ongoing armed conflict is entirely consistent with settled law of armed conflict principles governing who may be the object of attack.

Unfortunately, however, some among the ranks of al Qaeda, the Taliban, and their associated forces are U.S. citizens planning attacks against their own country from abroad. This, too, has historical precedent. In previous conflicts, U.S. citizens have fought in foreign armies against the United States—such as with the Axis countries during World War II. Long-standing legal principles and court decisions confirm that being a U.S. citizen does not immunize a member of the enemy from attack. Nonetheless, if we know in advance that the object of our attack is a U.S. citizen, we assume that constitutional rights—including the Fifth Amendment’s Due Process Clause—attach to a U.S. citizen even while he is abroad, and we consider those rights in assessing whether that individual may be targeted.

With regard to the targeting with lethal force of a U.S. citizen in a foreign country who is a senior operational al Qaeda leader actively engaged in planning operations to kill Americans, given the realities of our conflict with al Qaeda and the weight of the government’s interest in protecting its citizens from imminent attack, such an operation would be lawful at least when three criteria are met. First, an informed, high-level official of the U.S. Government determines that the individual poses an imminent threat of violent attack against the United States. Whether a threat is “imminent” incorporates consideration 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. Second, capture is infeasible, and the United States will continue to monitor whether capture becomes feasible prior to any strike. This is a fact-specific inquiry, but considers the relevant window of opportunity, whether the particular country would consent to a capture operation, and other factors, such as the risk to U.S. personnel. Finally, the operation is conducted in a manner consistent with applicable law of armed conflict principles.

With respect to this last criterion, we take extraordinary care to ensure that all military operations—not just the exceptional cases of those against U.S. citizens—are conducted in a manner consistent with well-established law of armed conflict principles, including: (1) *military necessity*, which requires that the use of military force (including all measures needed to defeat the enemy as quickly and efficiently as possible, which are not forbidden by the law of war) be directed at accomplishing a valid military purpose; (2) *humanity*, which forbids the unnecessary infliction of suffering, injury, or destruction; (3) *distinction*, which requires that only lawful targets—such as combatants and other military objectives—may be intentionally targeted; and (4) *proportionality*, which requires that the anticipated collateral damage of an attack not be excessive in relation to the anticipated concrete and direct military advantage from the attack.

These well-established rules that govern the use of force in armed conflict apply regardless of the type of weapon system used. From a legal standpoint, the use of remotely piloted aircraft for lethal operations against identified individuals presents the same issues as similar operations using manned aircraft. However, advanced precision technology gives us a greater ability to observe and wait until the enemy is away from innocent civilians before launching a strike, and thus minimize the risk to innocent civilians.

III. Management and Oversight of Military Operations

Before military force is used against members of al Qaeda, the Taliban, and associated forces, there is a robust review process, which includes rigorous safeguards to protect innocent civilians. Throughout the military chain of command, senior commanders, advised by trained and experienced staffs—including intelligence officers, operations officers, and judge advocates—review operations for compliance with applicable U.S. domestic and international law, including the law of armed conflict, and for consistency with the policies and orders of superiors in the military chain of command.

For operations outside Afghanistan, this review continues up the chain of command, through the 4-star combatant commander, to the Secretary of Defense. Before the Secretary makes a decision, the proposal is reviewed by senior military and civilian advisors, including the Chairman of the Joint Chiefs of Staff and the General Counsel of the Department of Defense. Department officials also receive input from senior officials in other departments and agencies from across our national security team. Military orders implementing a final decision are then transmitted down that chain of command to the relevant forces that carry out such operations.

Some have expressed concern that the process for managing military operations, no matter how rigorous, is largely confined to the Executive Branch. This fact reflects related practical and legal considerations. As a practical matter, officials in the military chain of command must often make real-time decisions that balance the need to act, the existence of alternative options, the possibility of collateral damage, and other factors – all of which depend on expertise and immediate access to information that only the Executive Branch may possess in real time.

As a legal matter, Article II of the Constitution makes the President the Commander-in-Chief of the armed forces. The President is therefore responsible for directing military operations in the prosecution of armed conflict. By U.S. law, the military chain of command runs from the President to the Secretary of Defense and then to combatant commanders. The current process appropriately reflects the President's role in the chain of command; alternatives that some have suggested would present significant constitutional issues.

Congress also plays a critical role in ensuring appropriate oversight of this process. The Department and the Joint Staff regularly brief members and staff of this committee and the House Armed Services Committee on military operations against al Qaeda, the Taliban, and associated forces, both on the prosecution of the conflict generally and specifically on each significant counterterrorism operation conducted outside Afghanistan.

We have also made significant efforts to increase transparency regarding whom the U.S. military targets in the current conflict against al Qaeda, the Taliban, and

associated forces and the procedures by which individual targeting decisions are made. Last year, for example, we declassified information about the U.S. military's counterterrorism activities in Yemen and Somalia in a June 2012 War Powers report to Congress. This type of transparency helps preserve public confidence, dispel misconceptions that the U.S. military targets low-level terrorists who pose no threat to the United States, and address questions raised by our allies and partners abroad. On the other hand, the public release of certain information, such as the intelligence by which current or past targets were identified, could enable the enemy to avoid or manipulate our application of military force. Ultimately, we must maintain a delicate balance between transparency and protecting information from public disclosure for security reasons.

Thank you. We look forward to answering your questions.