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## Beyond the Battlefield, Beyond Al Qaeda: The Destabilizing Legal Architecture of Counterterrorism

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## BEYOND THE BATTLEFIELD, BEYOND AL QAEDA: THE DESTABILIZING LEGAL ARCHITECTURE OF COUNTERTERRORISM

Robert M. Chesney\*

*By the end of the first post-9/11 decade, the legal architecture associated with the U.S. government's use of military detention and lethal force in the counterterrorism setting had come to seem relatively stable, supported by a remarkable degree of cross-branch and cross-party consensus (manifested by legislation, judicial decisions, and consistency of policy across two very different presidential administrations). That stability is certain to collapse during the second post-9/11 decade, however, thanks to the rapid erosion of two factors that have played a critical role in generating the recent appearance of consensus: the existence of an undisputed armed conflict in Afghanistan, as to which the law of armed conflict clearly applies, and the existence of a relatively identifiable enemy in the form of the original al Qaeda organization.*

*Several long-term trends contribute to the erosion of these stabilizing factors. Most obviously, the overt phase of the war in Afghanistan is ending. At the same time, the U.S. government for a host of reasons places ever more emphasis on what we might call the "shadow war" model (i.e., the use of low-visibility or even deniable means to capture, disrupt, or kill terrorism-related targets in an array of locations around the world). The original al Qaeda organization, meanwhile, is undergoing an extraordinary process of simultaneous decimation, diffusion, and fragmentation; one upshot of this transformation has been the proliferation of loosely related regional groups that have varying degrees of connection to the remaining core al Qaeda leadership.*

*These shifts in the strategic posture of both the United States and al Qaeda profoundly disrupt the stability of the current legal architecture on which military detention and lethal force rest. Specifically, these developments make it far more difficult (though not impossible) to establish the relevance of the law of armed conflict to U.S. counterterrorism activities, and they raise exceedingly difficult questions regarding whom these activities lawfully may be directed against. Critically, they also all but guarantee that there will be a new wave of judicial intervention to consider those very questions. Bearing that in mind, I conclude this Article by outlining steps that could be taken now to better align the legal architecture with the trends described above.*

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## INTRODUCTION

The Gulf of Aden lies like a funnel between the Indian Ocean and the Red Sea, bracketed by Yemen on its north shore and Somalia to the south. On a typical day, it is flush with massive tankers and cargo vessels headed to and from the Suez Canal. But the vessel that had the attention of U.S. government officials on April 19, 2011, was a much smaller affair, a mere fisherman's skiff attempting to slip quietly across the Gulf from Yemen to Somalia.<sup>1</sup>

1. Except as otherwise indicated, the following account of the investigation, capture, and detention of Ahmed Warsame derives from *Sealed Indictment, United States v. Warsame*, No. 1:11-cr-00559-UA (S.D.N.Y. June 30, 2011), available at <https://www.documentcloud.org/>

Onboard was a Somali man named Ahmed Abdulkadir Warsame. At the time, that name meant nothing to most Americans. But, for a small circle of U.S. government and military officials with access to the relevant intelligence, Warsame was a decidedly threatening figure who personified troubling changes sweeping through the counterterrorism landscape.

Warsame, you see, was not a member of al Qaeda, nor had he ever been anywhere near the battlefields of Afghanistan. He was, instead, a member of a Somali insurgent group known as *Harakat al-Shabaab al-Mujahideen* (the “Movement of the Mujahideen Youth”), or simply “al-Shabaab.”<sup>2</sup> Of course, so too were hundreds if not thousands of other young Somali men. What made Warsame different was that he had just spent time in Yemen as a guest of al Qaeda in the Arabian Peninsula (“AQAP”), receiving advanced training in explosives and working to build ties between the two groups.

Warsame’s activities had set off alarm bells in Washington. AQAP, though very much engaged in a localized effort to seize power in Yemen, had repeatedly demonstrated its interest in carrying out attacks on American targets, consistent with the larger strategic priorities set by the senior leadership of the original al Qaeda network.<sup>3</sup> Indeed, U.S. officials by early 2011 had come to see AQAP as the organization most likely to carry out a terrorist attack in America.<sup>4</sup> Al-Shabaab, in contrast, had thus far confined its operations to the East Africa region, and despite much talk of it becoming an al Qaeda “franchise,” its leadership appeared divided on the wisdom of that step. More significantly, perhaps, al Qaeda’s senior leadership was also

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documents/231509-warsame-indictment.html; DANIEL KLAIDMAN, *KILL OR CAPTURE* 174, 237–39, 249–52, 256–60, 262–63 (2012); Charlie Savage, *U.S. Tests New Approach to Terrorism Cases on Somali Suspect*, N.Y. TIMES, July 7, 2011, at A10, available at [http://www.nytimes.com/2011/07/07/world/africa/07detain.html?\\_r=1](http://www.nytimes.com/2011/07/07/world/africa/07detain.html?_r=1); and Press Release, U.S. Attorney S. Dist. of N.Y., *Accused al Shabaab Leader Charged with Providing Material Support to al Shabaab and al Qaeda in the Arabian Peninsula* (July 5, 2011), available at <http://www.justice.gov/usao/nys/pressreleases/July11/warsameindictmentpr.pdf>.

2. For an overview of al-Shabaab, see Stephanie Hanson, *Backgrounder: Al-Shabaab*, N.Y. TIMES (Mar. 2, 2009), available at [http://www.nytimes.com/cfr/world/slot2\\_20090227.html?\\_r=1](http://www.nytimes.com/cfr/world/slot2_20090227.html?_r=1).

3. Most famously, AQAP dispatched Umar Farouk Abdulmutallab to set off a bomb hidden in his underwear on a flight to Detroit on Christmas Day 2009. The September 2011 death of Anwar al-Awlaki—a U.S. citizen who appeared to spearhead AQAP’s external operations through propaganda, recruitment, and operational planning—appears not to have brought an end to AQAP’s interest in striking the “Far Enemy.” See Sudarsan Raghavan et al., *In Foiled Bomb Plot, AQAP Took Bait Dangled by Saudi Informant*, WASH. POST, May 9, 2012, available at [http://www.washingtonpost.com/world/in-foiled-bomb-plot-aqap-took-bait-dangled-by-saudi-informant/2012/05/09/gIQA9oXIEU\\_story.html](http://www.washingtonpost.com/world/in-foiled-bomb-plot-aqap-took-bait-dangled-by-saudi-informant/2012/05/09/gIQA9oXIEU_story.html). On al-Awlaki’s role, see Greg Miller & Alice Fordham, *Anwar al-Aulaqi Gets New Designation in Death*, Posting to *Checkpoint Washington*, WASH. POST (Sept. 30, 2011, 11:19 AM), [http://www.washingtonpost.com/blogs/checkpoint-washington/post/aulaqui-gets-new-designation-in-death/2011/09/30/gIQA9oXIEU\\_story.html](http://www.washingtonpost.com/blogs/checkpoint-washington/post/aulaqui-gets-new-designation-in-death/2011/09/30/gIQA9oXIEU_story.html).

4. See, e.g., *Understanding the Homeland Threat Landscape—Considerations for the 112th Congress: Hearing Before the H. Comm. on Homeland Sec.*, 112th Cong. 26 (2011) (statement of Michael Leiter, Director, National Counterterrorism Center), available at <http://www.gpo.gov/fdsys/pkg/CHRG-112hhrg72212/pdf/CHRG-112hhrg72212.pdf> (“I actually consider al Qaeda in the Arabian Peninsula . . . probably the most significant risk to the U.S. homeland.”).

divided on the al-Shabaab question.<sup>5</sup> Osama bin Laden in particular appears to have resisted formal ties, despite the arguments of other al Qaeda leaders.<sup>6</sup> While al Qaeda may not have been prepared at that time to establish a formal relationship with al-Shabaab, it could nonetheless encourage al-Shabaab to expand its efforts beyond Somalia and emulate the AQAP model by adopting a dual focus on local insurgency and periodic external operations against American and other Western targets. Toward that end, therefore, al Qaeda appears to have asked AQAP's leadership to do what it could to reorient al-Shabaab.

Warsame was likely the first fruit of that effort. His capture was also a case study in the difficulty of describing the metes and bounds of the U.S. government's authority to use military detention and lethal force in the name of counterterrorism. Could Warsame lawfully be killed outright, should actionable intelligence regarding his location arise? Could he at least be detained militarily without criminal charge, assuming capture was feasible? If the answer to either question was yes, did it follow that the same would have been true for all members of al-Shabaab? What about other groups or individuals that might have been in communication with al Qaeda leaders or have been sympathetic to al Qaeda's goals? With the original al Qaeda network seemingly on the decline, and the threat posed by emergent regional groups such as AQAP and perhaps now al-Shabaab waxing, these were increasingly pressing questions.

Against this backdrop, the Obama Administration adopted a complex approach to Warsame's case. The administration placed Warsame on a "kill/capture" list maintained by Joint Special Operations Command ("JSOC"). JSOC operators watched closely as Warsame proceeded across the Gulf on April 19, 2011 and the decision was made to attempt a capture.<sup>7</sup> The operation came off in textbook fashion; they seized the vessel without a shot fired.<sup>8</sup> For the next two months Warsame languished in the brig of the *USS Boxer*,<sup>9</sup> undergoing interrogation in military custody. The stage was thus set for what could become a significant test case for the scope of the government's detention authority. But before litigation could arise—indeed, before the public learned of Warsame's capture—the administration switched gears. In a rather bold move, it transferred Warsame to civilian custody, flying him to New York City to face criminal charges.

While shifting Warsame into the civilian criminal justice system may have rendered the question of detention authority academic in his case,<sup>10</sup> the

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5. See NELLY LAHOUD ET AL., LETTERS FROM ABBOTTABAD 38–42 (2012), available at [http://www.ctc.usma.edu/wp-content/uploads/2012/05/CTC\\_LtrsFromAbottabad\\_WEB\\_v2.pdf](http://www.ctc.usma.edu/wp-content/uploads/2012/05/CTC_LtrsFromAbottabad_WEB_v2.pdf) (reviewing documents seized in the raid on Osama bin Laden's compound).

6. See *id.*

7. See KLADMAN, *supra* note 1, at 237–39.

8. *Id.* at 238–39.

9. The ship happened to be on station in the region as part of an antipiracy task force.

10. But see *Hamdan v. United States*, 696 F.3d 1238, 1241 (D.C. Cir. 2012) (noting that a person otherwise eligible for military detention may be held for the duration of hostilities even after completing a criminal sentence).

underlying issues remain. Indeed, situations comparable to Warsame's are likely to arise with increasing frequency in light of certain strategic trends that I describe below. If they do, a future administration may not be inclined to follow the Warsame model, either out of a commitment to making greater use of the military detention option or out of concern for the domestic political backlash that might result in the event of another transfer from military to civilian custody.<sup>11</sup> Congress, for its part, might eventually force the issue by forbidding such transfers by statute (just as it has already forbidden such transfers in the case of detainees held at Guantanamo Bay).<sup>12</sup>

The ultimate lesson of the Warsame scenario is not that hard questions about the authority to use military detention or lethal force in such settings can be avoided but rather that they deserve sustained public attention. In the pages that follow, I explain that the second post-9/11 decade will be increasingly characterized by a kind of "shadow war," taking place on an episodic basis in locations far removed from zones of conventional combat operations and involving opponents not readily described as members of al Qaeda as such. The legal architecture that developed to a point of seeming stability over the past decade is not well adapted to this environment, and as time goes by—as new Warsames emerge—the gaps will become increasingly apparent and problematic.

\* \* \*

Part I fleshes out my baseline claim that the status quo legal architecture reached a point of apparent stability by the close of the first post-9/11 decade. Political debates still raged, of course, and legal criticism certainly continued in the pages of law review articles and advocacy group briefs. Yet across a range of issues—including the use of military detention at Guantanamo and in Afghanistan, the use of reformed military commissions to prosecute a narrowed set of offenses, and the use of drones to carry out lethal strikes in remote areas—the most striking fact was the emergence of cross-party and cross-branch consensus. The Obama Administration famously continued rather than terminated the core elements of various Bush Administration counterterrorism programs (not to mention a dramatic expansion of the drone program), and three years' worth of habeas corpus litigation following the Supreme Court's watershed decision in *Boumediene v. Bush*<sup>13</sup> served primarily (and quite surprisingly to many) to validate the legal foundation of the detention system. Congress, for its part, first took the lead in reviving the military commission system, and then in the National

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11. Warsame's transfer to civilian custody in New York sparked sharp criticism in some quarters. See, e.g., Marc A. Thiessen, *Obama's Terrorist 'Catch and Release' Policy*, Posting to *PostPartisan*, WASH. POST (July 6, 2011, 11:09 AM), [http://www.washingtonpost.com/blogs/post-partisan/post/obamas-terrorist-catch-and-release-policy/2011/07/06/gIQA1pxb0H\\_blog.html](http://www.washingtonpost.com/blogs/post-partisan/post/obamas-terrorist-catch-and-release-policy/2011/07/06/gIQA1pxb0H_blog.html).

12. National Defense Authorization Act for Fiscal Year 2012, Pub. L. No. 112-81, § 1027, 125 Stat. 1298, 1566–67 (2011).

13. 553 U.S. 723 (2008).

Defense Authorization Act for Fiscal Year 2012, reinvigorated the 2001 Authorization for Use of Military Force, providing a fresh statutory foundation for detention operations.

In Part II, I make the case that this consensus depended in significant part on two factors. First, throughout the first post-9/11 decade there has always been a “hot battlefield” in Afghanistan, an area involving high-intensity, large-footprint conventional combat operations as to which there is no serious dispute that the law of armed conflict (“LOAC”) applies. This has long provided a center of gravity for the legal debate surrounding the law of counterterrorism, ensuring that there is at least some setting in which LOAC authorities relating to detention and lethal force apply. Insofar as a given fact pattern could be linked back to Afghanistan, therefore, it has been possible to avoid thorny questions regarding the geographic scope of LOAC principles. Notably, the dozens of habeas cases of the first post-9/11 decade—which collectively have played an outsized role in establishing the appearance that the law has stabilized—almost entirely involve direct links to Afghanistan.<sup>14</sup> Second, throughout the same period there has also been at least a working assumption that we can coherently identify the enemy by referring to al Qaeda and the Taliban (along with glancing-but-unelaborated references to the “associated forces” of such groups). Again, the habeas case law has played a critical role in cementing this impression of clarity.

In Part III, I demonstrate that both of these stabilizing factors are rapidly eroding in the face of larger strategic trends concerning both al Qaeda and the United States. First, the United States, for a host of reasons (fiscal constraints, diplomatic pressure, and a growing sense of policy futility), is accelerating its withdrawal from Afghanistan. Second, the United States is simultaneously shifting to a low-visibility “shadow war” strategy that will rely on Special Operations Forces, CIA paramilitary forces, drones operated by both, proxy forces, and quiet partnerships with foreign security services.<sup>15</sup> Meanwhile, al Qaeda itself has fractured and diffused in pursuit of both the security that comes from geographic dispersal of personnel into new regions

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14. The sole exception involved an al Qaeda detainee captured in the United States whose case rather tellingly produced badly splintered judicial opinions. See *al-Marri v. Pucciarelli*, 534 F.3d 213 (4th Cir. 2008) (en banc) (per curiam with separate opinions by Judges Motz, Traxler, Gregory, Williams, Wilkinson, Niemeyer, and Duncan), *vacated as moot sub nom.* *al-Marri v. Spagone*, 555 U.S. 1220 (2009). For an overview of the larger body of detention case law, see BENJAMIN WITTES ET AL., *THE EMERGING LAW OF DETENTION 2.0* at 24–38 (2012), available at [http://www.brookings.edu/~media/research/files/reports/2011/5/guantanamo%20wittes/05\\_guantanamo\\_wittes.pdf](http://www.brookings.edu/~media/research/files/reports/2011/5/guantanamo%20wittes/05_guantanamo_wittes.pdf).

15. Journalists Daniel Klaidman and David Sanger each published illuminating accounts in the summer of 2012 depicting this ongoing shift from an internal Obama Administration perspective. See KLAIDMAN, *supra* note 1; DAVID E. SANGER, *CONFRONT AND CONCEAL* 150 (2012) (“[T]he Obama Doctrine . . . asserts [that] adversaries can be effectively confronted through indirect methods—without boots on the ground, without breaking the Treasury, without repeating the mistakes of mission creep.”); *id.* at 243–47 (elaborating on the light footprint strategy theme); see also Robert Burns et al., *Drones, Computers New Weapons of US Shadow Wars*, ASSOCIATED PRESS, June 16, 2012, available at 6/16/12 AP DataStream 20:05:32 (Westlaw).

and a strategic vision that embraces decentralization in the form of relationships with quasi-independent regional organizations that may have separate origins and agendas. As a result, it grows ever more difficult to speak coherently of “al Qaeda”; the senior leadership of the original network has been decimated, and so-called franchises with uncertain (or no) ties to that leadership are not only proliferating but are also rapidly emerging as more significant threats to U.S. national security. The upshot is that soon no undisputed hot battlefield will exist anywhere, and the center of gravity with respect to the use of lethal force will continue shifting to locations like Yemen, Pakistan, and Somalia. Already, these unorthodox scenarios are the primary focus for the use of lethal force, and they will similarly be the United States’ focus should it resume the practice of long-term military detention for new detainees.

Part III also maps the disruptive legal consequences of these strategic trends. My essential point is that the apparent stability of the post-9/11 legal architecture—the semblance that some sort of sustained institutional settlement has occurred—is an illusion. As the second post-9/11 decade progresses, policies associated with drone strikes and detention will unquestionably face increasing legal friction, casting doubt over the legality of the U.S. government’s use of detention and lethal force in an array of settings.

In Part IV, I take up the questions of whether we really ought to care about all this, and, if so, what—if anything—can and should be done. We should care, for it will not be possible to simply ride out the increasing legal friction. The current climate of judicial passivity—reflected in the Supreme Court’s unwillingness to reengage with the Guantanamo habeas cases,<sup>16</sup> the unwillingness of courts to adjudicate habeas petitions arising out of Afghanistan,<sup>17</sup> and the unwillingness of a district judge to adjudicate a suit challenging the planned use of lethal force against an American citizen<sup>18</sup>—will not last. For a host of reasons, a fresh wave of detention litigation concentrating on these very issues is all but guaranteed to arise. That litigation will in turn cast a substantial shadow over the use of lethal force, and, in any event, the use of lethal force may yet receive direct judicial attention. Bearing all this in mind, I conclude with a limited set of recommendations for addressing the uncertainty that plagues this area. Some elements of that uncertainty, alas, cannot readily be resolved. They arise in a pluralistic legal environment in which a host of relevant actors simply do not share common ground with respect to which bodies of law are applicable to these questions and what those bodies of law can fairly be said to require. Others, however, can usefully be addressed through statutory innovation.

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16. See Erwin Chemerinsky, *Losing Interest*, NAT’L L.J. (June 25, 2012), available at <http://www.law.com/jsp/nlj/PubArticleNLJ.jsp?id=1202560493349>.

17. See *Al Maqaleh v. Gates*, 605 F.3d 84, 95–99 (D.C. Cir. 2010); *Al Maqaleh v. Gates*, Nos. 06-1669, 08-1307, 08-2143, 2012 WL 5077483, at \*5–7 (D.D.C. Oct. 19, 2012) (dismissing habeas petitions on remand notwithstanding claims of new evidence).

18. See *Al-Aulaqi v. Obama*, 727 F. Supp. 2d 1 (D.D.C. 2010).



I. THE FIRST POST-9/11 DECADE: FROM INSTABILITY TO INSTITUTIONAL SETTLEMENT

What a decade it was for the lawyers. In the wake of the 9/11 attacks, the U.S. government famously adopted a set of counterterrorism policies involving, among other things, the use of military detention without criminal charge or judicial review; prosecution for war crimes in a presidentially constructed system of military commissions; and coercive interrogation using an array of methods including some that many perceived to be torture. Each of these was fraught with legal questions, both domestic and international, and predictably set off fierce legal disputes. By the middle of the first post-9/11 decade, it was clear that these disputes were not going away, that the disputes were driving policy change, and that more change—imposed both internally and externally—was likely on the way. In due course, these changes came about, and by the last years of the decade, the sense of instability had given way to an altogether different narrative.

By the close of the first post-9/11 decade, it seemed like an institutional settlement of sorts had arrived. Legal disputes continued, but the sense that they heralded a serious prospect of compelled policy change had largely disappeared. Courts appeared to be in retreat, and where they remained engaged, they largely endorsed the actions of the elected branches. Congress was eager to entrench this status quo, and a new president from a different political party—elected in part on a rule-of-law platform—embraced and defended key elements of the framework as well. The public, meanwhile, appeared largely exhausted with the whole topic. Across parties and branches, the legal architecture appeared to have stabilized.

A. *Legal Instability and the Post-9/11 Evolution of Counterterrorism Policy*

The U.S. government's practices relating to military detention, military commissions, and interrogation sparked an extraordinary amount of legal debate in the years following 9/11.<sup>19</sup> Over time, it became increasingly apparent that the legal ferment could well boil over, compelling policy changes.

That is more or less what happened, repeatedly, between 2004 and 2008. The Supreme Court ruled against the government in a series of cases that reshaped the military detention process at Guantanamo (specifically, ensuring access to counsel and the right to present fresh evidence to a federal judge in an effort to determine the legal and factual propriety of individual detention decisions).<sup>20</sup> The Court also nullified the Bush Administration's attempt to craft a military commission trial system without express legislative authorization, noting along the way that Common Article Three of the

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19. The literature on this topic is vast. For an insider account of the role of law and lawyers in shaping national security policy during the Bush Administration, see JACK GOLDSMITH, *THE TERROR PRESIDENCY* (2007).

20. See *Boumediene v. Bush*, 553 U.S. 723 (2008); *Hamdi v. Rumsfeld*, 542 U.S. 507, 509 (2004) (plurality opinion); *Rasul v. Bush*, 542 U.S. 466, 485 (2004).

Geneva Conventions—with its strong language addressing the interrogation of any persons held in custody—applies to the conflict with al Qaeda.<sup>21</sup> Congress intervened with legislation intended to prevent the use of the most abusive interrogation techniques, while also reconstituting the military commission system with new restraints and requiring the existence of *some* form of judicial review for Guantanamo detainees even while attempting to foreclose resort to habeas review in particular.<sup>22</sup> Meanwhile, the executive branch undertook to moderate a variety of policies, responding to the prospect of judicial oversight and mounting domestic political pressure (catalyzed by dramatic media exposés and the related litigation and advocacy efforts of a sprawling network of NGOs, lawyers, scholars, and activists) and no small amount of pressure from actors within the executive branch itself.<sup>23</sup> The president acknowledged the existence of CIA detention sites, for example, and ordered the detainees there to be removed to Guantanamo.<sup>24</sup> The Department of Defense repeatedly moderated the rules governing the emerging military commission system,<sup>25</sup> and with one eye squarely fixed on the possibility of judicial review of military detention at Guantanamo, it also voluntarily adopted a complex system of internal administrative review both of the initial detention decision (the Combatant Status Review Tribunal system) and of the decision to continue to hold specific persons over time (the Administrative Review Board system).<sup>26</sup> It eventually made a similar move in Afghanistan, moreover, with the creation of the Detention Review Board system.<sup>27</sup>

In short, both the legal and policy architectures for counterterrorism evolved in fits and starts throughout this hotly contested period, generally in the direction of increased constraint. By the final years of the first post-9/11 decade, however, the period of legal and policy ferment gave way to a period of institutional settlement—a period that would largely track the opening

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21. *Hamdan v. Rumsfeld*, 548 U.S. 557, 613, 631 (2006).

22. See Detainee Treatment Act of 2005, Pub. L. No. 109-148, div. A, tit. X, 119 Stat. 2739; Military Commissions Act of 2006, Pub. L. No. 109-366, 120 Stat. 2600, *invalidated in part by Boumediene*, 553 U.S. at 733.

23. On the role of the decentralized network of civil society voices that have pushed back against U.S. government counterterrorism policy, see JACK GOLDSMITH, *POWER AND CONSTRAINT* (2012).

24. See President Bush Delivers Remarks on Terrorism, *WASH. POST*, Sept. 6, 2006, available at <http://www.washingtonpost.com/wp-dyn/content/article/2006/09/06/AR2006090601425.html>.

25. Tim Golden, *Administration Officials Split over Stalled Military Tribunals*, *N.Y. TIMES*, Oct. 25, 2004, available at <http://www.nytimes.com/2004/10/25/international/world/special2/25gitmo.html?pagewanted=print&position>.

26. See *Combatant Status Review Tribunals/Administrative Review Boards*, U.S. DEPARTMENT OF DEF., [http://www.defense.gov/news/combatant\\_tribunalsarchive.html](http://www.defense.gov/news/combatant_tribunalsarchive.html) (last visited Mar. 9, 2013) (compiling documents establishing the two systems and tracking their progress from 2004–2005).

27. See Jeff A. Bovarnick, *Detainee Review Boards in Afghanistan: From Strategic Liability to Legitimacy*, *ARMY LAW.* (June 2010), at 9.

years in office of a new president whose campaign had explicitly championed a return to rule-of-law values in national security affairs.

### B. *The Appearance of Institutional Settlement*

The legal stabilization trend has been most pronounced with respect to military detention policy, thanks to a combination of cross-branch and cross-party developments.

Courts have played a critical role in this process. In the wake of *Boumediene*, district judges began grappling with the merits of dozens of habeas petitions brought by military detainees held at Guantanamo.<sup>28</sup> When it comes to resolving the factual disputes at the heart of these cases, results have been mixed.<sup>29</sup> But when it comes to the *legal* questions, the government has prevailed across the board all along.

It helps to consider that there are two basic questions of law one might ask in connection with military detention, broadly speaking. First, there is the question of whether the government may lawfully use military detention without criminal charge against *any* category of persons. Every judge enmeshed in the Guantanamo habeas litigation has answered this question affirmatively, much as the Supreme Court itself did back in 2004 in *Hamdi v. Rumsfeld*.<sup>30</sup> Next, there is the question of how precisely to define the category of detainable persons. In *Hamdi*, the Supreme Court confined itself to addressing solely the scenario before it: an arms-bearing member of the Afghan Taliban, captured on the battlefield in Afghanistan at a time when armed conflict raged, and held in connection with that ongoing conflict. Post-*Boumediene*, lower court judges encountered an array of distinct fact patterns: persons linked to al Qaeda or other organizations participating in the hostilities in Afghanistan; persons who were captured or arrested outside Afghanistan; and persons whose conduct was considerably more removed from the paradigm of an arms-bearing “soldier.”<sup>31</sup> While these judges have not always agreed as to the rationale for approving detention in such cases,

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28. See WITTES ET AL., *supra* note 14, at 14, 57. Jack Goldsmith makes a powerful case regarding the legitimizing impact that the resulting case law had with respect to the government’s detention power. See GOLDSMITH, *supra* note 23, at 194 (“[T]he [Guantanamo Bay] habeas corpus cases have . . . empowered the presidency and the military, directly and indirectly, in important ways.”).

29. See WITTES ET AL., *supra* note 14. It was rough sledding for the government early on, with judges repeatedly taking a dim view of the evidence the government had put forward. But over time, the record has evened out considerably. See *id.* Indeed, critics have taken to denouncing the habeas review system as something of a sham, a betrayal of what they took *Boumediene* to represent. See, e.g., Lyle Denniston, *Ex-Judge: Boumediene Is Being “Gutted”*, SCOTUSBLOG (July 17, 2012, 3:54 PM), <http://www.scotusblog.com/2012/07/ex-judge-boumediene-is-being-gutted>.

30. 542 U.S. 507 (2004) (plurality opinion).

31. See WITTES ET AL., *supra* note 14.

the important point is that a wide variety of them, including both Republican and Democratic appointees, have so approved on *some* rationale.<sup>32</sup> Appellate review of these decisions at the D.C. Circuit Court of Appeals has powerfully reinforced that conclusion, moreover, while also clarifying its doctrinal foundations, and the Supreme Court has made clear in case after case that it is not interested in further engagement with the question.<sup>33</sup> In short, the habeas process has proved to be a powerful engine for validating the legal foundations of military detention, to the delight of some and the horror of others.

Courts have not been alone in this project of settlement. Congress, too, has played a significant role, though it only became engaged on the question of detention authority after the courts cleared the path for it to do so through the spate of rulings noted above. Previously, Congress had appeared quite averse to the topic,<sup>34</sup> but once the period of institutional settlement was well underway in the judiciary, Congress joined the party by enacting the National Defense Authorization Act for Fiscal Year 2012 (the “NDAA FY12”).<sup>35</sup> The NDAA FY12 was burdened with an array of complicated and problematic detention provisions, including both constraints on the ability of the executive branch to release or transfer military detainees once in custody at Guantanamo and a confusing—and ultimately quite ineffectual—attempt to force the executive branch to opt for military detention (instead of civilian criminal prosecution) in certain cases. But when it comes to the fundamental questions of detention law—whether there is authority to detain and to whom such authority applies—the NDAA FY12 was the embodiment of the new climate of institutional settlement. The legislative history of the statute is shot through with statements that the statute was meant to codify the status quo as developed by the judiciary in the habeas case law.<sup>36</sup> The statute itself speaks explicitly of simply affirming that the Authorization for Use of Military Force (“AUMF”) includes detention authority and that

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32. *See id.* For a review of the doctrinal disagreements that have characterized these cases, see Robert M. Chesney, *Who May Be Held? Military Detention Through the Habeas Lens*, 52 B.C. L. REV. 769 (2011).

33. Chemerinsky, *supra* note 16.

34. True, Congress provided the original statutory foundation for detention when it enacted the September 2001 Authorization for Use of Military Force (“AUMF”), which specified that “the President is authorized to use all necessary and appropriate force” against the entity responsible for the 9/11 attacks and anyone harboring that entity. But the AUMF famously did not actually address detention authority, let alone attempt to mark its metes and bounds, which is one reason why there was so much legal debate on this topic in the following years. And while Congress addressed related issues such as habeas jurisdiction, it avoided the substance of this topic. Even after *Boumediene* in 2008 made clear that the judiciary would now be obliged to develop the substantive law of detention on its own in the absence of legislative intervention, Congress continued to shy away.

35. National Defense Authorization Act for Fiscal Year 2012, Pub. L. No. 112-81, §§ 1021–34, 125 Stat. 1298, 1562–73 (2011).

36. *See, e.g.*, Letter from Edwin Meese, III, Former U.S. Att’y Gen., et al., to Howard P. McKeon, Chairman, House Armed Servs. Comm. (May 9, 2012), available at [http://armedservices.house.gov/index.cfm/files/serve?File\\_id=cbfe63cd-a38b-47c5-8b3c-0c532545fb8a](http://armedservices.house.gov/index.cfm/files/serve?File_id=cbfe63cd-a38b-47c5-8b3c-0c532545fb8a).

this authority extends to persons who are members or supporters of al Qaeda, the Taliban, or “associated forces” engaged in hostilities against the United States or its coalition partners<sup>37</sup>—in other words, the precise formulation that the government had been advancing, and the courts had been accepting, for many years. The NDAA FY12 was, at bottom, a status quo enactment in this respect, embodying what might be described as an “AUMF good enough” spirit.

The sense that detention law had finally settled, however, was not just a matter of the judiciary and Congress embracing the executive branch’s position. Quite significantly—perhaps even *most* significantly—it also reflected a surprising degree of cross-party consensus. Put more plainly, the perception of an institutional settlement owes a great deal to the fact that the Obama Administration substantially embraced the legal architecture of detention as it had developed by the end of the Bush Administration. When the Obama Administration came into power in early 2009, many observers wondered whether and to what extent it would retreat from the Bush Administration’s positions on the scope of the government’s detention authority. That question came to a head very quickly, as one of the Guantanamo habeas cases required a filing on this very matter less than two months after the inauguration.<sup>38</sup> To the surprise of some, the Obama Administration not only continued to assert the legality of using military detention in that case and others but in doing so, it also argued for essentially the same substantive scope of authority as had the Bush Administration in its later years. President Obama, like President Bush, defended the view that it would be lawful to detain both members and nonmember supporters of al Qaeda, the Afghan Taliban, and “associated forces that are engaged in hostilities against the United States or its coalition partners.”<sup>39</sup> Obama differed from Bush in this specific area in only three notable ways: (1) he abandoned the descriptive label “enemy combatant” (which had come to have quite negative connotations), (2) he made clear that he viewed his authority as subject to (though consistent with) LOAC, and (3) he described his authority as flowing from the AUMF rather than from *both* the AUMF and his inherent authority under Article II of the Constitution.<sup>40</sup>

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37. See National Defense Authorization Act for Fiscal Year 2012 § 1021. An argument can be made that this was not merely a codification exercise with respect to the portion of the definition encompassing persons who are not members of these groups but are instead “supporters” of them. The district court judges had split on this particular question to some extent, while the D.C. Circuit had repeatedly endorsed the government’s view but only in dicta. For more on this question, see Marty Lederman & Steve Vladeck, *The NDAA: The Good, the Bad, and the Laws of War—Part I*, LAWFARE (Dec. 31, 2011, 4:43 PM), <http://www.lawfareblog.com/2011/12/the-ndaa-the-good-the-bad-and-the-laws-of-war-part-i/>.

38. See KLIDMAN, *supra* note 1, at 58–59.

39. See No. 08-442 (D.D.C.), Respondent’s Memorandum Regarding the Government’s Detention Authority Relative to Detainees Held at Guantanamo Bay, at 2, *Hamlily v. Obama*, 616 F. Supp. 2d 63 (D.D.C. 2009), available at <http://www.justice.gov/opa/documents/memo-re-det-auth.pdf>.

40. See *id.* at 1–3. Interestingly, the Obama Administration did not actually disclaim the relevance of Article II in connection with detention authority. Nor did it prove shy about

This was not just a temporary expedient forced on the new administration by a fast-moving litigation docket, though the initial exigency certainly did force the administration's hand.<sup>41</sup> Later that same spring, the president gave a marquee address at the National Archives concerning detention policy and counterterrorism.<sup>42</sup> Obama sounded strong rule-of-law themes and made clear his preference for using civilian criminal prosecution when possible in terrorism-related cases.<sup>43</sup> But he also explicitly endorsed the propriety of using military commissions for prosecution in some settings and military detention without criminal charge when necessary.<sup>44</sup> In the months and years since then, the Obama Administration has vigorously defended the legality of detention in a host of Guantanamo habeas cases,<sup>45</sup> apparently only encountering significant internal discord with respect to the relatively narrow question of whether it ought to claim detention authority as to persons who are mere supporters—but not members—of AUMF-covered groups when those persons are acting in locations remote from the “hot battlefields.”<sup>46</sup> And in a related vein, the administration has just as vigorously fought to prevent the extension of judicial review to the use of military detention in Afghanistan (both in cases involving Afghans captured there and in more difficult cases involving non-Afghans captured elsewhere but brought to Afghanistan for detention).<sup>47</sup>

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invoking Article II authority, standing alone, later in connection with the use of force in Libya. For a detailed account of Bush–Obama continuity, see GOLDSMITH, *supra* note 23 *passim*.

41. See KLADMAN, *supra* note 1, at 58–59. Addressing other security-related policy decisions forced to a head by the pressure of the litigation schedule, Klaidman quotes Obama on another occasion venting that “[i]t’s another one of these damn litigation decisions they want to talk about, and I’m tired of it. . . . I’m tired of being jammed this way.” *Id.* at 47.

42. President Barack Obama, Remarks by the President on National Security (May 21, 2009), available at <http://www.whitehouse.gov/the-press-office/remarks-president-national-security-5-21-09>.

43. *Id.*

44. *Id.*

45. See WITTES ET AL., *supra* note 14. The fact that all this occurred at the same time that the Obama Administration was calling for the closure of Guantanamo is of no moment. The president in his 2009 National Archives speech made clear that continued military detention might be needed in some cases, and substantial efforts were made to establish a facility within the United States in which such detainees could be held after the closure of Guantanamo. See Obama, *supra* note 42; see also Peter Slevin, *Illinois Prison Picked for Detainees*, WASH. POST, Dec. 16, 2009, available at [http://articles.washingtonpost.com/2009-12-16/news/36834397\\_1\\_thomson-correctional-center-illinois-prison-guantanamo-bay](http://articles.washingtonpost.com/2009-12-16/news/36834397_1_thomson-correctional-center-illinois-prison-guantanamo-bay).

46. John O. Brennan, Ass’t to the President for Homeland Sec. and Counterterrorism, Remarks on Strengthening Our Security by Adhering to Our Values and Laws at the Harvard Law School Program on Law and Security (Sept. 16, 2011), available at <http://www.whitehouse.gov/the-press-office/2011/09/16/remarks-john-o-brennan-strengthening-our-security-adhering-our-values-an>; see also KLADMAN, *supra* note 1; Charlie Savage, *Obama Team Is Divided on Anti-Terror Tactics*, N.Y. TIMES, Mar. 29, 2010, at A1, available at [http://www.nytimes.com/2010/03/29/us/politics/29force.html?\\_r=1&hp=&pagewanted=all](http://www.nytimes.com/2010/03/29/us/politics/29force.html?_r=1&hp=&pagewanted=all).

47. See, e.g., *Al Maqaleh v. Gates*, 605 F.3d 84 (D.C. Cir. 2010).

This pattern of cross-branch and cross-party consensus gives the impression that the legal architecture of detention has stabilized, but the settlement phenomenon is not limited to detention policy. The same thing has happened, albeit to a lesser extent, in other areas.<sup>48</sup>

The military commission prosecution system provides a good example. When Obama came into office, it seemed quite possible, indeed likely, that he would shut down the commission system. Indeed, the new president promptly ordered all commission proceedings suspended pending a policy review.<sup>49</sup> In the end, however, the administration worked with the then-Democratic-controlled Congress to pursue a mend-it-don't-end-it approach culminating in passage of the Military Commissions Act of 2009, which addressed a number of key objections to the statutory framework Congress and the Bush Administration had crafted in 2006.<sup>50</sup> In his National Archives address in spring 2009, moreover, Obama also made clear that he would use this system in appropriate cases.<sup>51</sup> He has duly done so, notwithstanding his administration's doomed attempt to prosecute the so-called "9/11 defendants" (especially Khalid Sheikh Mohamed) in civilian courts. While difficult questions still surround the commission system as to particular issues—such as the propriety of charging "material support" offenses for pre-2006 conduct<sup>52</sup>—the system as a whole is far more stable today than it was at any point in the past decade.<sup>53</sup>

There have been strong elements of cross-party continuity between the Bush and Obama Administrations on an array of other counterterrorism policy questions, including the propriety of using rendition in at least some circumstances and, perhaps most notably, the legality of using lethal force not just in contexts of overt combat deployments but also in areas physically remote from the "hot battlefield." Indeed, the Obama Administration quickly outstripped its predecessor in terms of the quantity and location of its airstrikes outside of Afghanistan,<sup>54</sup> and it also greatly surpassed the Bush

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48. Cf. David Kravets, *Former CIA Chief: Obama's War on Terror Same as Bush's, but with More Killing*, WIREd, Sept. 10, 2012, <http://www.wired.com/threatlevel/2012/09/bush-obama-war-on-terror/> (noting opinion by former CIA and NSA director Michael Hayden that there has been remarkable continuity across the Bush and Obama Administrations regarding many national security issues).

49. See Peter Finn, *Obama Seeks Halt to Legal Proceedings at Guantanamo*, WASH. POST, Jan. 21, 2009, available at <http://www.washingtonpost.com/wp-dyn/content/article/2009/01/20/AR2009012004743.html>.

50. Military Commissions Act of 2009, Pub. L. No. 111-84, div. A, tit. XVIII, 123 Stat. 2574.

51. See Obama, *supra* note 42.

52. Larkin Reynolds & Wells Bennett, *Hamdan Oral Argument Preview*, LAWFARE (May 2, 2012, 9:29 PM), <http://www.lawfareblog.com/2012/05/hamdan-oral-argument-preview/>.

53. Policy changes contributing to the enhanced stability of the system include the appointment of top-tier personnel such as the current chief prosecutor, Brigadier General Mark Martins, as well as significant improvements in the transparency of system proceedings and filings.

54. See, e.g., Bill Roggio & Alexander Mayer, *Charting the Data for U.S. Airstrikes in Pakistan, 2004–2012*, LONG WAR J., <http://www.longwarjournal.org/pakistan-strikes.php> (last

Administration in its efforts to marshal public defenses of the legality of these actions.<sup>55</sup> What is more, the Obama Administration succeeded in fending off a lawsuit challenging the legality of the drone-strike program (in the specific context of Anwar al-Awlaki, an American citizen and member of AQAP known to be on a list of approved targets for the use of deadly force in Yemen, who was in fact killed in a drone strike some months later).<sup>56</sup>

The point is not to claim that legal disputes surrounding these counterterrorism policies have effectively ended. Far from it; a steady drum-beat of criticism persists, especially in relation to the use of lethal force via drones. But by the end of the first post-9/11 decade, this criticism no longer seemed likely to spill over in the form of disruptive judicial rulings, newly restrictive legislation, or significant spikes in diplomatic or domestic political pressure, as had repeatedly occurred in earlier years. Years of law-conscious policy refinement—and quite possibly some degree of public fatigue or inurement when it came to legal criticisms—had made possible an extended period of cross-branch and cross-party consensus. This development in turn left the impression that the underlying legal architecture had reached a stage of stability that was good enough for the time being.

## II. FOUNDATIONS OF THE APPARENT INSTITUTIONAL SETTLEMENT (AND WHAT THEY OBSCURE)

This perception of institutional settlement is an illusion. It depends on the existence of a set of stabilizing factors—large-scale U.S. involvement in undisputed armed conflict in Afghanistan and a relatively clear conception of the identity of the enemy—that are rapidly decaying. For years these factors drew our attention away from a pair of critical and wholly unresolved legal issues that might best be described as “boundary questions.” Now, it is rapidly becoming apparent that these boundary questions are central to determining the boundaries of the government’s authority to detain and to kill in the name of counterterrorism.

### A. *What Are the Boundary Questions?*

It is hard to talk sensibly about the legality of using detention or lethal force in a particular case without taking a position, explicitly or otherwise, on the relevance of LOAC to the analysis. And it is equally difficult to do so without some coherent conception of the identity of the “enemy,” at both

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updated Feb. 8, 2013, 4:46 PM); Bill Roggio & Bob Barry, *Charting the Data for U.S. Airstrikes in Yemen, 2002–2013*, LONG WAR J., <http://www.longwarjournal.org/multimedia/Yemen/code/Yemen-strike.php> (last updated Jan. 23, 2013, 8:02 PM).

55. See Kenneth Anderson, *Readings: The Canonical National Security Law Speeches of Obama Administration Senior Officials and General Counsels*, LAWFARE (Aug. 28, 2012, 3:37 PM), <http://www.lawfareblog.com/2012/08/readings-the-canonical-national-security-law-speeches-of-obama-administration-senior-officials-and-general-counsels/>.

56. *Al-Aulaqi v. Obama*, 727 F. Supp. 2d 1 (D.D.C. 2010); *Islamist Cleric Anwar al-Awlaki Killed in Yemen*, BBC NEWS (Sept. 30, 2011, 12:17 PM), <http://www.bbc.co.uk/news/world-middle-east-15121879>.



the individual and organizational levels. Both sets of issues are critical to defining the legal boundaries of the government's powers. Given the apparent stability of the legal architecture in recent years, one might suppose that both questions had been largely resolved. Far from it, however.

### 1. In What Circumstances Does LOAC Govern?

Consider first the LOAC problem. LOAC—also known today as International Humanitarian Law (“IHL”) and formerly known simply as the law of war—provides an array of rules governing the permissible means and methods of armed conflict (including who may be killed and under what circumstances) and the proper treatment and disposition of persons who fall into the hands of the enemy in such circumstances (including who may be detained for the duration of hostilities without criminal charge).<sup>57</sup> But once we move beyond the paradigm case of two states using their regular armed forces against one another, pinning down the precise circumstances governed by LOAC—LOAC's “field of application”—proves to be a rather difficult task.

It is not that people disagree about the test for LOAC's field of application, at least not when stated in abstract terms. When dealing with a situation involving a state party on one side and a nonstate actor on the other, there is widespread agreement that the nonstate party must possess (at least) some sufficient degree of organizational coherence and that the violence at issue must rise to some sufficient level of intensity (taking into account factors such as the nature, scale, methods, impact, and duration of the violence).<sup>58</sup> So far so good. But once we move to apply this test to a particular fact pattern, we quickly discover that the room for disagreements is substantial. The general outlines of the test appear settled, but the agreement does not extend to the granular level, let alone to the proper application and results in particular cases.

First, it is entirely unclear just where the line lies between the level of intensity at which violence remains a matter of civil disorder or criminality and the level at which it earns the title “armed conflict.” That is to say, there is no clear consensus as to the metrics, such as number of deaths or types of

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57. For an introduction to the area suited for a general audience, see INT'L COMM. OF THE RED CROSS, INTERNATIONAL HUMANITARIAN LAW (2002), available at [http://www.icrc.org/eng/assets/files/other/icrc\\_002\\_0703.pdf](http://www.icrc.org/eng/assets/files/other/icrc_002_0703.pdf). For a casebook approach designed from an operational perspective, see GEOFFREY S. CORN ET AL., THE LAW OF ARMED CONFLICT (2012). See also U.S. DEP'T OF THE ARMY, FIELD MANUAL NO. FM 27-10, THE LAW OF LAND WARFARE (1956).

58. See, e.g., NILS MELZER, TARGETED KILLING IN INTERNATIONAL LAW 252–61 (2008); Kenneth Anderson, *Targeted Killing and Drone Warfare: How We Came to Debate Whether There Is a “Legal Geography of War”* 5–7, in FUTURE CHALLENGES IN NATIONAL SECURITY AND LAW (Peter Berkowitz ed., 2011), [http://media.hoover.org/sites/default/files/documents/Future\\_Challenges\\_Anderson.pdf](http://media.hoover.org/sites/default/files/documents/Future_Challenges_Anderson.pdf). Monica Hakimi points out that “[t]he test for identifying noninternational armed conflicts is notoriously deficient” but also that “[m]ost decisionmakers consider” the same factors at a high level of generality. Monica Hakimi, *A Functional Approach to Targeting and Detention*, 110 MICH. L. REV. 1365, 1374 (2012).

weaponry, to be used in objectively calibrating the elements of the intensity inquiry. It is a holistic inquiry with inevitable room for disagreement among reasonable persons in marginal cases. Second, even if the metrics for the test were clearer, disagreement can also arise because of uncertainty regarding which fact patterns are properly made the objects of that inquiry. Consider, from this viewpoint, the circumstances of AQAP in Yemen. The United States has repeatedly used lethal force against AQAP targets—at least forty times between 2010 and August 4, 2012, according to one source<sup>59</sup>—and AQAP has on a few occasions attempted to set off bombs on United States-bound planes.<sup>60</sup> AQAP and the Yemeni government have engaged in much more numerous exchanges of fire,<sup>61</sup> and of course the United States, other governments, and other elements of the al Qaeda network have had their violent interactions as well. Does all of this count in assessing the intensity factor? If only part of this counts, which part? And over what time period does the inquiry properly extend? It is not clear that these questions only admit of a single correct answer. Third, there may also be disagreement as to the underlying facts themselves: who actually carried out which actions, with what intentions or knowledge, and toward what ends and with what consequences.

Assuming that one overcomes these obstacles, a separate boundary issue involving LOAC then arises: Are there geographic constraints with respect to *where* LOAC may apply?<sup>62</sup> That is, if we assume that the conditions for recognition of an armed conflict are satisfied in, say, Afghanistan, does it follow that LOAC applies not only in Afghanistan but also in other locations around the world, no matter how remote from Afghanistan, so long as the parties to the conflict in Afghanistan encounter one another there? The U.S. government takes the position that LOAC travels with the parties wherever they might roam.<sup>63</sup> Others disagree. One viewpoint, for example, holds that

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59. See Roggio & Barry, *supra* note 54.

60. See, e.g., Julian Borger et al., *Cargo Plane Bomb Plot: Saudi Double Agent 'Gave Crucial Alert'*, *GUARDIAN*, Nov. 1, 2010, <http://www.guardian.co.uk/world/2010/nov/01/cargo-plane-plot-saudi-agent-gave-alert>; Peter Finn, *Attempted Bomber of Detroit-Bound Plane Gets Life in Prison*, *WASH. POST*, Feb. 16, 2012, available at [http://www.washingtonpost.com/world/national-security/attempted-bomber-of-detroit-bound-plane-gets-life-in-prison/2012/02/16/gIQA3uHIR\\_story.html](http://www.washingtonpost.com/world/national-security/attempted-bomber-of-detroit-bound-plane-gets-life-in-prison/2012/02/16/gIQA3uHIR_story.html); Raghavan et al., *supra* note 3 (describing collapse of a plot in late spring 2012).

61. For a detailed collection of events, see Cody Curran et al., *AQAP and Suspected AQAP Attacks in Yemen Tracker 2010, 2011, and 2012*, *CRITICAL THREATS* (May 21, 2012), <http://www.criticalthreats.org/yemen/aqap-and-suspected-aqap-attacks-yemen-tracker-2010>.

62. See Anderson, *supra* note 58, at 10–16; see also Laurie R. Blank, *Defining the Battlefield in Contemporary Conflict and Counterterrorism: Understanding the Parameters of the Zone of Combat*, 39 *GA. J. INT'L & COMP. L.* 1, 11–14 (2010); Jennifer C. Daskal, *The Geography of the Battlefield: A Framework for Detention and Targeting Outside the "Hot" Conflict Zone*, 161 *U. PA. L. REV.* (forthcoming 2013) (manuscript available at <http://ssrn.com/abstract=2049532>).

63. See, e.g., Brennan, *supra* note 46 (“An area in which there is some disagreement is the geographic scope of the conflict. The United States does not view our authority to use military force against al-Qa’ida as being restricted solely to ‘hot’ battlefields like Afghanistan. . . . Others in the international community—including some of our closest allies and

LOAC has no application outside the geographic boundaries of the specific state in which events satisfy the threshold-of-intensity criterion; another accepts that LOAC can apply to persons outside the borders of such a state, but only where their activities in some meaningful sense tie back to the original zone of hostilities (such as by exercising remote command of operations).<sup>64</sup>

Boundary questions also emerge along the temporal dimension. That is, even if we assume that a state of armed conflict existed in connection with some particular situation of violence in some relevant location, difficult questions can arise as to precisely when that situation achieved this status<sup>65</sup> and for how long thereafter that status remains in play.<sup>66</sup> There is little doubt that the problem of temporal boundaries is particularly vexing in a circumstance in which the precise identity of the opponent is in question—which brings us to our next set of boundary questions.

## 2. Who Precisely Is the Enemy?

Separate from (though not unrelated to) the LOAC boundary issue is the question of how precisely to identify the enemy or opponent in whatever conflict (or other paradigm of interactions) is at issue. One would hardly think twice about this in a conventional state-against-state armed conflict, both because of the central role that visible and discrete armed forces play in that setting and because the domestic-law instruments associated with such conflicts—declarations of war, authorizations for use of military force—would typically provide an express answer to the question. But it is a step that can prove quite complicated in the context of noninternational armed conflict, particularly where the operative domestic law instruments do not

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partners—take a different view of the geographic scope of the conflict, limiting it only to the ‘hot’ battlefields.”).

64. See, e.g., MELZER, *supra* note 58, at 257–61, 267; Mary Ellen O’Connell, *Defining Armed Conflict*, 13 J. CONFLICT & SECURITY L. 393 (2008); Jakob Kellenberger, President, Int’l Comm. of the Red Cross, Grotius Lecture: Confronting Complexity Through Law: The Case for Reason, Vision and Humanity 7 (Mar. 28, 2012), <http://intercrossblog.icrc.org/sites/default/files/files/Grotius%20Lecture%202012.pdf> (“It should be recalled that the ICRC does not share the view that a conflict of such [transnational] scope [against al Qaeda and its associated forces], previously known as the ‘war against terrorism’, [sic] is taking place.”); Daniel Cahen through Robert Chesney, *Guest Post from the ICRC’s Daniel Cahen Responding to My Post on Syria/LOAC*, LAWFARE (July 17, 2012, 11:28 AM), <http://www.lawfareblog.com/2012/07/guest-post-from-the-icrcs-daniel-cahen-responding-to-my-post-on-syrialoac/>. For an exceptionally useful overview of the clashing viewpoints, see Daskal, *supra* note 62, at 8–19.

65. This issue lurks in the background of the charges in some military commission prosecutions, for example, insofar as they turn on pre-9/11 conduct—though the personal jurisdiction provisions of the commission system appear to contemplate pre-9/11 conduct explicitly, thus muddying the waters. Cf. John C. Dehn, *An Opportunity for Judicial Review of the Existence of Armed Conflict?*, OPINIO JURIS (Aug. 19, 2011, 10:36 AM), <http://opiniojuris.org/2011/08/19/an-opportunity-for-judicial-review-of-the-existence-of-armed-conflict/>.

66. See MARY L. DUDZIAK, WAR•TIME (2012) (deconstructing the notion that war has discernible temporal boundaries); see also Samuel Moyn, *War Time: An Idea, Its History, Its Consequences*, LAWFARE (May 24, 2012, 11:10 AM) (book review), <http://www.lawfareblog.com/2012/05/war-time-an-idea-its-history-its-consequences/>.

actually name the enemy. For example, with nonstate actors it may be exceedingly difficult to distinguish which groups should be understood as jointly comprising a single entity, which are distinct yet mutually engaged in the conflict, and which might be sympathetic with or supportive of a party to the conflict without actually being a party to the conflict. All these inquiries become even more difficult where the groups involved seek to obscure their location, membership, organizational structure, and activities.

### B. *Stabilizing Factors That Obscure the Boundary Questions*

How can it be, in light of these boundary issues, that in recent years the legal architecture for the U.S. government's use of detention and lethal force has acquired a veneer of stability? It is not because these boundary questions have been resolved nor because they are novel. It is because certain stabilizing factors have spared us the need to focus on them.<sup>67</sup>

#### 1. Undisputed Armed Conflict in Afghanistan

Throughout the post-9/11 era—well, at least since November 2001—there has always been at least one circumstance in which it is essentially undisputed that the United States was engaged in armed conflict. Specifically, the United States has been engaged in large-scale, overt combat operations in Afghanistan at all relevant times, and for a number of years in the midst of this period, it was similarly engaged in Iraq. There is no serious dispute that circumstances in Afghanistan constitute armed conflict nor that LOAC applies there as a result. This has long ensured that the U.S. government can argue with great force that it is fighting under color of LOAC—at least *somewhere* against *someone*.

That would not matter to the larger debate if the use of detention and lethal force in Afghanistan had been largely a sideshow over the years, relative to activities elsewhere. But the opposite has been the case. Afghanistan has dominated perceptions of how and where the United States uses military force in relation to terrorism (though Iraq had its moment as well, of course). And this is especially true when it comes to the handful of occasions when the government's legal theories have been put to the test in a serious and high-profile way.

One such occasion was the 2004 Supreme Court decision involving the detention of Yaser Hamdi, a man who was captured in Afghanistan and taken to Guantanamo but then brought to America after officials learned

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67. To be clear, I am contending that the stabilizing factors discussed below (clarity as to the existence of a LOAC-governed armed conflict in Afghanistan and relative clarity as to the identity of the enemy) have combined to generate cases and fact patterns that have occupied the lion's share of attention when it comes to determining the legal boundaries of the government's authority. These cases and fact patterns are not challenging, however, from the point of view of the aforementioned boundary questions. Collectively, they give an inaccurate impression of resolution, which in turn facilitates the apparent cross-branch, cross-party consensus that emerged late in the first post-9/11 decade. That consensus also reflects a substantial amount of policy agreement and perhaps policy fatigue as well.

that he had a plausible claim to U.S. citizenship.<sup>68</sup> The Supreme Court's decision in his case played a central role in legitimizing the use of military detention and confirming the relevance of LOAC as part of the governing legal architecture. To be sure, the plurality opinion took pains to specify that it was solely addressing the facts of Hamdi's case (an alleged Taliban fighter caught bearing arms with his unit on an Afghan battlefield and held while the conflict in Afghanistan continued).<sup>69</sup> Indeed, the opinion anticipated the possibility that detention in *other* circumstances may not warrant application of the traditional legal framework for detention associated with LOAC:

If the practical circumstances of a given conflict are entirely unlike those of the conflicts that informed the development of the law of war, that understanding may unravel. But that is not the situation we face as of this date. Active combat operations against Taliban fighters apparently are ongoing in Afghanistan.<sup>70</sup>

Nonetheless, the decision contributed to a larger perception that there is little need to engage with the LOAC boundary question, assisted, no doubt, by the fact that the Supreme Court has not taken a similar case since then—let alone one presenting a fact pattern lacking ties to Afghanistan.

The work of the lower courts in more recent years has been to similar effect. As noted above in Section I.B, the decisions emerging from the Guantanamo habeas process have roundly endorsed the government's viewpoint (i.e., that the detention-facilitating rules of LOAC are applicable and are consistent with U.S. government practices).<sup>71</sup> Just like *Hamdi*, however, these cases are very much rooted in the comparatively easy context of Afghanistan. The overwhelming majority of Guantanamo habeas cases concern persons who were captured in Afghanistan, captured fleeing from Afghanistan, or captured in more remote locations where they allegedly were engaged in activities linked to the hostilities in Afghanistan (such as recruiting fighters to go there).<sup>72</sup> And so long as U.S. forces continue to engage in overt combat operations in Afghanistan—so long as the condition specified by the Supreme Court in *Hamdi* continues to apply—these cases are largely incapable of providing the occasion to test the outer boundaries of the LOAC model.

Even the quite distinct habeas proceedings involving American citizen Jose Padilla—an alleged al Qaeda “sleeper” agent arrested on a jetway in Chicago upon his return to the country from Pakistan—eventually turned on claims about Padilla's prior activities relating to Afghanistan.<sup>73</sup> The sole

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68. *Hamdi v. Rumsfeld*, 542 U.S. 507 (2004) (plurality opinion).

69. *See id.* at 518 (specifying that the holding concerns “detention of individuals falling into the limited category we are considering, for the duration of the particular conflict in which they were captured”).

70. *Id.* at 521.

71. *See supra* Section I.B.

72. *See* WITTES ET AL., *supra* note 14, at 24–38.

73. *See* *Padilla v. Hanft*, 423 F.3d 386 (4th Cir. 2005). Before the Supreme Court could weigh in on the matter, the government transferred Padilla to the civilian criminal justice

case that appeared to lack any particular ties to Afghanistan—that involving Ali Salah Kahleh al-Marri, a Qatari citizen arrested in the United States and then held in military detention as a suspected al Qaeda agent—made little headway one way or another with respect to the LOAC model. The various judicial opinions it produced were badly splintered and the issues were clouded by the peculiar considerations raised by the invocation of military detention authority within the United States proper.<sup>74</sup>

Collectively, this multi-year run of judicial decisions has played an influential role in forming perceptions about the legality of U.S. detention policy due to their unique status as an adversarial and highly public forum for contesting the government's legal claims regarding its counterterrorism powers. Again and again, these cases have accepted the applicability of LOAC and the subsidiary notion that detention authority exists under that rubric. This agreement has played a central role in molding the public's understanding of the legitimacy of those claims, not to mention impacting congressional perceptions. Yet it has gone largely unremarked that almost all these decisions concern the one location in which there has been no disagreement that an armed conflict exists, the one location where the LOAC boundary issues have little significance.

## 2. Relative Clarity as to the Identity of the Enemy

The perception of legal stability at the close of the first post-9/11 decade also benefitted mightily from a second stabilizing factor: relative clarity with respect to the identity of the enemy.

At the outset in 2001, there was no serious dispute that an entity known as al Qaeda existed, that al Qaeda was responsible for the 9/11 attacks, and that al Qaeda was to be the central object of the use of force that would follow.<sup>75</sup> It was equally clear that the Afghan Taliban movement existed, that it controlled the bulk of Afghanistan's territory, that its leadership tolerated the presence in Afghanistan of a substantial part of al Qaeda (including al Qaeda's own senior leadership), and that, as a result, the deployment of sustained military force against al Qaeda would likely require the use of force against the Afghan Taliban as well.<sup>76</sup> What followed was a massive, overt military intervention in Afghanistan, squarely focused on al Qaeda and the Afghan Taliban.<sup>77</sup> This focus closely tracked the broad outlines of the

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system, where he was ultimately convicted. Abby Goodnough, *Jose Padilla Convicted on All Counts in Terror Trial*, N.Y. TIMES, Aug. 16, 2007, available at <http://www.nytimes.com/2007/08/16/us/16cnd-padilla.html>.

74. See *al-Marri v. Pucciarelli*, 534 F.3d 213 (4th Cir. 2008) (en banc) (per curiam), vacated as moot *sub nom.* *al-Marri v. Spagone*, 555 U.S. 1220 (2009).

75. See NAT'L COMM'N ON TERRORIST ATTACKS UPON THE U.S., THE 9/11 COMMISSION REPORT 330–34 (2004) [hereinafter 9/11 COMM'N REPORT], available at <http://www.9-11commission.gov/report/911Report.pdf>.

76. See *id.*

77. See Michael E. O'Hanlon, *A Flawed Masterpiece*, FOREIGN AFFAIRS (May/June 2002), at 47–48.

AUMF that Congress enacted in September 2001 (which spoke of using force *only* against the entity responsible for the 9/11 attacks and anyone harboring that entity).<sup>78</sup> And although at the time Bush argued publicly for a far more ambitious and expansive counterterrorism agenda—giving rise to the much-criticized formulation of the “Global War on Terror,” entailing the possibility of using force against other terrorist groups of international reach even if unrelated to the 9/11 attacks<sup>79</sup>—the pushback sparked by this broadening rhetoric underscored the notion that the fight properly encompassed just al Qaeda and the Afghan Taliban.<sup>80</sup>

Subsequent legal challenges to the use of military detention repeatedly reinforced the understanding that there was a clearly identified enemy in the form of al Qaeda and the Afghan Taliban. The Supreme Court’s 2004 *Hamdi* decision, as noted above, dealt with a man said to be a fighter for the Afghan Taliban.<sup>81</sup> The government asserted that Jose Padilla was an al Qaeda agent, dispatched to the United States by the al Qaeda senior leadership.<sup>82</sup> And in a seemingly endless parade of post-2008 Guantanamo habeas cases, the government almost invariably alleged that the men were Afghan Taliban members, al Qaeda members, or in many instances both.<sup>83</sup> Very few of the Guantanamo cases involved any other organizational affiliation. The few that did, moreover, not only drew little attention but also could be understood as involving only minor and logical extensions of the Afghanistan hostilities in order to encompass manifestly distinct groups that had nonetheless openly joined the fighting against American and allied forces on the ground in Afghanistan, such as Gulbuddin Hekmatyar’s *Hezb-e Islami Gulbuddin* (“HIG”)<sup>84</sup> and the Islamic Movement of Uzbekistan (“IMU”).<sup>85</sup>

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78. Authorization for Use of Military Force, Pub. L. No. 107-40, 115 Stat. 224 (2001).

79. See President George W. Bush, Address Before a Joint Session of the Congress on the United States Response to the Terrorist Attacks of September 11 (Sept. 20, 2001), in 37 WKLY. COMPILATION PRESIDENTIAL DOCUMENTS 1347, 1348, available at <http://www.gpo.gov/fdsys/pkg/WCPD-2001-09-24/pdf/WCPD-2001-09-24-Pg1347.pdf> (“Our war on terror begins with Al Qaida, but it does not end there. It will not end until every terrorist group of global reach has been found, stopped, and defeated.”).

80. The criticism that the war in Iraq distracted the United States from Afghanistan also advanced the impression that the proper understanding of the post-9/11 conflict was that it concerned al Qaeda and the Afghan Taliban.

81. *Hamdi v. Rumsfeld*, 542 U.S. 507, 510 (2004) (plurality opinion).

82. *Padilla v. Hanft*, 423 F.3d 386, 388 (4th Cir. 2004).

83. See WITTES ET AL., *supra* note 14, at 24–38.

84. See *Khan v. Obama*, 741 F. Supp. 2d 1, 8 (D.D.C. 2010) (concluding in a brief discussion that HIG qualifies as an “associated force” of al Qaeda), *aff’d*, 655 F.3d 20, 33 (D.C. Cir. 2011).

85. See *Al Harbi v. Obama*, No. 05-02479, 2010 WL 2398883, at \*16 (D.D.C. May 13, 2010) (concluding that government lacked evidence linking alleged IMU member to IMU or al Qaeda). Note that the government has subsequently put forth new classified evidence in seeking relief under Federal Rule of Civil Procedure 60(b). See Raffaella Wakeman, *Checking in on the Mingazov Case*, LAWFARE (June 21, 2012, 6:10 PM), <http://www.lawfareblog.com/2012/06/checking-in-on-the-mingazov-case/>; Raffaella Wakeman, *Mingazov Remanded to District Court*, LAWFARE (Aug. 23, 2012, 2:32 PM), <http://www.lawfareblog.com/2012/08/mingazov-remanded-to-district-court/>. For an overview of IMU’s origins and evolution, with an emphasis on the

These cases almost never presented serious questions as to the organizational boundaries of al Qaeda itself or the AUMF more broadly, as opposed to endless difficulties surrounding the alleged ties of specific persons to specific groups. The sole exception was *Parhat v. Gates*, a 2008 D.C. Circuit Court of Appeals decision concluding that the government lacked sufficient proof to show that the Chinese Uighur group known as “ETIM”—the East Turkestan Islamic Movement—was part and parcel of the al Qaeda network.<sup>86</sup> This was the exception that proved the rule, however. Far from portending a rash of cases presenting more difficult variations on the organizational boundaries theme, *Parhat* was followed by years of Guantanamo habeas cases that presented no such issues.

The relative uniformity and simplicity of the Guantanamo cases when it comes to the question of organizational boundaries is not surprising for another reason: the bulk of detainees there were captured relatively early in the post-9/11 era. Those detainees hail from a period in the life cycle of al Qaeda and the Afghan Taliban that predates most of the complexities that I will describe below. The resulting case law is bound to reflect the simpler circumstances that prevailed early in the first post-9/11 decade. Insofar as that case law has played an important role in constructing perceptions of legal stability, these perceptions are more than a little artificial.

### III. DISRUPTIVE STRATEGIC CHANGE

These stabilizing factors will not last. A set of long-term trends involving changes to the strategic posture of both al Qaeda and the United States will profoundly disrupt them. Indeed, that process is already well underway. Bit by bit, this erosion is unsettling the legal foundation for the U.S. government’s use of both military detention and lethal force.

#### A. *Strategic Change and the Evolution of al Qaeda*

Who is the enemy against which the United States is fighting in the second post-9/11 decade? That fundamental question has grown ever more difficult over time, and the problem is accelerating.

There may have been a time when it would suffice to refer simply to al Qaeda and the Afghan Taliban in answer to this question. But this is no longer an adequate response for two reasons. First, in Afghanistan, U.S. forces have been engaged in combat for years with a large number of armed groups that cannot properly be considered part of either al Qaeda or the Afghan Taliban. Second, al Qaeda itself has undergone an extraordinary process of diffusion and fragmentation. One upshot is that, in a number of regions around the world, there are armed groups claiming some degree of

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varied ways in which IMU has connected to both the Afghan Taliban and al Qaeda, see Christopher Swift, *Militant Pathways: Local Radicalization and Regional Migration in Central Asia*, CTC SENTINEL, Nov. 2011, at 8, available at <http://www.ctc.usma.edu/wp-content/uploads/2011/12/CTCSentinel-Vol4Iss11-123.pdf>.

86. 532 F.3d 834, 854 (D.C. Cir. 2008).



association with what remains of al Qaeda's senior leadership. Sometimes this is a matter of an al Qaeda cell growing independent, and sometimes it is a matter of an originally distinct entity drawing close to al Qaeda's orbit. The important point, at any rate, is that it is difficult to say which, if any, of these groups are best understood as part of al Qaeda, which of these groups are not part of al Qaeda yet nonetheless constitute enemies of the United States, and which of these groups are neither. Warsame's fact pattern is a case in point. Unfortunately, such scenarios do not fit comfortably within the existing domestic legal architecture embodied in the AUMF, the NDAA FY12, and the case law generated by military detainees.

### 1. Proliferation and Fragmentation

The proliferation of enemies is most apparent in Afghanistan and Pakistan (although it is not limited to that region, as I will explain below). The point as to proliferation in the Afghanistan–Pakistan region is not simply that the organizational boundaries of the Afghan Taliban can be hard to describe. Even if we treat the Afghan Taliban as a unified whole (i.e., lump together all commanders loyal to some degree to Mullah Mohamed Omar's Quetta Shura), the fact remains that there have long been many other armed groups in the field in Afghanistan that cannot fairly be described as a formal part of either the Afghan Taliban or al Qaeda, including the Haqqani Network and the HIG.<sup>87</sup> Each of these armed groups routinely uses force against U.S. and allied forces in Afghanistan (and some but not all direct force against Pakistani forces as well), and U.S. forces routinely target and detain their leaders and members in turn.<sup>88</sup> Because these groups cooperate extensively, it can be exceedingly difficult to parse the organizational boundaries

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87. See SETH G. JONES, NAT'L DEF. RESEARCH INST., COUNTERINSURGENCY IN AFGHANISTAN 37 (2008), available at [http://www.rand.org/content/dam/rand/pubs/monographs/2008/RAND\\_MG595.pdf](http://www.rand.org/content/dam/rand/pubs/monographs/2008/RAND_MG595.pdf) ("The insurgency in Afghanistan included six main insurgent groups: the Taliban, Hezb-i-Islami, the Haqqani network, foreign fighters (mostly Arabs and Central Asians), tribes based in Pakistan and Afghanistan, and criminal networks."); Kimberly Dozier, *AP Sources: US Mulls New Covert Raids in Pakistan*, ASSOCIATED PRESS, June 22, 2012, available at 6/22/12 AP DataStream 16:24:58 (Westlaw) (discussing conflict with the Haqqani Network). But see Bill Roggio, *Haqqani Network Is Part of the Taliban—Siraj Haqqani*, LONG WAR J. (Oct. 5, 2012), [http://www.longwarjournal.org/archives/2012/10/siraj\\_haqqani\\_denies.php](http://www.longwarjournal.org/archives/2012/10/siraj_haqqani_denies.php) (reporting statement from Siraj Haqqani disputing American claims that the Haqqani Network is not part of the Afghan Taliban). Making matters more complicated still, there also are at least some groups that appear to partner with the Afghan Taliban for purposes not directly related to combat operations in the region. See Bill Roggio, *Turkish Jihadist Group Has Agreement to Train with Afghan Taliban*, LONG WAR J. (Apr. 5, 2012), [http://www.longwarjournal.org/archives/2012/04/turkish\\_jihadist\\_lea.php](http://www.longwarjournal.org/archives/2012/04/turkish_jihadist_lea.php) (describing training camp-focused agreement).

88. See JONES, *supra* note 87, at 37–66. The blog *Long War Journal*, sponsored by the Foundation for the Defense of Democracies, provides frequent updates of small-scale firefights and other fights between coalition forces and a broad array of these insurgent groups in Afghanistan. LONG WAR J., [www.longwarjournal.org](http://www.longwarjournal.org) (last visited Mar. 9, 2013). For a recent example involving an American drone strike in Pakistan targeting the leader of the IMU, see Declan Walsh and Ismail Khan, *Uzbek Group Says Drone Killed Leader*, N.Y. TIMES, Aug. 5, 2012, at A8, available at <http://www.nytimes.com/2012/08/05/world/asia/us-drone-strike-kills-uzbek-militant-leader.html>.

between them. As an anonymous American military officer put the point in late 2010, “This is actually a syndicate of related and associated militant groups and networks. . . . Trying to parse them, as if they have firewalls in between them, is really kind of silly. They cooperate with each other. They franchise work with each other.”<sup>89</sup> Other officials added that “the loose federation was not managed by a traditional military command-and-control system, but was more akin to a social network of relationships that rose and faded as the groups decided on ways to attack Afghan, Pakistani, American and NATO interests.”<sup>90</sup> Organizational ambiguity from this perspective is not so much a problem of inadequate intelligence (though that certainly could be an issue) as it is simply an organic and irreducible feature of the socio-political landscape within which these groups and networks operate.

Having said all that, the blurred organizational boundaries in the Afghanistan–Pakistan theater are not the biggest reason why the two-party, al Qaeda–Taliban conception of the enemy is problematic. The bigger problem is the fragmentation and diffusion of al Qaeda itself: it has evolved over the past decade in a manner that makes it far more difficult to speak coherently about its organizational boundaries, and the trend appears to be accelerating.<sup>91</sup>

Al Qaeda has been evolving throughout its existence.<sup>92</sup> Born in the waning days of the anti-Soviet jihad in Afghanistan, it began as a rather under-specified collaborative project that the leaders of several existing groups and networks, including bin Laden, agreed to.<sup>93</sup> A number of members were soon sworn in to the new group,<sup>94</sup> and by the time it became based in the Sudan, al Qaeda had become quite institutionalized, possessing bureaucratic structures, job descriptions, payrolls, and other accoutrements of a hierarchical organization with centralized leadership.<sup>95</sup>

Fast-forward a few years to Afghanistan, and the situation was more complex. Al Qaeda now had a center of operations from which its senior leadership could act with relative impunity to recruit and train personnel in large numbers.<sup>96</sup> Not all those trainees necessarily were best understood as part of al Qaeda; the bulk of them went on to fight, or assist the fighting, in places like Afghanistan, Chechnya, or Bosnia, or else simply returned to live

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89. Thom Shanker, *Insurgents Set Aside Rivalries on Afghan Border*, N.Y. TIMES, Dec. 29, 2010, at A1, available at <http://www.nytimes.com/2010/12/29/world/asia/29military.html?pagewanted=all> (internal quotation marks omitted).

90. *Id.*

91. See JOHN ROLLINS, CONG. RESEARCH SERV., R41070, AL QAEDA AND AFFILIATES: HISTORICAL PERSPECTIVE, GLOBAL PRESENCE, AND IMPLICATIONS FOR U.S. POLICY (2011), available at <http://www.fas.org/sgp/crs/terror/R41070.pdf>.

92. Useful secondary sources on the origins and evolution of al Qaeda include PETER L. BERGEN, *HOLY WAR, INC.* (2002); STEVE COLL, *GHOST WARS* (2004); 9/11 COMM’N REPORT, *supra* note 75; and LAWRENCE WRIGHT, *THE LOOMING TOWER* (2006).

93. See WRIGHT, *supra* note 92, at 132–34.

94. See *id.*

95. See 9/11 COMM’N REPORT, *supra* note 75, at 57–59.

96. See *id.* at 66–67.

more peaceful lives elsewhere.<sup>97</sup> The more promising ones were offered the chance for more advanced training along with more explicit ties to al Qaeda as such.<sup>98</sup> This process gradually generated a cadre of personnel more directly responsive to the direction and control of al Qaeda's senior leadership.<sup>99</sup> This development in turn enabled al Qaeda to mount its own operations, as illustrated by the attack on the U.S. embassies in Kenya and Tanzania in 1998, the bombing of the *USS Cole* in Yemen in 2000, and the 9/11 attacks themselves.<sup>100</sup>

Even in these early years, it would be difficult to map the precise organizational boundaries of al Qaeda. Some key leaders were involved in other organizations as well,<sup>101</sup> raising questions as to whether those organizations should be understood as independent or not. And al Qaeda had always been open to the possibility of assisting other groups in conducting operations suiting the interests of al Qaeda's senior leadership, which further muddied the water.<sup>102</sup> These complications were relatively manageable circa 2001, however. At that time, it was perfectly plausible to speak of al Qaeda writ large as a discrete and identifiable organization, regardless of how much factual uncertainty there might have been regarding the associational status of particular persons in relation to the group.<sup>103</sup>

Things are different today thanks to the complex ways in which al Qaeda evolved in response to internal and external pressures. The general thrust of these changes has been to weaken the central organization relative to an emerging set of regional organizations that may share al Qaeda's brand but are not necessarily responsive to its direction and control.<sup>104</sup> The combination is a recipe for uncertainty regarding just what "al Qaeda" means today.

97. See Staff Statement, Nat'l Comm'n on Terrorist Attacks upon the U.S., Overview of the Enemy 9–10, available at [http://govinfo.library.unt.edu/911/staff\\_statements/staff\\_statement\\_15.pdf](http://govinfo.library.unt.edu/911/staff_statements/staff_statement_15.pdf).

98. See 9/11 COMM'N REPORT, *supra* note 75, at 156–57; see also OMAR NASIRI, *INSIDE THE JIHAD* 134 (2006).

99. See 9/11 COMM'N REPORT, *supra* note 75, at 156–57.

100. See *id.* at 115–16, 190–91, 248–50.

101. See WRIGHT, *supra* note 92, at 173.

102. See BRUCE RIEDEL, *THE SEARCH FOR AL QAEDA* (2008); see also DANIEL BYMAN, *BREAKING THE BONDS BETWEEN AL-QA'IDA AND ITS AFFILIATE ORGANIZATIONS* iv (2012), available at <http://www.brookings.edu/~media/research/files/papers/2012/7/alqaida%20terrorism%20byman/alqaida%20terrorism%20byman> (“Al-Qa’ida has always been both a group with its own agenda and a facilitator of other terrorist groups. This meant that it not only carried out attacks on U.S. targets in Kenya, Tanzania, and Yemen throughout the 1990s, but it helped other jihadist groups with funding, training, and additional logistical essentials.”); LAHOUD ET AL., *supra* note 5, at 9–10.

103. The 9/11 Commission Report's depiction of Khalid Sheikh Mohamed's flirtations with membership provides an excellent case study of the individual-level uncertainty that could arise in this era. See 9/11 COMM'N REPORT, *supra* note 75, at 145–50.

104. See Clint Watts, *What If There Is No Al-Qaeda? Preparing for Future Terrorism*, FOREIGN POL'Y RES. INST. (July 2012), <http://www.fpri.org/enotes/2012/201207.watts.al-qaeda.pdf>; see also LAHOUD ET AL., *supra* note 5, at 11–12 (“On the operational front . . . the

Several factors have driven this process of fragmentation. Most obviously, decentralization to some extent is a matter of survival in the face of intense and sustained efforts by the United States and its allies to capture or kill the leaders and members of the core al Qaeda organization. Such efforts were underway prior to 9/11, with mixed success,<sup>105</sup> and the scope and impact of those efforts accelerated dramatically in late 2001. A host of new policies—including the invasion of Afghanistan, the use of lethal force in other locations (Yemen, for example, in 2002), the expanded use of rendition (i.e., capturing an individual and transferring him or her to the custody of another country), the pressure on allies both to provide intelligence cooperation and to use their own authorities to capture and either transfer or detain suspects, and the use of both criminal prosecution and noncriminal detention—combined to incapacitate a large number of al Qaeda figures and drive the remainder much deeper into hiding.<sup>106</sup> The bulk of the leadership apparently sought haven in Pakistan,<sup>107</sup> but the eventual expansion of U.S. kinetic operations to the Federally Administered Tribal Areas (“FATA”) combined with an array of other efforts to locate these leaders ultimately made it extraordinarily difficult for remaining personnel to communicate, let alone engage in training and operational planning, as illustrated by the extent to which bin Laden was isolated and the frequency with which subordinate leaders have been killed.<sup>108</sup> The oppressive operational environment—particularly the constraints on communications that followed from the extraordinary security measures taken to hide key leaders’ locations—ensured that al Qaeda’s leaders in central Asia would have a limited ability to stay in touch with, let alone manage the operations of, operatives and cells located elsewhere (or even in the Afghanistan–Pakistan area).<sup>109</sup>

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affiliates either did not consult with Bin Ladin or were not prepared to follow his directives. . . . [T]he framing of an [al Qaeda central] as an organization in control of regional ‘affiliates’ reflects a conceptual construction by outsiders rather than the messy reality of insiders.”).

105. See 9/11 COMM’N REPORT, *supra* note 75, at 111–15.

106. See TSG IntelBrief: *Al Qaeda 3.0: An Unfolding Strategy and Threat*, SOUFAN GROUP (Aug. 7, 2012), [http://soufangroup.com/briefs/details/?Article\\_Id=357](http://soufangroup.com/briefs/details/?Article_Id=357). For a broad-ranging overview of developments during the first post-9/11 decade, see PETER L. BERGEN, *THE LONGEST WAR* (2011).

107. See Eric Schmitt, *Pakistan Deaths Shift Power in Terrorism Network*, N.Y. TIMES, June 8, 2012, at A8, available at <http://www.nytimes.com/2012/06/08/world/asia/al-qaeda-power-shifting-away-from-pakistan.html>.

108. See KLAIMAN, *supra* note 1; SANGER, *supra* note 15; see also LAHOUD ET AL., *supra* note 5, at 1 (“Bin Ladin enjoyed little control over either groups affiliated with al-Qa’ida in name . . . or so-called ‘fellow travelers’ . . .”). On the penchant for al Qaeda’s operational leaders to be killed, see Declan Walsh & Eric Schmitt, *Al Qaeda’s No. 2 Said to Be Killed in a Drone Strike*, N.Y. TIMES, June 6, 2012, at A1, available at <http://www.nytimes.com/2012/06/06/world/asia/qaeda-deputy-killed-in-drone-strike-in-pakistan.html?pagewanted=all>.

109. Al Qaeda correspondence captured during the Abbottabad raid reveals a senior leadership that was unable to exercise effective control over its affiliates. LAHOUD ET AL., *supra* note 5, at 13; see also SOUFAN GROUP, *supra* note 106 (“While a number of senior leaders remain alive . . . their main goal appears to be primarily survival. Accordingly, the balance of

It is perhaps inevitable that in such circumstances, cells located abroad might develop their own independent agendas, especially as they draw new members from indigenous sources. AQAP provides a case study of this aspect of fragmentation (as distinct from a separate model, discussed below, in which a regional “franchise” originates not as an al Qaeda cell but as an independent, indigenous organization).

AQAP’s story is best understood against the backdrop of operations that the core al Qaeda organization conducted in Yemen in the late 1990s. Al Qaeda by that time had developed a substantial operational capacity in its own right and had turned its eyes to Yemen with the hope of striking an American military target in an unexpected location; the periodic visits of U.S. warships to the port of Aden provided a golden opportunity.<sup>110</sup> And although an attack on the *USS The Sullivans* in 1999 failed, a subsequent attack on the *USS Cole* in 2000 did not.<sup>111</sup> These attacks demonstrated al Qaeda’s capacity to operate in Yemen on an ad hoc basis. But aside from a Yemeni native named Qa’id Salim Talib Sinyan al-Harithi (who was later killed in a U.S. drone strike), al Qaeda did not appear to maintain a sustained presence in the country at that time.<sup>112</sup> As one observer put the point, the *Cole* attack “appears to have been more an example of opportunism than a sign of an enduring al-Qa’ida presence in Yemen.”<sup>113</sup>

This began to change after the 9/11 attacks. By 2002, a group of Yemeni men who had been in Afghanistan training with al Qaeda made it out of the region, returning to Yemen with instructions from al Qaeda to carry out additional attacks when possible.<sup>114</sup> Under the leadership of a Saudi operative named Fawaz Yahya Hasan al-Rabay’i, this new al Qaeda cell ultimately carried out a *Cole*-style bombing on the French vessel *M/V Limburg* and then conducted a failed attempt to shoot down a helicopter with a rocket-propelled grenade.<sup>115</sup> After that a long string of arrests crippled the cell, resulting in the imprisonment of al-Rabay’i and dozens of others.<sup>116</sup>

These things stood for a number of years until a dramatic prison break—involving a tunnel dug between the prison and a nearby mosque—

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power between al-Qaeda central and its affiliates has changed, with the affiliates gaining additional power and far greater strategic latitude.”); *id.* (describing the core of al Qaeda as “unable to offer effective operational guidance, and weakened by the death of senior leaders”).

110. See 9/11 COMM’N REPORT, *supra* note 75, at 190–93.

111. *Id.* at 180, 190–93.

112. See COMBATING TERRORISM CTR. AT W. POINT, A FALSE FOUNDATION? AQAP, TRIBES AND UNGOVERNED SPACES IN YEMEN 31–35 (Gabriel Koehler-Derrick ed., 2011) [hereinafter A FALSE FOUNDATION?], available at <http://www.ctc.usma.edu/posts/a-false-foundation-aqap-tribes-and-ungoverned-spaces-in-yemen>.

113. *Id.* at 31.

114. See *id.* at 33; see also Gregory D. Johnsen, *Tracking Yemen’s 23 Escaped Jihadi Operatives—Part 1*, JAMESTOWN FOUND. TERRORISM MONITOR (Sept. 27, 2007, 3:34 PM), [http://www.jamestown.org/programs/gta/single/?tx\\_ttnews%5Btt\\_news%5D=4437&tx\\_ttnews%5BbackPid%5D=182&no\\_cache=1](http://www.jamestown.org/programs/gta/single/?tx_ttnews%5Btt_news%5D=4437&tx_ttnews%5BbackPid%5D=182&no_cache=1).

115. A FALSE FOUNDATION?, *supra* note 112, at 33.

116. See Johnsen, *supra* note 114.

resulted in the escape of some two dozen extremists, including not only al-Rabay'i but also future AQAP leaders Nasir al-Wahayshi and Qasim al-Raymi.<sup>117</sup> Within a year's time, the escapees proclaimed the formation of a new organization known as "al-Qa'ida in the Land of Yemen," which soon carried out a double suicide bombing targeting an oil facility.<sup>118</sup> Many more attacks followed, some directed at Western targets in Yemen, but many focused on local government officials and Yemen's security services and military.<sup>119</sup> Over time, it became apparent that the new group was developing substantial indigenous roots and growing ties with tribal leaders in provincial areas already resistant to central government control.<sup>120</sup> Name changes followed as well, with "al-Qa'ida in the Land of Yemen" giving way first to "al-Qa'ida in the Southern Arabian Peninsula" and then finally—after the addition to its leadership of two Saudis who had formerly been held at Guantanamo—it became "al-Qa'ida in the Arabian Peninsula," or simply "AQAP."<sup>121</sup>

Today, AQAP appears committed to a two-pronged strategy.<sup>122</sup> It is first and foremost committed to fighting a relatively conventional insurgency against the central government in Yemen and has had considerable success of late in taking and holding territory toward that end.<sup>123</sup> At the same time, AQAP has repeatedly demonstrated its interest in attacking American and other Western targets, both within Yemen and externally. The failed attempt by the so-called "underwear bomber" to take down a flight to Detroit on Christmas Day 2009 and the failed attempt to set off bombs on two international parcel delivery flights in 2010 both testify to this interest in external operations.<sup>124</sup>

Bearing all this in mind, is AQAP best understood to be part and parcel of the original al Qaeda organization or a wholly distinct organization that simply shares historic ties, branding, goals, and enemies? AQAP is widely cited as the al Qaeda franchise that remains most closely tied to the core

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117. *See id.*

118. A FALSE FOUNDATION?, *supra* note 112, at 34.

119. *Id.* at 37.

120. *Id.* at 41–45.

121. *See id.* at 13 n.2, 46–47.

122. *See Terrorist Threat to the U.S. Homeland—Al-Qaeda in the Arabian Peninsula (AQAP): Hearing Before the Subcomm. on Counterterrorism & Intelligence of the H. Comm. on Homeland Sec., 112th Cong. 7–8 (2011) (statement of Christopher Boucek, Associate, Carnegie Endowment [sic] for International Peace), available at <http://www.gpo.gov/fdsys/pkg/CHRG-112hhrg72216/pdf/CHRG-112hhrg72216.pdf>; see also John O. Brennan, Ass't to the President for Homeland Sec. and Counterterrorism, Speech to the Council on Foreign Relations on U.S. Policy Toward Yemen Council on Foreign Relations (Aug. 8, 2012), available at <http://www.c-spanvideo.org/program/307492-1>.*

123. *See, e.g.,* Bill Roggio, *AQAP Kills 17 Yemeni Troops in Southern Yemen*, LONG WAR J. (Mar. 31, 2012), [http://www.longwarjournal.org/archives/2012/03/aqap\\_kills\\_17\\_yemeni.php](http://www.longwarjournal.org/archives/2012/03/aqap_kills_17_yemeni.php).

124. *See supra* note 60 and accompanying text.

leadership,<sup>125</sup> and we do know that AQAP's current emir—al Wahayshi—has publicly pledged *bayat* to Ayman al Zawahiri, the post-bin Laden leader of al Qaeda, promising “obedience in good and hard times, in ease and difficulty.”<sup>126</sup> We know, too, that bin Laden at one point rejected a request by al Wahayshi to elevate the American-born cleric Anwar al-Awlaki to a more senior leadership position within AQAP.<sup>127</sup> On the other hand, there is little evidence that the al Qaeda senior leadership exercised detailed control over AQAP's operational activities.<sup>128</sup> Absent agreement with respect to just what conditions suffice to establish that a regional group such as AQAP is part of the core organization, it is hard to say much more.

Complicating matters, there is a distinct model whereby regional groups are linked to al Qaeda. Whereas AQAP illustrates the breakaway model of al Qaeda's fragmentation, al-Shabaab in Somalia is a case study of a model in which an indigenous, independent group is gradually brought into the al Qaeda orbit.

Al Qaeda was not a stranger to East Africa in the pre-9/11 period. On the contrary, al Qaeda spent its formative years in the Sudan, and even after bin Laden shifted headquarters to Afghanistan, the group maintained an operational presence robust enough to carry out the simultaneous bombing of U.S. embassies in both Kenya and Tanzania in 1998.<sup>129</sup> A substantial number of al Qaeda operatives remained in the region thereafter, and during the first post-9/11 decade, other members moved to the area, fleeing the pressure in Pakistan.<sup>130</sup> Eventually, al Qaeda attempted to invest this regional concentration of operatives with a sense of unity, labeling it “al Qaeda in East Africa” (“AQEA”). Yet AQEA has never acquired much in the way of organizational coherence, let alone a substantially distinct identity à la AQAP. The interesting question in East Africa is not whether AQEA is breaking away from al Qaeda's senior leadership but instead whether the indigenous Somali insurgent group known as “al-Shabaab” will merge into the al Qaeda network to a meaningful degree.

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125. See BYMAN, *supra* note 102, at 12 (“AQAP has close operational relations with the al-Qa'ida core.”).

126. Al Wuhayshi's statement was translated by the SITE Institute. Bill Roggio, *AQAP Leader Pledges Oath of Allegiance to Ayman al Zawahiri*, LONG WAR J. (July 26, 2011), [http://www.longwarjournal.org/archives/2011/07/aqap\\_leader\\_pledges.php](http://www.longwarjournal.org/archives/2011/07/aqap_leader_pledges.php).

127. Mark Mazzetti, *C.I.A. Drone Is Said to Kill Qaeda's No. 2*, N.Y. TIMES, Aug. 28, 2011, at A1, available at [http://www.nytimes.com/2011/08/28/world/asia/28qaeda.html?\\_r=2&ref=markmazzetti](http://www.nytimes.com/2011/08/28/world/asia/28qaeda.html?_r=2&ref=markmazzetti).

128. E.g., Gregory D. Johnsen, *The Impact of Bin Ladin's Death on AQAP in Yemen*, CTC SENTINEL, May 2011, at 9, available at <http://www.ctc.usma.edu/wp-content/uploads/2011/05/CTCSentinel-UBLSI-20114.pdf>. For the argument that it is inappropriate to insist on formal operational control, see Mary Habeck, *Answering Objections: Is al Qaeda Really Dead? Part II*, FOREIGN POL'Y (Apr. 26, 2012, 5:51 PM), [http://shadow.foreignpolicy.com/posts/2012/04/26/answering\\_objections\\_is\\_al\\_qaeda\\_really\\_dead\\_part\\_ii](http://shadow.foreignpolicy.com/posts/2012/04/26/answering_objections_is_al_qaeda_really_dead_part_ii).

129. See WRIGHT, *supra* note 92.

130. See Eric Schmitt & David E. Sanger, *Some in Qaeda Leave Pakistan for Somalia and Yemen*, N.Y. TIMES, June 12, 2009, at A1, available at <http://www.nytimes.com/2009/06/12/world/12terror.html>.

Al-Shabaab originated as the youth wing of a coalition of Somali political factions and extremist groups collected under the label the Islamic Courts Union (“ICU”), which seized control across a wide swath of southern Somalia in 2006.<sup>131</sup> An Ethiopian invasion that same year broke the ICU’s power, which helped trigger al-Shabaab’s emergence as a fully independent organization.<sup>132</sup> In relatively short order, al-Shabaab managed to retake much of southern Somalia, mounting a persistent campaign of attacks—including suicide bombings—against Somalia’s transitional government in Mogadishu and the African Union peacekeepers that supported it.<sup>133</sup> Remarkably, the organization even succeeded in recruiting a number of young Somali American men from the Minneapolis–St. Paul area—including at least one person who later carried out a suicide bombing.<sup>134</sup> However, whether al-Shabaab’s aspirations would remain wholly local became much less clear over time.

People began to question whether the group had evolved into an al Qaeda regional franchise, especially after al-Shabaab pulled off a horrific double suicide bombing in Uganda in 2010, killing about seventy-four people including one American.<sup>135</sup> The al-Shabaab–al Qaeda tie, however, proved difficult to pin down for a few reasons. First, there has long been some amount of “dual-hatting,” meaning that AQEA members have, on an individual basis, taken on important roles within al-Shabaab’s leadership structure.<sup>136</sup> Saleh Ali Saleh Nabhan, for example, was both an al Qaeda

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131. See ROB WISE, CTR. FOR STRATEGIC & INT’L STUDIES, *AL SHABAAB* (2011), available at [http://csis.org/files/publication/110715\\_Wise\\_AlShabaab\\_AQAM%20Futures%20Case%20Study\\_WEB.pdf](http://csis.org/files/publication/110715_Wise_AlShabaab_AQAM%20Futures%20Case%20Study_WEB.pdf); see also ERIN FOSTER-BOWSER & ANGELIA SANDERS, CIVIL-MILITARY FUSION CTR. MEDITERRANEAN BASIN TEAM, *SECURITY THREATS IN THE SAHEL AND BEYOND* 6–9 (2012), available at [http://reliefweb.int/sites/reliefweb.int/files/resources/Full\\_Report\\_3818.pdf](http://reliefweb.int/sites/reliefweb.int/files/resources/Full_Report_3818.pdf); NELLY LAHOUD, *BEWARE OF IMITATORS: AL-QA’IDA THROUGH THE LENS OF ITS CONFIDENTIAL SECRETARY* 82–84 (2012), available at <http://www.ctc.usma.edu/wp-content/uploads/2012/06/CTC-Beware-of-Imitators-June2012.pdf> (drawing on translated autobiography of al Qaeda member Fadil Harun to describe the independent origins of al-Shabaab and the fact that it had no ties to al Qaeda prior to 2009).

132. See Jeffrey Gettleman, *Ethiopian Troops Said to Enter Somalia, Opening New Front Against Militants*, N.Y. TIMES, Nov. 21, 2011, at A4, available at <http://www.nytimes.com/2011/11/21/world/africa/ethiopian-troops-enter-somalia-witnesses-say.html> (describing prior invasion and its consequences).

133. See *id.*; WISE, *supra* note 131, at 7.

134. Andrea Elliott, *Charges Detail Road to Terror for 20 in U.S.*, N.Y. TIMES, Nov. 24, 2009, at A1, available at <http://www.nytimes.com/2009/11/24/us/24terror.html>.

135. See Sudarsan Raghavan, *Islamic Militant Group al-Shabab Claims Uganda Bombing Attacks*, WASH. POST, July 12, 2010, available at <http://www.washingtonpost.com/wp-dyn/content/article/2010/07/12/AR2010071200476.html>.

136. E.g., Jeffrey Gettleman & Eric Schmitt, *U.S. Kills Top Qaeda Militant in Southern Somalia*, N.Y. TIMES, Sept. 15, 2009, at A1, available at <http://www.nytimes.com/2009/09/15/world/africa/15raid.html> (“Mr. Nabhan was one of the handful of Qaeda terrorists hiding out in Somalia for years, taking advantage of the country’s chaos to elude agents pursuing them. . . . There is increasing evidence that foreign jihadists, like Mr. Nabhan, are leading Somali Shabab and training them in suicide bombs.”); see also Thomas Joscelyn, *Detained UK Suspect Trained by Shabaab*, LONG WAR J. (July 9, 2012), [http://www.longwarjournal.org/archives/2012/07/detained\\_uk\\_suspect.php](http://www.longwarjournal.org/archives/2012/07/detained_uk_suspect.php) (discussing Fazul Abdullah Mohammed as both an



member associated with AQEA and a senior al-Shabaab official.<sup>137</sup> Second, quite apart from ad hoc integration of specific al Qaeda members into its leadership, al-Shabaab has also long had a substantial number of foreign fighters within its ranks, and since at least 2008, leaders associated with these foreign fighters have distinguished themselves from indigenously focused al-Shabaab leaders by publicly advocating the formal integration of al-Shabaab into al Qaeda.<sup>138</sup> Third, al Qaeda's senior leaders themselves seem to have been divided on the question of ties to al-Shabaab.<sup>139</sup> All that said, there was at least a substantial amount of friendly communication underway, with AQAP leaders apparently playing an important role as both go-betweens and advocates encouraging al-Shabaab to turn its sights beyond its own borders.<sup>140</sup>

The prospect of merger gained considerable ground in February 2012, when a key al-Shabaab leader appeared in a video to announce al-Shabaab's formal accession to the al Qaeda network; the video included a clip of Ayman al Zawahiri himself welcoming al-Shabaab aboard.<sup>141</sup> Whether the video truly spoke for al-Shabaab as a whole, however—and whether the link will involve actual subordination of al-Shabaab to al Qaeda or even the sort of cooperative relationship that may exist between AQAP and al Qaeda—remains to be seen. An al-Shabaab figure long associated with al Shabaab's foreign forces made the pronouncement, and that wing had made similar statements of allegiance to al Qaeda in the past.<sup>142</sup> Other al-Shabaab leaders have previously expressed reluctance to being drawn in to al Qaeda's larger global orientation, however, lest they lose focus on their ambitions for

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AQEA leader and an al-Shabaab commander); Bill Roggio, *British Shabaab Operative Killed in Airstrike in Somalia*, LONG WAR J. (Jan. 21, 2012), [http://www.longwarjournal.org/archives/2012/01/british\\_shabaab\\_oper.php](http://www.longwarjournal.org/archives/2012/01/british_shabaab_oper.php) (describing drone strike against Bilal al Berjawi and depicting al Berjawi as an al Qaeda member who had been second in command of AQEA while also functioning as a leader of al-Shabaab).

137. See Gettleman & Schmitt, *supra* note 136. On the raid that killed Nabhan, see KLAIMAN, *supra* note 1, at 122–27.

138. See Bill Roggio, *Moroccan Jihadist Killed in Somalia Airstrike*, LONG WAR J. (Feb. 24, 2012), [http://www.longwarjournal.org/archives/2012/02/moroccan\\_jihadist.php](http://www.longwarjournal.org/archives/2012/02/moroccan_jihadist.php) (reporting attack on Moroccan extremist who had been part of al-Shabaab and an advocate of merger with al Qaeda); Edmund Sanders, *Conditions May Be Ripe for al Qaeda to Gain in Somalia*, L.A. TIMES, Aug. 25, 2008, available at <http://articles.latimes.com/2008/aug/25/world/fg-shabab25>.

139. Compare LAHOUD ET AL., *supra* note 5, at 41 (suggesting division), with Brian Bennett, *Al Qaeda's Yemen Branch Has Aided Somalia Militants, U.S. Says*, L.A. TIMES, July 18, 2011, available at <http://articles.latimes.com/2011/jul/18/world/la-fg-bin-laden-somalia-20110718> (suggesting interest on the part of al Qaeda's leadership).

140. Bennett, *supra* note 139.

141. See Nelly Lahoud, *The Merger of Al-Shabab and Qa'idat al-Jihad*, CTC SENTINEL, Feb. 2012, at 1–2, available at <http://www.ctc.usma.edu/wp-content/uploads/2012/02/CTC-Sentinel-Vol5Iss24.pdf>.

142. See *id.*

Somalia (and lest they draw unwanted attention from Western security services).<sup>143</sup> At the time of this writing, then, the most that can be said is that AQAP appears to be more closely connected to al Qaeda than does al-Shabaab, but the gap may be shrinking.

There are many other examples of al Qaeda's fragmentation, most of them similar to the al-Shabaab model of an independent group moving into al Qaeda's orbit to some indeterminate and unstable degree. Al Qaeda has been linked in relatively unspecified ways to a group of Islamist extremists in northern Nigeria known as Boko Haram.<sup>144</sup> The Algerian extremist group formerly known as the Salafist Group for Call and Combat has embraced the al Qaeda brand more formally, becoming "al Qaeda in the Islamic Maghreb" or "AQIM," and has recently seized territory in northern Mali working in close concert with a local armed group of extremists known as Ansar Dine ("Defenders of the Faith").<sup>145</sup> Multiple groups linked to al Qaeda have emerged in the area of the Sinai Peninsula in Egypt, including groups like Ansar al Jihad<sup>146</sup> and one calling itself the Mujahideen Shura Council.<sup>147</sup> Iraq notoriously became the home of al Qaeda in Iraq ("AQI") in the years following the U.S. invasion. AQI proved very reluctant to conform its operations to the dictates of al Qaeda's senior leadership in Pakistan in its first iteration; after nearly being eliminated a few years ago, however, it is now enjoying a substantial resurgence.<sup>148</sup> And as the civil war in Syria unfolds, an al Qaeda-linked group known as Jabhat al-Nursah has become increasingly prominent, though whether the group is best understood as part of AQI or

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143. Bennett, *supra* note 139; see also Will McCants, *A Tangled Net Assessment of al-Qaeda*, JIHADICA (Apr. 19, 2012), <http://www.jihadica.com/a-net-assessment-of-al-qaeda/> ("[I]t is not clear that the entire organization has agreed with the al-Qaeda merger.").

144. David Blair, *Al-Qaeda's Hand in Boko Haram's Deadly Nigerian Attacks*, TELEGRAPH, Feb. 5, 2012, <http://www.telegraph.co.uk/news/worldnews/al-qaeda/9062825/Al-Qaeda-s-hand-in-Boko-Harams-deadly-Nigerian-attacks.html>; Dina Temple-Raston, *Al-Qaida Arm in Yemen Flexes Its Muscles in Nigeria*, NPR (July 12, 2012, 3:07 AM), <http://www.npr.org/2012/07/12/156641658/al-qaida-arm-in-yemen-flexes-its-muscles-in-nigeria>; see also FOSTER-BOWSER & SANDERS, *supra* note 131, at 4–6 (providing background information on Boko Haram).

145. Bruce Riedel, *The New Al Qaeda Menace*, NAT'L INT. (Aug. 8, 2012), <http://nationalinterest.org/commentary/the-new-al-qaeda-menace-7305>; see also FOSTER-BOWSER & SANDERS, *supra* note 131, at 2–3.

146. Bill Roggio, *Ansar al Jihad Swears Allegiance to al Qaeda's Emir*, LONG WAR J. (Jan. 24, 2012), [http://www.longwarjournal.org/archives/2012/01/ansar\\_al\\_jihad\\_swear.php](http://www.longwarjournal.org/archives/2012/01/ansar_al_jihad_swear.php).

147. Ibrahim Barzak, *Shadowy al Qaeda-Linked Group Claims Israel Attack*, WASH. TIMES, June 19, 2012, <http://www.washingtontimes.com/news/2012/jun/19/shadowy-al-qaeda-linked-group-claims-israel-attack/?page=all>; Bill Roggio, *Mujahideen Shura Council Calls Attack in Israel a 'Gift' to Zawahiri and al Qaeda 'Brothers'*, LONG WAR J. (July 30, 2012), [http://www.longwarjournal.org/archives/2012/07/egyptian\\_jihadist\\_gr.php](http://www.longwarjournal.org/archives/2012/07/egyptian_jihadist_gr.php).

148. See, e.g., Rod Nordland, *15 City Officials Quit in Iraq, Citing Threat from Al Qaeda*, N.Y. TIMES, July 28, 2012, at A8, available at [http://www.nytimes.com/2012/07/28/world/middleeast/15-iraqi-officials-in-baquba-quit-in-protest-over-qaeda-threat.html?\\_r=1&gwh=6A8681D6B4BBE399B30B48524113808E](http://www.nytimes.com/2012/07/28/world/middleeast/15-iraqi-officials-in-baquba-quit-in-protest-over-qaeda-threat.html?_r=1&gwh=6A8681D6B4BBE399B30B48524113808E).

as an independent entity is in dispute.<sup>149</sup> Each of these groups may differ markedly from one another in terms of (1) their actual degree of connection to al Qaeda itself, (2) their interest in conducting operations against American or other Western targets outside the confines of the state in which they usually operate, and (3) their own organizational coherence.<sup>150</sup>

Extreme decentralization receives a further nudge from certain influential theorists of jihad—most notably Abu Musab al-Suri—who advocate for a radically decentralized model in which there is little to no hierarchy or connectivity among participants and instead simply an inspirational vision that would lead large numbers of individuals or small groups to form and take action on their own initiative.<sup>151</sup> They would be members of a movement, one might say, but not of any particular *organization*. This model—familiar in the United States as the “leaderless resistance” approach, and popularized in particular by Marc Sageman as the “leaderless jihad” concept—maximizes operational security, as it is impossible to unravel a network after identifying one or more key nodes when there *is* no network.<sup>152</sup>

Notwithstanding these pressures and theories, the drive to decentralize might have amounted to relatively little if there had not been havens to

149. See, e.g., Seth G. Jones, Op-Ed., *Al Qaeda's War for Syria*, WALL ST. J., July 26, 2012, available at <http://online.wsj.com/article/SB10000872396390443343704577551281530782466.html>; Thomas Joscelyn, *Al Nusrah Front Leader Renews Allegiance to al Qaeda, Rejects New Name*, LONG WAR JOURNAL, Apr. 10, 2013, available at [http://www.longwarjournal.org/archives/2013/04/al\\_nusrah\\_front\\_lead.php](http://www.longwarjournal.org/archives/2013/04/al_nusrah_front_lead.php); Neil MacFarquhar & Hwaida Saad, *Jihadists Taking a Growing Role in Syrian Revolt*, N.Y. TIMES, July 30, 2012, at A1, available at [http://www.nytimes.com/2012/07/30/world/middleeast/as-syrian-war-drags-on-jihad-gains-foothold.html?\\_r=1&hp](http://www.nytimes.com/2012/07/30/world/middleeast/as-syrian-war-drags-on-jihad-gains-foothold.html?_r=1&hp); Ed Husain, *Al Qaeda's Specter in Syria*, Posting to *First Take*, COUNCIL ON FOREIGN REL. (Aug. 6, 2012), [http://www.cfr.org/syria/al-qaedas-specter-syria/p28782?cid=rss-terrorism-al\\_qaeda\\_s\\_specter\\_in\\_syria-080612&utm\\_source=feedburner&utm\\_medium=feed&utm\\_campaign=Feed%3A+ssue%2Fterrorism+%28CFR.org+-+Issues+-+Terrorism%29&utm\\_content=Google+Reader](http://www.cfr.org/syria/al-qaedas-specter-syria/p28782?cid=rss-terrorism-al_qaeda_s_specter_in_syria-080612&utm_source=feedburner&utm_medium=feed&utm_campaign=Feed%3A+ssue%2Fterrorism+%28CFR.org+-+Issues+-+Terrorism%29&utm_content=Google+Reader); Dina Temple-Raston, *U.S. Sees Signs of Al-Qaida Arm in Syria*, NPR (Aug. 3, 2012, 4:35 AM), <http://www.npr.org/2012/08/03/157932381/u-s-sees-signs-of-al-qaida-arm-in-syria>.

150. Cf. BYMAN, *supra* note 102, at 32–37. As to that last point, note that some of these groups have internally embraced a relatively decentralized command structure. Retired General Stanley McChrystal, who commanded JSOC from 2003 to 2008, noted this reality in a much discussed 2011 article in which he commented that traditional organizational models failed to account for the decentralized network structure of al Qaeda in Iraq, which amounted to “a constellation of fighters organized not by rank but on the basis of relationships and acquaintances, reputation and fame.” Stanley A. McChrystal, *It Takes a Network*, FOREIGN POL’Y, March/April 2011, at 66, 68, available at [http://www.foreignpolicy.com/articles/2011/02/22/it\\_takes\\_a\\_network?page=full](http://www.foreignpolicy.com/articles/2011/02/22/it_takes_a_network?page=full).

151. See, e.g., U.S. NAVAL INST., A TERRORIST’S CALL TO GLOBAL JIHAD (Jim Lacey ed., 2008) (providing an abridged English translation of al-Suri’s *Da’wat al-muqawamah al-islamiyyah al-’alamiyyah*, or “Call to Global Islamic Resistance”).

152. See MARC SAGEMAN, LEADERLESS JIHAD 140–46 (2008). Of course, the model can only work if potential participants are actually exposed to information that would suffice to inspire them to action, as well as to enough expertise (regarding tactical method, creation of explosives, and so forth) to enable them to act effectively; the internet is particularly useful on this dimension, and this is a major reason why the leaderless resistance model is more likely to find traction today than in decades past.

which at least some al Qaeda personnel could disperse (or remain in place, for those situations where an al Qaeda member was already present) and regions with indigenous, like-minded organizations to which al Qaeda might establish ties. In fact, both were available. Ungoverned areas—or, at least, areas beyond the writ of central governments—turned out to exist not only in the FATA of Pakistan but also in a number of provinces in Yemen, wide swaths of Somalia, and northern Mali.<sup>153</sup> Each of these areas had indigenous populations hostile to some degree to their respective central governments and inclined both theologically and politically to sympathize actively with al Qaeda, or at least to tolerate the presence of groups espousing al Qaeda's viewpoint.<sup>154</sup> And in each of these areas there was no shortage of existing armed groups. The emergence of civil war in Syria may well be producing a similar opportunity.<sup>155</sup>

In summary, al Qaeda has fragmented along several dimensions. Its core personnel have dispersed geographically, making it more difficult to determine whether a particular individual is in fact part of al Qaeda. At the same time, it has embraced (willfully or not) a model in which its own regional cells are increasingly independent while simultaneously seeking nominal or loose ties to existing independent regional actors. The widely varying nature of these groups' relationship to al Qaeda's senior leadership makes it exceedingly difficult (particularly without access to the best intelligence) to say which of these groups are part of al Qaeda itself, which are independent yet allied in some meaningful fashion with al Qaeda, and which are merely in sympathetic communication with al Qaeda but are not in any real sense subject to its direction and control.

Making matters more complicated still, the original al Qaeda organization may be on the brink of complete collapse due to a number of factors including the extraordinary success that the United States and its allies have had in killing or capturing its key leaders. In addition, al Qaeda has suffered a body blow to its popularity as a result of (1) growing public appreciation for the number of Muslims killed by its operations and those of its cobranded affiliates and (2) the increased profile of an alternative path to political change in the Sunni Arab world made manifest in the Arab Spring movement and its various component revolutions.<sup>156</sup> At some point, the core

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153. See Stewart M. Patrick, *Are 'Ungoverned Spaces' a Threat?*, COUNCIL ON FOREIGN REL. (Jan. 11, 2010), <http://www.cfr.org/somalia/ungoverned-spaces-threat/p21165> (arguing for a nuanced view of the problem posed by ungoverned spaces in general).

154. See *id.*; see also A FALSE FOUNDATION?, *supra* note 112; Dan Merica, *Defense Official: U.S. Needs to 'Accelerate' Effort to Help Mali*, CNN (July 26, 2012, 3:42 PM), <http://www.cnn.com/2012/07/26/us/mali-terror-concerns/index.html>.

155. See, e.g., MacFarquhar and Saad, *supra* note 149.

156. See, e.g., Craig Whitlock, *Panetta: U.S. 'Within Reach' of Defeating al-Qaeda*, WASH. POST, July 9, 2011, available at [http://www.washingtonpost.com/world/panetta-us-within-reach-of-defeating-al-qaeda/2011/07/09/gIQAvPpG5H\\_story.html](http://www.washingtonpost.com/world/panetta-us-within-reach-of-defeating-al-qaeda/2011/07/09/gIQAvPpG5H_story.html); Fawaz A. Gerges, *How the Arab Spring Beat Al Qaeda*, DAILY BEAST (May 13, 2012, 4:45 AM), <http://www.thedailybeast.com/articles/2012/05/13/fawaz-a-gerges-on-how-the-arab-spring-beat-al-qaeda.html>. But see Seth G. Jones, *Think Again: Al Qaeda*, FOREIGN POL'Y, May/June 2012, at

may well be gone altogether, leaving no “al Qaeda” to which the regional groups could be connected.<sup>157</sup> Even if the core survives, however, its decline relative to the operational significance and independence of the “franchises” makes it ever less sensible—ever more dated—to view the overall situation through a core-centric lens.

## 2. The Legal Consequences of Proliferation and Fragmentation

The proliferation and fragmentation trends described above create a growing disconnect between the conception of the enemy embedded in the existing domestic legal architecture and the facts on the ground. The 2001 AUMF, though framed in general terms, was relatively straightforward in terms of identifying an enemy. It encompassed al Qaeda in its reference to the organization responsible for the 9/11 attacks, and it encompassed the Afghan Taliban in its reference to those who might harbor the organization responsible for the 9/11 attacks. It said no more and no less and thus set the stage for a two-party conception of the enemy.

Bush himself challenged that conception early on in a speech to Congress, proclaiming that the War on Terror would not be limited to al Qaeda but would extend to all terrorist organizations of global reach threatening America.<sup>158</sup> Such a capacious understanding of the enemy was beyond what Congress had provided in the AUMF, and thus the speech raised the question of whether military force against additional groups might instead be justified domestically (i.e., in terms of the separation of powers) on grounds of inherent presidential power to use force under Article II of the Constitution (either as a matter of national self-defense or on some broader theory of executive discretion to use force to further the national interest).<sup>159</sup> But, though subsequent rhetoric often referred to a “Global War on Terror” rather than a conflict with al Qaeda as such, the matter eventually came to seem rather academic, as it did not appear that the United States was actually detaining or targeting persons outside the al Qaeda–Afghan Taliban

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47, available at [http://www.foreignpolicy.com/articles/2012/04/23/think\\_again\\_al\\_qaeda?page=full](http://www.foreignpolicy.com/articles/2012/04/23/think_again_al_qaeda?page=full) (arguing that reports of al Qaeda’s demise are premature).

157. Cf. Greg Miller, *Al-Qaeda Targets Dwindle as Group Shrinks*, WASH. POST, Nov. 22, 2011, available at [http://www.washingtonpost.com/world/national-security/al-qaeda-targets-dwindle-as-group-shrinks/2011/11/22/gIQAxBXJNmN\\_story.html](http://www.washingtonpost.com/world/national-security/al-qaeda-targets-dwindle-as-group-shrinks/2011/11/22/gIQAxBXJNmN_story.html). A similar shift could well occur vis-à-vis the Taliban, in the event of a peace agreement in Afghanistan.

158. Bush, *supra* note 79, at 1348; see also ERIC SCHMITT & THOM SHANKER, COUNTER-STRIKE 25 (2011) (describing post-9/11 debate within the Bush Administration with respect to “how precisely to define the enemy beyond Al Qaeda”).

159. See Memorandum Opinion for the Att’y Gen. from Caroline D. Krass, Principal Deputy Ass’t Att’y Gen., *Authority to Use Military Force in Libya* (Apr. 1, 2011), <http://www.justice.gov/olc/2011/authority-military-use-in-libya.pdf>; Memorandum for Alberto R. Gonzales, Counsel to the President, and William J. Haynes, II, Gen. Counsel, Dep’t of Def., from John C. Yoo, Deputy Ass’t Att’y Gen., and Robert J. Delahunty, Special Counsel, *Authority for Use of Military Force to Combat Terrorist Activities Within the United States* (Oct. 23, 2001), <http://www.justice.gov/olc/docs/memomilitaryforcecombatus10232001.pdf>.

framework.<sup>160</sup> The emerging detention case law powerfully reinforces this perception as the vast bulk of cases involved persons that the government said were members of al Qaeda or the Afghan Taliban.<sup>161</sup> The fact that the Obama Administration expressly invoked authority only under the AUMF further reinforced the apparent primacy of the two-party conception.<sup>162</sup>

All of which would be fine from the domestic separation-of-powers perspective, except that in reaction to the proliferation and fragmentation trends described above, the United States eventually *did* begin using force against members of other groups after all—or at least it began using force in situations which could not be reconciled with the two-party conception without encountering difficult factual questions about the precise nature of the link between a given group and al Qaeda or the Afghan Taliban. This occurred on a widespread and sustained scale in Afghanistan itself and in Pakistan;<sup>163</sup> it occurred on a narrower and more episodic scale in Yemen in relation to AQAP;<sup>164</sup> and it may or may not have occurred from time to time in Somalia, depending on whether one thinks that episodic uses of force there have targeted al-Shabaab as such or, instead, individuals linked to the core al Qaeda organization.<sup>165</sup>

The executive branch has long argued that any such extensions remain justified from a domestic law perspective on the theory that the AUMF implicitly includes authority to use force against any entities that emerge as cobelligerents of al Qaeda or the Afghan Taliban—a status the executive branch refers to as becoming an “associated force.”<sup>166</sup> This approach began in the Bush Administration, which built the associated forces model into its description of the boundaries of its detention authority in the course of the Guantanamo habeas litigation.<sup>167</sup> The Obama Administration has continued this approach, both in litigation and in its National Strategy for Counterterrorism.<sup>168</sup>

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160. See *supra* Section II.B; see also John B. Bellinger, III, Legal Advisor, U.S. Dep’t of State, Address to the London School of Economics on Legal Issues in the War on Terrorism 8 (Oct. 31, 2006), [http://www2.lse.ac.uk/publicEvents/pdf/20061031\\_JohnBellinger.pdf](http://www2.lse.ac.uk/publicEvents/pdf/20061031_JohnBellinger.pdf) (“We do not believe that we are in a legal state of war with every terrorist group everywhere in the world. Rather, the United States uses the term ‘global war on terrorism’ to mean that all countries must strongly oppose, and must fight against, terrorism in all its forms, everywhere around the globe. . . . We do, however, believe that we are in a legal state of armed conflict with al Qaida, for the reasons I have already described.”).

161. See *supra* Section II.B.

162. See *supra* note 40 and accompanying text.

163. See *supra* Section III.A.

164. See *supra* Section III.A.

165. See Gettleman & Schmitt, *supra* note 136; Roggio, *supra* note 136.

166. See Chesney, *supra* note 32, at 788–93.

167. See *id.*

168. *National Strategy for Counterterrorism*, WHITE HOUSE 3 & n.1 (June 28, 2011), [http://www.whitehouse.gov/sites/default/files/counterterrorism\\_strategy.pdf](http://www.whitehouse.gov/sites/default/files/counterterrorism_strategy.pdf); see also Chesney, *supra* note 32, at 830–31.

There are two problems with the associated-forces solution. First, some critics deny that the cobelligerency concept has application in this setting, reasoning that cobelligerency is a creature of international law applicable solely in the context of international armed conflict—a circumstance not present here.<sup>169</sup> Whatever the merits of that criticism in the abstract, however, it became irrelevant to the domestic law separation-of-powers dispute (i.e., the fight as to whether Congress had implicitly authorized the use of force against “associated forces” or if the president may have such power through Article II in the alternative) when Congress in 2011 enacted the NDAA FY12, which included language expressly embracing the executive branch’s detention-authority definition—encompassing not just al Qaeda and the Taliban but also “associated forces.”<sup>170</sup> It is thus no longer necessary to argue that such a concept should be read into the AUMF via cobelligerency; Congress has expressly embraced the general idea.

But what exactly counts as an associated force? This is the second problem, and not only does it remain untouched by the NDAA FY12 but it is also a problem that is growing increasingly serious as the trends described above unfold. Simply put, it is not clear what criteria apply to identify a group as an associated force.

International law is little help, even if we were to accept the relevance of the cobelligerency concept, given the distance between the organizations and networks currently at issue and the state-centric situations that gave rise to that concept in the past. Congress missed the chance to address this issue in the NDAA FY12, choosing to simply codify the “associated forces” concept without defining it. The habeas-derived case law from the past decade also has little to offer. As noted above, those cases almost invariably involve persons linked either to the Afghan Taliban or to the core al Qaeda organization (or more specifically, to the training camps and recruiting pipelines that al Qaeda operated pre-9/11). Such fact patterns spare the courts any need to grapple with the nuances that situations like that of Warsame present (i.e., those that are replete with uncertainty regarding various groups and their ties to al Qaeda).

Here we might add, too, a note on the impact of the sheer passage of time. In some quarters, a tipping point has arrived. Nothing captures this sense better—or more relevantly—than the blunt denunciation issued by Christopher Heyns—designated by a United Nations body to be a “special rapporteur” monitoring the practice of “extrajudicial killing”—at an event sponsored by the American Civil Liberties Union (“ACLU”) in the summer of 2012. According to the account provided by the *Guardian*,

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169. See, e.g., Kevin Jon Heller, *The Law of Neutrality Does Not Apply to the Conflict with Al-Qaeda, and It's a Good Thing, Too: A Response to Chang*, 47 *TEX. INT'L L.J.* 115, 125–30 (2011); Gabor Rona, *Targeted Killing: A Response to Michael Lewis*, *OPINIO JURIS* (July 30, 2012, 11:00 AM), <http://opiniojuris.org/2012/07/30/gabor-rona-on-targeted-killing-a-response-to-michael-lewis/>. But see Karl S. Chang, *Enemy Status and Military Detention in the War Against Al-Qaeda*, 47 *TEX. INT'L L.J.* 1, 42–46 (2011).

170. National Defense Authorization Act for Fiscal Year 2012, Pub. L. No. 112-81, § 1021(b)(2), 125 Stat. 1298, 1562 (2011).

Heyns ridiculed the US suggestion that targeted UAV strikes on al-Qaida or allied groups were a legitimate response to the 9/11 attacks. “It’s difficult to see how any killings carried out in 2012 can be justified as in response to [events] in 2001,” he said. “Some states seem to want to invent new laws to justify new practices.”<sup>171</sup>

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In his recent depiction of the Obama Administration’s counterterrorism policies, journalist Daniel Klaidman offers the following account of the president’s appreciation for the growing legal instability. The president, he observed, was

a lawyer, and he understood that in the shadow wars, far from conventional battlefields, the United States was operating further out on the margins of the law. Ten years after 9/11, the military was taking the fight to terrorist groups that didn’t exist when Congress granted George Bush authority to go to war against al-Qaeda and the Taliban. Complicated questions about which groups and individuals were covered under the [AUMF] were left to the lawyers. Their finely grained distinctions and hair-splitting legal arguments could mean the difference between who would be killed and who would be spared.<sup>172</sup>

That passage perfectly captures the legal impact of al Qaeda’s evolution. It also turns our attention to a second disruptive strategic shift: that on the part of the U.S. government as it moves away from overt combat deployments and toward discrete, low-visibility uses of force.

#### B. *Strategic Change and the U.S. Government’s Shift to Shadow War*

Legal destabilization is not just a matter of al Qaeda’s evolution and consequent uncertainty as to the identity of the enemy. It also flows from a long-term shift in the U.S. government’s approach to the disposition of its own forces, a shift in strategy that Klaidman writes is “firmly in line with Obama’s approach to the war on terror: surgical and discrete.”<sup>173</sup> Specifically, the United States is drawing down in Afghanistan while simultaneously expanding its involvement in what might best be described as “shadow war.” The end result will be something altogether new in our experience: a

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171. Owen Bowcott, *Drone Strikes Threaten 50 Years of International Law, Says U.N. Rapporteur*, GUARDIAN, June 21, 2012, <http://www.guardian.co.uk/world/2012/jun/21/drone-strikes-international-law-un>.

172. KLAIMAN, *supra* note 1, at 205. Klaidman’s book details several instances in which lawyers and officials engaged in sharp internal debates with respect to whether it would be proper to engage in strikes against targets in Somalia, sometimes turning on points of law, sometimes points of policy, and sometimes points of evidentiary assessment. See, e.g., *id.* at 49–51 (describing rejection of a proposed operation targeting both an unidentified high-value target and an al-Shabaab training camp).

173. *Id.* at 205; see also *id.* at 120 (“[T]he [CIA]’s operational capabilities [a]re well suited to [Obama’s] strategic goal—taking high-ranking al-Qaeda and Taliban operatives off the battlefield while shrinking America’s footprint in the region.”); *id.* at 121 (describing



formally secret yet partially transparent set of institutions and programs engaged in the use of lethal force and other military-style counterterrorism measures on a systematic basis (including both direct action by low-visibility U.S. forces and support for operations conducted by other governments) yet wholly delinked from any contemporaneous circumstance of undisputed armed conflict. In that setting, the persistent disagreement as to when and where LOAC governs simply cannot be ignored.

### 1. Step One: Drawdown in Afghanistan

The United States has maintained a large-scale combat presence in Afghanistan for more than a decade, and as recently as 2009 the main focus of debate in Washington concerned the size of the troop surge that circumstances there warranted.<sup>174</sup> But things are different today. No one speaks of outright victory over the Afghan Taliban and other insurgents, let alone generational commitments to achieve that end. The White House has reportedly embraced considerably more modest goals, embodied by the slogan “Afghan Good Enough.”<sup>175</sup> Drawdown is no longer an abstract possibility but a policy reality with a specific timeline. The transition of security responsibility to Afghan forces is already well on its way, with the goal of completion in 2014.<sup>176</sup> In sum, large-scale U.S. involvement in the war in Afghanistan is coming to a close, much as occurred in Iraq a few years previously.<sup>177</sup>

There are many reasons for this policy shift. As an initial matter, the U.S. government faces tremendous budget pressure and likely will for many years to come. This pressure is due to a number of factors, such as the long period of recession and stagnation in the U.S. domestic economy following the collapse of the housing bubble, long-running imbalances in the federal

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Obama and CIA Director Leon Panetta as viewing “the drone program as a potential strategic game-changer in the war on terror”).

174. See BOB WOODWARD, *OBAMA’S WARS* (2010).

175. SANGER, *supra* note 15, at 49–51.

176. Helene Cooper & Matthew Rosenberg, *NATO Agrees on Afghan Security Transition in 2013*, N.Y. TIMES, May 21, 2012, at A6, available at <http://www.nytimes.com/2012/05/22/world/nato-formally-agrees-to-transition-on-afghan-security.html?pagewanted=all&r=2&>; Helene Cooper & Eric Schmitt, *Officials in U.S. Debate Speeding Afghan Pullout*, N.Y. TIMES, Mar. 13, 2012, at A1, available at <http://www.nytimes.com/2012/03/13/world/asia/us-officials-debate-speeding-up-afghan-pullout.html?pagewanted=all&r=1>.

177. Hostilities in Afghanistan could of course continue or even worsen after the American drawdown, and it is possible that U.S. forces could continue to participate in more limited ways in that fighting. The important point, however, is that the reduced scale and changed nature of lingering American involvement will likely raise serious questions as to whether the United States remains a party to an armed conflict there, very much akin to the questions that exist today in relation to U.S. involvement in hostilities in Yemen. Even if the better answer to such questions is that an armed conflict does still exist and the United States is still a party to it, there is no question that the matter will be far more disputed than it currently is.

budget, an apparent political impasse with respect to serious reform of entitlement spending, and financial and monetary instability abroad (particularly in the Eurozone). Collectively, these circumstances and others create extraordinary pressure to save money where possible, including in the defense and foreign affairs budgets. That is true of the formal, recurring defense budget and certainly of the kinds of supplemental appropriations that the U.S. government routinely needed in the past to fund operations in Afghanistan and Iraq. The public's willingness to support expenditures in Afghanistan is eroding, moreover, due to periodic reports of wasteful spending there, such as a recent inspector general's report, which concluded that hundreds of millions of dollars spent on infrastructure projects have not only fueled local corruption and led to waste but may actually prove counterproductive.<sup>178</sup>

Other factors reinforce the fiscal pressure. The American public appears increasingly weary of overseas combat deployments and attendant casualties. Public support for continuing a U.S. troop presence in Afghanistan reached an all-time low in April 2012, according to a Pew Research Center poll, with 59% of "swing voters" (constituting 23% of all registered voters) favoring withdrawal as soon as possible and even 48% of committed Romney voters taking the same view (65% of committed Obama voters took this view as well).<sup>179</sup> Barring a catalyzing event such as a major terrorist attack on the homeland, there is no reason to expect that trend to reverse in the near future. Diplomatic factors pull in the same direction as our allies one by one withdraw from the field in the face of their own fiscal and political constraints.<sup>180</sup>

A variety of policy considerations play their part as well. Some might argue, for example, that large-scale combat deployments are ultimately counterproductive in that the presence of U.S. forces may give rise to more problems than it solves. Path dependency also matters here, as progress along the path to withdrawal at some point becomes irreversible in the face of mounting diplomatic, financial, and domestic political costs that might follow from a reversal of course; indeed, it may be that relations with the Karzai Administration and the various neighboring states on which the United States depends for trans-shipment of resources simply preclude a

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178. See Rajiv Chandrasekaran, *U.S. Construction Projects in Afghanistan Challenged by Inspector General's Report*, WASH. POST, July 30, 2012, available at [http://articles.washingtonpost.com/2012-07-30/world/35487571\\_1\\_taliban-insurgency-afghan-government-afghanistan](http://articles.washingtonpost.com/2012-07-30/world/35487571_1_taliban-insurgency-afghan-government-afghanistan).

179. *Most Swing Voters Favor Afghan Troop Withdrawal*, PEW RES. CTR. FOR PEOPLE & PRESS 1 (Apr. 18, 2012), <http://www.people-press.org/files/legacy-pdf/04-18-12%20Afghanistan%20Release2.pdf>.

180. See, e.g., James Kirkup, *NATO Sets 'Irreversible' Roadmap to Withdrawing Troops from Afghanistan*, TELEGRAPH, May 22, 2012, <http://www.telegraph.co.uk/news/worldnews/asia/afghanistan/9281562/Nato-sets-irreversible-roadmap-to-withdrawing-troops-from-Afghanistan.html> (noting French plans to withdraw by the end of 2012 and NATO plans to shift to a solely supporting role by mid-2013, with complete withdrawal scheduled for the end of 2014).

reversal at this stage.<sup>181</sup> And though there is talk of a continued U.S. military presence in Afghanistan going forward, supported by a strategic partnership agreement that loosely envisions such collaboration, remaining forces are likely to concentrate on a background role involving training and other forms of support to the Afghan government; to the extent U.S. forces do engage in direct action there in the future, it will likely involve the same low-intensity “shadow war” model discussed below.<sup>182</sup>

In sum, it seems unlikely that the United States will continue to engage in large-scale combat operations in Afghanistan beyond 2014. As a consequence, there will soon be no circumstance in which it is undisputed both that there is an armed conflict and that the United States is a party. This state of affairs will have significant legal consequences. Before discussing these consequences, however, it is important to account for a closely related development: America’s increasing reliance on shadow war.

## 2. Step Two: Increased Emphasis on Shadow War

At precisely the same time that the United States is reducing its involvement in large-scale, overt combat operations, it is increasingly making use of warlike methods—including the use of lethal force and military detention—in episodic, low-intensity circumstances in which the U.S. role is meant to be secret or at least not formally acknowledged. This is what I mean by the “shadow war” model.

The shadow war approach to counterterrorism is not a novelty. On the contrary, it has roots going back at least to the early 1980s and has been in

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181. See, e.g., Simon Long, *Afghanistan: Too Close for Comfort*, *Economist* (Special Report: Pakistan), Feb. 11, 2012, at 5–6, available at <http://www.economist.com/node/21546892> (detailing Pakistan’s closure of ISAF supply routes in response to an American drone strike). It is difficult to say how much partisan political calculation also matters in this mix. It is easy to generalize, asserting that the Obama Administration has something to gain vis-à-vis its base by withdrawing from Afghanistan (and avoiding large-scale deployments to any new settings) and that a hypothetical Romney Administration would have had the opposite political incentives. But the reality may be more complicated. A combination of Tea Party-inspired emphasis on fiscal constraint, realist-inspired skepticism about the efficacy of large-scale deployments, and libertarian-inspired concerns about the growth of the national security state and America’s role in global affairs has infused Republican politics with crosscurrents that make such assessments difficult. The Democratic Party contains multitudes as well, including advocates of armed humanitarian intervention and persons and groups committed to the welfare of Afghans who may suffer postwithdrawal (particularly Afghan women). In an era in which independent voters often hold the balance of power, it is not obvious that politicians running for national office are best served in the general election by playing to their bases. All of which suggests that political calculations will play out in idiosyncratic ways.

182. On the strategic partnership for the future, see Press Release, Office of the White House Press Sec’y, Fact Sheet: The U.S.–Afghanistan Strategic Partnership Agreement (May 1, 2012), available at <http://www.whitehouse.gov/the-press-office/2012/05/01/fact-sheet-us-afghanistan-strategic-partnership-agreement>. On the shift toward a shadow war model for Afghanistan postdrawdown, see Greg Miller, *CIA Digs in as Americans Withdraw from Iraq, Afghanistan*, *WASH. POST*, Feb. 7, 2012, available at [http://www.washingtonpost.com/world/national-security/cia-digs-in-as-americans-withdraw-from-iraq-afghanistan/2012/02/07/gIQAFNJTxQ\\_story.html](http://www.washingtonpost.com/world/national-security/cia-digs-in-as-americans-withdraw-from-iraq-afghanistan/2012/02/07/gIQAFNJTxQ_story.html).

use continually in relation to al Qaeda since the 1990s. But it is different today in three respects. It has become far more capable, thanks to robust institutionalization, resourcing, and technological progress. It has become far more central to counterterrorism strategy, thanks to the trends described above (the fragmentation of the enemy and the many pressures cutting against reliance on overt means). And it has become far more exposed to public scrutiny, thanks to the emerging climate of compelled transparency surrounding government action (including the avalanche of purposeful government leaks that help make articles like this possible in the first place).

a. *A Thumbnail Sketch of the Origins of the Shadow War*

The seminal moment for the shadow war model arguably occurred in 1983.<sup>183</sup> A rash of bombings and kidnappings in Lebanon presented the White House with a dilemma. The option of striking back at the responsible parties (or their state sponsors) with overt military force, such as a sustained air strike campaign, faced a host of practical, political, and diplomatic obstacles, not to mention resistance from Pentagon leaders steeped in the notion from Vietnam that there is no such thing as the surgical use of military force. The circumstances favored covert means, then, but whether that could include the use of deadly force generated substantial internal debate. Vietnam was not the only recent event influencing attitudes, after all. The 1970s also witnessed a series of revelations concerning CIA plots to kill various foreign leaders. The Ford Administration responded by adopting an executive order prohibiting assassination, and both Presidents Carter and Reagan followed suit. The general counsel of the CIA ultimately determined, however, that the use of lethal force for counterterrorism purposes was a different kettle of fish, paving the way for Reagan to authorize the CIA to develop a proxy force of foreign personnel capable of killing terrorism-related targets. Ultimately, the plan foundered due to the apparently poor quality of the team the CIA recruited, but the underlying authority remained in place, as did the legal framework pursuant to which the use of lethal force against terrorism threats was conceived not to be assassination but, rather, an act of lawful self-defense.

When the emergence of al Qaeda caused terrorism concerns to spike again in the 1990s, the circumstances once more favored reliance on covert and clandestine methods (at least with respect to threats lying beyond the reach of the American criminal justice system). This pressure resulted first in the rendition program undertaken during the Clinton Administration, which sought to incapacitate individual terrorists by putting them in the custody of their own governments. Then, as the threat mounted, the Clinton Administration turned back to the Reagan model and authorities relating to covert lethal force. As before, the prospect generated intense disagreements,

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183. The following account derives from Robert Chesney, *Military–Intelligence Convergence and the Law of the Title 10/Title 50 Debate*, 5 J. NAT'L SECURITY L. & POL'Y 539, 549–63 (2012).

and as a result, the precise extent to which covert lethal force was authorized both varied over time and was subject to much misunderstanding. Still, covert lethal force *was* authorized to some extent. Initially, it focused once more on the use of proxy forces, though there were hopes early on that technology—in the form of an armed drone—might at last provide the United States with the capacity to kill in denied areas without relying on proxy forces or putting its own personnel in danger.

After the East African embassy bombings of 1998, the Clinton Administration broke new ground by adding an overt military track to the existing shadow war model, embodied in the launch of cruise missiles at al Qaeda-linked targets in Afghanistan and the Sudan (and in the preservation of the same launch option thereafter in the event that the administration could obtain actionable intelligence). This development in theory could have generated a sustained public debate regarding what it meant to go to war against a nonstate actor and how the law of war—LOAC—ought to apply in such circumstances. But it did not. The public did not know about the shadow war elements, and the one episode of overt military force proved to be insufficient to spark such a debate; a momentary flash of lethal force compares poorly to the slow boil of military detention when it comes to generating sustained debate, it seems.

After 9/11, things changed. The overt military track was no longer a marginal part of the policy but rather the elephant in the room, even with the simultaneous expansion of the shadow war; the invasion of Afghanistan and the creation of a long-term military detention system at Guantanamo drew the vast bulk of attention. The expansion of shadow war operations against al Qaeda did draw *some* attention, particularly in connection with rendition and interrogation. But in the nature of things, the expansion of the shadow war was not nearly so widely appreciated or understood, at least not at the time. Simply put, the visible and dramatic expansion of the overt military track during the first post-9/11 decade largely eclipsed the simultaneous expansion of the shadow war.

b. *Why the Shadow War Is Becoming Dominant*

Why is the shadow war aspect of U.S. counterterrorism policy growing again at the very moment when the overt military track is in decline? As an initial matter, as described above, the core al Qaeda organization is giving way, in fits and starts, to a set of regional actors who have no particular ties to the Afghan theater and may well have only the most formal ties to al Qaeda's remaining senior leadership. In practical terms, that means that U.S. counterterrorism operations will increasingly focus on places like Yemen and Somalia. At the same time, the decline of overt combat operations in Afghanistan will have the effect of converting that location into something more akin to what today exists in Yemen and Somalia: a venue for shadow war operations. The pressures described above, militating against sustained combat operations, will push counterterrorism policy into the shadows in these locations. The more politically difficult it is to pursue the

overt option, the more comparatively attractive it becomes to pursue covert or other secret means; if the latter are more affordable financially and less abrasive diplomatically, so much the better.

Next, consider the centrality of technological change to all this. As noted above, the idea of using lethal force covertly once depended on putting specific persons in harm's way. If the government was unwilling to put Americans at risk, it had to act through local proxy forces, with all the risk that entailed—including the risk of sheer inefficacy. Technological change has utterly disrupted this calculus, creating unprecedented opportunities for projecting lethal force without reliance on proxies and with relatively little risk to U.S. personnel. Specifically, advances in drone technologies—from armed, unmanned aerial vehicles like the MQ-1 Predator and the MQ-9 Reaper to an array of stealthy surveillance devices—have given the United States an unprecedented capacity to project force into areas where it has no sustained deployments of ground forces.<sup>184</sup> Projecting force in such areas with reduced personal risk previously required reliance on alternatives such as cruise missiles or manned aircraft sorties (although the latter certainly involved personal risk if the denied area had serious air defense capabilities).<sup>185</sup> These were not always attractive options for commanders and policymakers because of the long lag time between the decision to strike and the actual moment of impact, as well as concerns about the precision of these platforms in terms of the accuracy of the resulting attack. Manned aircrafts, moreover, generally require plausible search-and-rescue capacities that might further deter their use in the first place. The extraordinary expansion of drones' capacities and numbers from the pre-9/11 period to the present has a game-changing impact on what the United States can accomplish on the shadow war track (although it is true, to be sure, that drones are far more effective insofar as they rest on a foundation of intelligence-collection that may require a substantial amount of human intelligence (“HUMINT”)). The days of depending on long-range Tomahawk missile strikes to carry out lethal operations seem impossibly distant—and impossibly constraining, comparatively speaking.

Another key enabling factor is the extent to which the shadow war model has been institutionalized and thereby entrenched. An array of developments in both the military and intelligence communities have created a sustainable and rather impressive capacity for conducting a broad spectrum of covert and clandestine counterterrorism operations. These developments include a vast expansion of the authorities, budget, manpower, and other JSOC resources, as well as corresponding changes in the CIA (including, for example, a sweeping conversion of the workforce into targeting-related roles

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184. See, e.g., Anderson, *supra* note 58; Siobhan Gorman & Adam Entous, *CIA Plans Yemen Drone Strikes*, WALL ST. J., June 14, 2011, available at <http://online.wsj.com/article/SB10001424052702303848104576384051572679110.html>; David Axe, *Hidden History: America's Secret Drone War in Africa*, WIRED (Aug. 13, 2012, 6:30 AM), <http://www.wired.com/dangerroom/2012/08/somalia-drones/all/>.

185. See Axe, *supra* note 184.

and the acquisition of a veritable drone air force).<sup>186</sup> They also include a remarkable amount of cooperation between the military and the CIA, both in the field and at the back-office level; in some contexts it may be more accurate to speak of JSOC and CIA capacities collectively rather than as wholly independent institutions.<sup>187</sup>

The institutionalization of shadow war capacity also has a proxy-force dimension, albeit one with complicated legal implications. The larger special operations community beyond JSOC participates in a wide array of missions around the world, including especially Foreign Internal Defense (“FID”) missions, which provide support to host-state security forces, which in turn play the front-line role in attempting to suppress insurgents and other armed groups in their territory.<sup>188</sup> Such missions of course have a force-

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186. See, e.g., Greg Miller, *Under Obama, an Emerging Global Apparatus for Drone Killing*, WASH. POST, Dec. 27, 2011, available at [http://www.washingtonpost.com/national/national-security/under-obama-an-emerging-global-apparatus-for-drone-killing/2011/12/13/gIQANPdILP\\_story.html](http://www.washingtonpost.com/national/national-security/under-obama-an-emerging-global-apparatus-for-drone-killing/2011/12/13/gIQANPdILP_story.html). On the president’s understanding of the utility of JSOC for low-visibility counterterrorism operations, see KLADMAN, *supra* note 1, at 204–05. See also Chesney, *supra* note 183, at 562–83 (discussing evolution of JSOC and noting that the CIA has established a unit specifically focused on both Somalia and Yemen); Julian E. Barnes & Adam Entous, *U.S. Seeks Faster Deployment*, WALL ST. J., May 7, 2012, available at <http://online.wsj.com/article/SB10001424052702303630404577390333494738036.html> (describing proposals for enabling quicker global deployment of “strike teams”); Kimberly Dozier, *Spec-Ops Troops Study to Be Part-Spy, Part-Gumshoe*, ASSOCIATED PRESS, Jan. 4, 2012, available at 1/4/12 AP DataStream 08:23:52 (Westlaw) (describing increasing emphasis on training for forensic data-collection during raids, as well as efforts to increase CIA–Special Operations integration).

187. See Chesney, *supra* note 183, at 578–80.

188. See, e.g., *The Future of U.S. Special Operations Forces: Hearing Before the Subcomm. on Emerging Threats and Capabilities of the H. Comm. on Armed Servs.*, 112th Cong. (2012), available at <http://www.gpo.gov/fdsys/pkg/CHRG-112hhr75150/pdf/CHRG-112hhr75150.pdf>; *Department of Defense Authorization for Appropriations for Fiscal Year 2013 and the Future Years Defense Program: Hearings Before the S. Comm. on Armed Servs.*, 112th Cong. 45–86 (2012), available at <http://www.gpo.gov/fdsys/pkg/CHRG-112shrg76541/pdf/CHRG-112shrg76541.pdf> (colloquy before the Subcommittee on Emerging Threats and Capabilities reviewing a host of ways in which FID missions support counterterrorism); Otto K. Liller, *Special Operations Forces and Foreign Internal Defense: An Effective Counterterrorism Model* (Feb. 14, 2005) (unpublished paper, Naval War College), [www.dtic.mil/dtic/tr/fulltext/u2/a464349.pdf](http://www.dtic.mil/dtic/tr/fulltext/u2/a464349.pdf). For an example of a FID-type mission involving training of Ugandan forces, see Nick Turse, *America’s Shadow Wars in Africa*, TOMDISPATCH.COM (July 12, 2012, 9:27 AM), <http://www.tomdispatch.com/post/175567/>, and John Vandiver, *Marines in Support of AFRICOM Establish Task Force in Sigonella*, STARS & STRIPES (Oct. 5, 2011), <http://www.stripes.com/news/marines-in-support-of-africom-establish-task-force-in-sigonella-1.156957>. For an example of a FID mission involving considerably more than just training, see Alan Boswell, *African Villagers Embrace U.S. Role in Hunt for Lord’s Resistance Army Leader*, McCLATCHY (Feb. 13, 2012), <http://www.mcclatchydc.com/2012/02/13/138737/african-villagers-embrace-us-role.html>. See also David S. Cloud, *U.S. Special Forces Commander Seeks to Expand Operations*, L.A. TIMES, May 5, 2012, available at <http://articles.latimes.com/2012/may/04/world/la-fg-special-forces-20120505> (citing sources within the special operations community for proposition that recent proposals to expand discretion of the U.S. Special Operations Command with respect to deployment primarily concern increased capacities “to gather intelligence and build the capabilities of foreign allies to defeat terrorist networks”).

multiplying effect for the host state itself, but they can also play an important role in advancing the U.S. government's own counterterrorism efforts, eliminating the need for more overt forms of intervention that might otherwise arise; by definition, the U.S. role in such missions does not entail direct application of lethal force or detention. The role of special operations forces in the Philippines, assisting government forces in suppressing the al Qaeda-linked Abu Sayyaf movement, provides a good illustration.<sup>189</sup> Bearing all this in mind, the proxy model appears to be a still-more-discreet alternative to the direct-action focus of the shadow war described above—one that would tend to avoid legal difficulties from a U.S. perspective. The proxy model can also be viewed as part of the shadow war framework, insofar as support-oriented missions happen to provide unique opportunities for intelligence collection, relationship building, developing access to airports and other important facilities, and forward positioning of personnel and equipment that might later be useful for other, more direct, forms of intervention. Recent news accounts of FID or FID-like missions that may be underway in Africa illustrate these possibilities.<sup>190</sup>

The upshot of all this is an extraordinary expansion in the practical capacity of the U.S. government to use lethal force or carry out captures in denied or otherwise-sensitive locations (whether directly or through the agency of other governments or proxy forces) without having to commit to overt, large-footprint military campaigns that would readily be categorized as armed conflict.<sup>191</sup> All of which might well go largely unnoticed and hence unanalyzed if the shadow war model actually entailed a reliable degree of

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189. For a brief overview, see *Joint Special Operations Task Force—Philippines (JSOTF—P)*, GLOBALSECURITY.ORG, <http://www.globalsecurity.org/military/agency/dod/jsotf-p.htm> (last visited Mar. 9, 2013).

190. On the importance of nondirect action missions both as a means of bolstering third-party forces and of intelligence collection, see Eric Schmitt et al., *Admiral Pushing for Freer Hand with Commandos*, N.Y. TIMES, Feb. 13, 2012, at A1, available at <http://www.nytimes.com/2012/02/13/us/admiral-pushes-for-freer-hand-in-special-forces.html?pagewanted=all>. On Africa, see Lolita C. Baldor, *US Looks to Expand Military Aid, Intel to Africa*, ASSOCIATED PRESS, June 25, 2012, available at 6/25/12 AP DataStream 16:56:56 (Westlaw), and Craig Whitlock, *U.S. Expands Secret Intelligence Operations in Africa*, WASH. POST, June 13, 2012, available at [http://www.washingtonpost.com/world/national-security/us-expands-secret-intelligence-operations-in-africa/2012/06/13/gJQAHyvAbV\\_story.html](http://www.washingtonpost.com/world/national-security/us-expands-secret-intelligence-operations-in-africa/2012/06/13/gJQAHyvAbV_story.html). Whitlock has also drawn attention to the role of private contractors in amplifying these efforts, with an emphasis on their role in intelligence collection. See Craig Whitlock, *Contractors Run U.S. Spying Missions in Africa*, WASH. POST, June 14, 2012, available at [http://www.washingtonpost.com/world/national-security/contractors-run-us-spying-missions-in-africa/2012/06/14/gJQAvC4RdV\\_story.html](http://www.washingtonpost.com/world/national-security/contractors-run-us-spying-missions-in-africa/2012/06/14/gJQAvC4RdV_story.html). Reliance on contractors, of course, helps to reduce the visibility of the activities in question, running with the grain of the shadow war approach.

191. On the role of foreign government forces acting with substantial U.S. support as an element of shadow war, see Craig Whitlock, *U.S. Intensifies Its Proxy Fight Against al-Shabab in Somalia*, WASH. POST, Nov. 24, 2011, available at [http://www.washingtonpost.com/world/national-security/us-intensifies-its-proxy-fight-against-al-shabab-in-somalia/2011/11/21/gIQAVLyNtN\\_story.html](http://www.washingtonpost.com/world/national-security/us-intensifies-its-proxy-fight-against-al-shabab-in-somalia/2011/11/21/gIQAVLyNtN_story.html). While the CIA is not currently engaged directly in long-term detention as was the case during the Bush Administration, this could change going forward. No statute forbids it; the current prohibition stems merely from an executive order issued by Obama at the outset of his presidency. In the meantime, it is worth noting reports that the



secrecy. But, of course, it does not. Though *some* operations may remain secret, it will never be clear in advance which ones will run the gauntlet of purposeful leaks, unintentional disclosures, professional investigative reporting, and other means by which many—if not most—aspects of U.S. government counterterrorism activities end up in the public record. In most cases, officials would do well to proceed on the assumption that the shadows in which they operate are neither particularly dark nor sustainable over time.

### 3. The Legal Consequences of the Shift to Shadow War

The drawdown in Afghanistan, combined with the expansion of the shadow war model, ensures that the legal architecture of counterterrorism will be far more contested—and hence less stable—going forward than it was during the first post-9/11 decade. When U.S. involvement in overt armed conflict in Afghanistan comes to an end, so too will the other key stabilizing factor identified in Part II: the existence of at least one location as to which LOAC indisputably applies and as to which many cases could be linked.<sup>192</sup> The fact patterns that will matter most in the future—the instances in which the U.S. government will most likely wish to use lethal force or military detention—will instead increasingly be rooted in other locations, such as Yemen and Somalia.

It does not follow that LOAC will be irrelevant to future uses of detention or lethal force. To the extent that the government continues to invoke LOAC, the persuasiveness of its arguments will vary from case to case. In some contexts, for example, the government can make relatively conventional arguments that the level of violence in a given state has risen to a level constituting a noninternational armed conflict, quite apart from whether there also exists a borderless armed conflict with al Qaeda or its successors. Where that is the case, and where the level of U.S. participation in those hostilities warrants the conclusion that it is a party to such a conflict, LOAC arguments may prove persuasive after all. Yemen currently provides a good example of an area ripe for such an analysis.<sup>193</sup>

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CIA remains involved in what some might describe as proxy detention via rendition to cooperative local security services. See, e.g., Jeremy Scahill, *The CIA's Secret Sites in Somalia*, NATION, Aug. 1, 2011, at 11, available at <http://www.thenation.com/article/161936/cias-secret-sites-somalia>; Eli Lake, *Somalia's Prisons: The War on Terror's Latest Front*, DAILY BEAST (June 27, 2012, 6:30 AM), <http://www.thedailybeast.com/articles/2012/06/27/somalia-s-prisons-the-war-on-terror-s-latest-front.html>. Finally, note that counterterrorism involving al Qaeda and its successors is not the only context in which the shadow war model may prove appealing; Israel and Iran already engage in what very much appears to be shadow war, and it is possible that U.S. involvement in that setting could become more direct over time. Cf. Scott Shane, *Iran Adversaries Said to Step up Covert Actions*, N.Y. TIMES, Jan. 12, 2012, at A1, available at [http://www.nytimes.com/2012/01/12/world/middleeast/iran-adversaries-said-to-step-up-covert-actions.html?\\_r=1&pagewanted=all](http://www.nytimes.com/2012/01/12/world/middleeast/iran-adversaries-said-to-step-up-covert-actions.html?_r=1&pagewanted=all).

192. No one argues today that the United States is still engaged in armed conflict governed by LOAC in Iraq, after all, and Afghanistan seems destined to follow a similar path (albeit one in which the host-state government is relatively less secure and capable).

193. See, e.g., Jens David Ohlin, *How to Count Armed Conflicts*, LIEBERCODE (July 27, 2012, 8:09 AM), <http://www.liebercode.org/2012/07/how-to-count-armed-conflicts.html>.

But even in those cases, the very nature of the shadow war approach is such that there can be no guarantees that such arguments will be accepted, certainly not as they were during the first post-9/11 decade vis-à-vis Afghanistan. And since not all shadow war contexts will match Yemen in supporting such a conventional analysis, attempts to invoke LOAC in some cases will have to stand or fall instead on the far broader argument that the United States is engaged in a borderless armed conflict governed by LOAC wherever the parties may be found.

The borderless-conflict position at first blush appears nicely entrenched in the status quo legal architecture. It is supported, after all, by a substantial degree of cross-party consensus (it was endorsed most recently in a series of speeches by Obama Administration officials).<sup>194</sup> But it has always been fiercely disputed, including by the International Committee of the Red Cross (“ICRC”) and many of America’s allies. That dispute was not so much resolved over the past decade as it was persistently avoided; the case law of that era almost always involved persons who could be linked in some way back to the undisputed combat zone of Afghanistan. Thanks to the U.S. government’s shift toward shadow war, however, this will not be the situation when new cases arise, as they surely will.<sup>195</sup>

Making matters worse, the U.S. government’s position on the relevance of LOAC to its use of detention and lethal force may become harder to maintain going forward even *without* a drawdown in Afghanistan due to the aforementioned decline and fragmentation of al Qaeda. The borderless-conflict position does require, after all, identifiable parties on *both* sides. Even if one accepts that the United States and al Qaeda are engaged in a borderless armed conflict, organizational ambiguity of the sort described above will increasingly call into question whether specific cases are sufficiently linked to that conflict (or to any other that might be said to exist with respect to specific al Qaeda-linked groups, such as AQAP). Again Warsame’s situation provides a useful illustration, or perhaps more accurately, a cautionary tale.

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Though widely perceived at the time as a period of great legal controversy and uncertainty, the first post-9/11 decade will in retrospect be perceived as a comparatively simple state of affairs during which it was largely undisputed that LOAC applied *somewhere* and that the central objects of the U.S. government’s use of detention and lethal force were entities one could coherently describe as al Qaeda and the Afghan Taliban. But that period is ending, and it may be that the second post-9/11 decade will witness far more serious legal disputes as a result.

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194. See Anderson, *supra* note 58.

195. See *infra* Part IV; see also Jo Becker & Scott Shane, *Secret ‘Kill List’ Proves a Test of Obama’s Principles and Will*, N.Y. TIMES, May 29, 2012, available at <http://www.nytimes.com/2012/05/29/world/obamas-leadership-in-war-on-al-qaeda.html?pagewanted=all> (describing internal administration process for vetting drone strike decisions, emphasizing focus on Yemen and Somalia).

## IV. SHIFTING THE LEGAL FRAMEWORK ONTO FIRMER FOOTING

What if anything ought to be done in response to this looming legal instability? One possibility is to attempt to avoid the difficulty altogether by changing policy. That is, the government could abandon the use of military detention (at least in its long-term form) and limit the use of lethal force to circumstances compatible with a human rights law framework (i.e., circumstances involving a strictly imminent threat to human life with no plausible prospect for arrest). In a speech on May 23, 2013, Obama gestured strongly in this direction.<sup>196</sup> Echoing the observations made above, he pointed out that the armed conflict with al Qaeda might well draw to a close in the near future.<sup>197</sup> And in the meantime, he explained, the United States would continue to prefer criminal prosecution to military detention, while limiting its use of force outside Afghanistan to circumstances involving an array of factors, including a continuing, imminent threat to American lives and no feasible opportunity for capturing rather than killing the target.<sup>198</sup>

At first blush these pronouncements give the impression that the legal issues identified above might cease to matter. On closer inspection, however, that is far from certain. First, the president's speech by no means promised to end the use of long-term military detention, either for the Guantanamo detainees or for those non-Afghan detainees still in U.S. custody in Afghanistan.<sup>199</sup> The size of those populations will likely shrink, but some number of them will remain, along with the legal dilemmas they present. Second, it remains far from certain just how restrictive the use of force will be under color of the president's newly articulated framework. The president was quite clear that when force was used, it would continue to be under color of the 2001 AUMF subject to the law of armed conflict, at least for the near future.<sup>200</sup> The legal questions raised by that model accordingly will remain, even if the number of new instances implicating them shrinks going forward.

With or without these changes, of course, the government might simply choose to do nothing in response to the legal uncertainties described above.<sup>201</sup> That is, it might conclude that it can ride out the increasing legal friction without encountering resistance of a kind that actually upends policy or practice. Such hopes would likely be dashed, however. I explain why below and then conclude with a brief discussion of proactive, realistic steps that the government might take instead.

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196. President Barack Obama, Remarks by the President at the National Defense University (May 23, 2013), *available at* <http://www.whitehouse.gov/the-press-office/2013/05/23/remarks-president-national-defense-university>.

197. *Id.*

198. *Id.*

199. *Id.*

200. *Id.*

201. *See generally* Anderson, *supra* note 58.

### A. *The Coming Wave of Judicial Intervention*

The government will not be able to simply ride out the legal friction generated by the fragmentation of al Qaeda and the shift toward shadow war. Those trends do not merely shift unsettled questions of substantive law to the forefront of the debate; they also greatly increase the prospects for a new round of judicial intervention focusing on those substantive questions.

#### 1. Military Detention

Consider military detention first. Fresh judicial intervention regarding the substantive law of detention is a virtual certainty. It will come in connection with the lingering Guantanamo population, and it will come as well in connection with any future detainees taken into custody on a long-term basis, regardless of where they might be held.

##### a. *Existing Guantanamo Detainees*

Most of the existing Guantanamo detainees have already had a shot at habeas relief, and many lost on both the facts and the law. But some of them can and will pursue a second shot, should changing conditions call into question the legal foundation for the earlier rulings against them.<sup>202</sup>

The first round of Guantanamo habeas decisions depended in almost every instance on the existence of a meaningful tie to ongoing hostilities in Afghanistan, as did the Supreme Court's 2004 decision in *Hamdi*. Indeed, Justice O'Connor in *Hamdi* was at pains to caution that at some point in the future this baseline condition making LOAC relevant could unravel.<sup>203</sup> The declining U.S. role in combat operations in Afghanistan goes directly to that point.

This decline will open the door to a second wave of Guantanamo litigation, with detainees arguing that neither LOAC nor the relevant statutory authorities continues to apply. This argument may or may not succeed on the merits. At first blush, the NDAA FY12 would seem to present a substantial obstacle to the detainees. That statute expressly codifies detention authority as to members (and supporters) of al Qaeda, the Afghan Taliban, and "associated forces,"<sup>204</sup> thus grounding detention authority directly in domestic law rather than requiring courts to impute such authority into the 2001 AUMF by implication from LOAC (as the Supreme Court had to do in

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202. An early indication of the next wave of habeas petitions appeared in the summer of 2012 when a dispute emerged as to whether detainees who had lost their habeas challenges should have continuing access to counsel. See Steve Vladeck, *Habeas, Res Judicata, and Why the New Guantanamo MOU Is a Big Deal*, LAWFARE (July 17, 2012, 5:13 PM), <http://www.lawfareblog.com/2012/07/habeas-res-judicata-and-why-the-new-guantanamo-mou-is-a-big-deal/>. Implicit in the dispute was the idea that such access sooner or later would be needed to mount a fresh habeas challenge.

203. *Hamdi v. Rumsfeld*, 542 U.S. 507, 520 (2004) (plurality opinion).

204. National Defense Authorization Act for Fiscal Year 2012, Pub. L. No. 112-81, § 1021(a), (b)(2), 125 Stat. 1298, 1562 (2011).

*Hamdi* itself). But it is not quite so simple. The same section of the NDAA FY12 relinks the question of detention authority to LOAC after all. It specifies that statutory detention authority as an initial matter exists solely “pending disposition under the law of war.”<sup>205</sup> And although it then lists long-term military detention as a possible disposition option, the statute specifically defines this authority as “[d]etention under the law of war without trial until the end of the hostilities authorized by the [AUMF].”<sup>206</sup>

A court confronted with this language *might* interpret it in a manner consistent with the government’s borderless-conflict position, such that the drawdown in Afghanistan would not matter. But it might not. The repeated references to the “law of war” in the statute—that is to LOAC—might lead at least some judges to conduct a fresh field-of-application analysis regarding the extent to which LOAC remains applicable in light of the drawdown, and judges might then read the results back into the NDAA FY12. I am not saying that this is the likely outcome or that any such analysis would necessarily reject the government’s borderless-conflict position. I am just saying that judges eventually will decide these matters without real guidance from Congress (unless Congress clarifies its intentions in the interim). Note, too, that any such judicial interpretations may well have far broader implications than just the fate of the particular detainee in question; a ruling that LOAC has no application in a given situation would cast a long shadow over any other LOAC-based actions the U.S. government might undertake in the same or similar contexts (including targeting measures).

Regardless of what occurs in Afghanistan, the existing Guantanamo detainee population might also find occasion to come back to court should the decline of the core al Qaeda organization continue to the point where it can plausibly be described as defunct. In such a case, it is likely that at least some current al Qaeda detainees would revive their habeas petitions in order to contend that the demise of the organization also means the demise of detention authority over members of the defunct group. This argument would be particularly likely to come from those who were held on the ground of membership in al Qaeda but who the government had not shown to have been otherwise involved in hostile acts. This would be a challenging argument to make; the government would surely respond that al Qaeda would no longer be defunct if some of its members were set free. But setting that possible response aside, such a petition could compel the government to litigate the question of whether the continuing existence of various “franchises,” like AQAP or al-Shabaab, suffices to preserve detention authority over al Qaeda members. That is, such a challenge could lead a judge to weigh in on the organizational boundary question.

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205. *Id.* § 1021(a).

206. *Id.* § 1021(c)(1).

b. *New Detainees*

The existing Guantanamo detainees are not the only ones who might require judges to address the increasingly difficult LOAC and organizational boundary issues. New detainees might do so as well.

As the Warsame situation illustrated, the Obama Administration remains loath to bring new detainees into military custody at Guantanamo. But Congress could force its hand, should Congress further extend its growing array of statutory constraints against bringing certain individuals within the United States for purposes of criminal trial, foreclosing the disposition option ultimately employed with Warsame. A future Republican administration, meanwhile, may or may not be so reluctant to make use of Guantanamo in the event that it encounters a Warsame-like scenario outside of Afghanistan. Should any new detainees be taken to Guantanamo, they will automatically have access to judicial review in accordance with *Boumediene*. And in light of the trends described above, it seems quite likely that such review would turn in no small part on LOAC and organizational boundary issues.

Might detainees be taken somewhere besides Guantanamo (or U.S. territory proper), where habeas jurisdiction is not yet established? The only other detention facility currently associated with U.S. forces overseas is the Detention Facility in Parwan, Afghanistan (“DFIP”). But the DFIP is no alternative to Guantanamo, at least not for persons captured outside of Afghanistan. First, although it appears that a small number of detainees were imported into Afghanistan from elsewhere relatively early in the first post-9/11 decade, officials have more recently made clear that the Afghan government has long since forbidden the practice.<sup>207</sup> Second, the United States in any event has agreed to transfer control of the DFIP to the Afghan government.<sup>208</sup> And though there is lingering debate as to the functional extent of this transfer, that debate will likely not survive the completion of the drawdown in Afghanistan any more than the identical debate survived completion of the drawdown a few years before in Iraq.<sup>209</sup>

Even if the DFIP did remain available, or if some other facility somehow could be made available abroad, placing new detainees there (other than persons captured and held in Afghanistan while conflict there continues) would almost certainly precipitate an extension of *Boumediene* to those detainees too, resulting in judicial review. True, the D.C. Circuit Court of Appeals in *al Maqaleh v. Gates* rejected an attempt to invoke habeas jurisdiction

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207. See *Nominations Before the S. Comm. on Armed Servs.*, 112th Cong. 398–99 (2011) (testimony of Lieutenant General John R. Allen, U.S. Marine Corps, and Vice Admiral William H. McRaven, U.S. Navy), available at <http://www.gpo.gov/fdsys/pkg/CHRG-112shrg74537/pdf/CHRG-112shrg74537.pdf>.

208. Memorandum of Understanding Between the Islamic Republic of Afg. and the U.S. on Transfer of U.S. Detention Facilities in Afghan Territory to Afg. (Mar. 9, 2012), available at <http://mfa.gov.af/en/news/7671>.

209. Cf. Robert M. Chesney, *Iraq and the Military Detention Debate: Firsthand Perspectives from the Other War, 2003–2010*, 51 VA. J. INT’L L. 549 (2011).

by a group of DFIP detainees who had been captured abroad and brought into Afghanistan years ago.<sup>210</sup> The court was careful in its opinion, however, to emphasize that those transfers occurred prior to *Boumediene* and that there was no other basis for believing that the transfers reflected an attempt to avoid habeas jurisdiction.<sup>211</sup> Similar transfers occurring in 2012 or thereafter would quite likely produce a very different outcome.<sup>212</sup>

## 2. Lethal Force

Lethal force is a different kettle of fish when it comes to the possibility of judicial review. In theory, there are two ways the courts could become involved in assessing the legality of the use of lethal force in the counterterrorism setting. First, there could be a criminal investigation resulting in a civilian prosecution or a court-martial proceeding turning on the legality of a particular use of force. Incidents in Iraq and Afghanistan involving members of the armed forces and private contractors illustrate how this can occur from time to time, as individuals are prosecuted for allegedly killing civilians or prisoners.<sup>213</sup> The typical case of this kind, however, never turns on or otherwise raises questions regarding the relevance of LOAC or the organizational boundaries of the enemy. And there is no prospect that criminal investigators and prosecutors in the United States, whether civilian or military, will take steps to change that by opening an investigation into, say, drone strikes in Yemen. If American courts ever do become involved, then, it will be pursuant to the second possibility: civil litigation.

In 2010, the ACLU and the Center for Constitutional Rights (“CCR”) attempted to persuade a federal court to intervene prospectively with respect to Anwar al-Awlaki, an American citizen and member of AQAP who had become notorious for his role in encouraging others to carry out attacks on

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210. *Al Maqaleh v. Gates*, 605 F.3d 84 (D.C. Cir. 2010).

211. *Id.* at 98–99. It is also worth noting that on remand in the *al Maqaleh* litigation, the district court expressed specific concern about the impact of the looming drawdown on the jurisdictional question. See Wells Bennett, *Read-Out from Motions Hearing in Al-Maqaleh and Hamidullah*, LAWFARE (July 16, 2012, 11:02 PM), <http://www.lawfareblog.com/2012/07/read-out-from-motions-hearing-in-al-maqaleh-and-hamidullah/>.

212. The possibility of proxy detention raises an additional set of complications. The idea here is that the United States might prefer, for these and other reasons, to persuade other states to take custody of individuals rather than hold the persons itself. A U.S. citizen allegedly held in proxy detention has previously succeeded in convincing a court to entertain a habeas petition. The more interesting question, though, is whether noncitizens could combine that approach with *Boumediene* to reach the same outcome. Such cases would of course face tremendously difficult evidentiary hurdles, but it would be a mistake to assume that courts would outright refuse to consider them, particularly if the context is one of pure shadow war rather than, say, conventional conflict in Afghanistan.

213. See, e.g., Timothy Williams, *Iraqis Angered as Blackwater Charges Are Dropped*, N.Y. TIMES, Jan. 2, 2010, at A4, available at <http://www.nytimes.com/2010/01/02/us/02blackwater.html?gwh=7EB05F0C6176C7A9F38D48DFD3122713>; William Yardley, *American Soldier Is Convicted of Killing Afghan Civilians for Sport*, N.Y. TIMES, Nov. 11, 2011, at A16, available at <http://www.nytimes.com/2011/11/11/us/calvin-gibbs-convicted-of-killing-civilians-in-afghanistan.html?r=1>.

the United States. Media reports had indicated that the U.S. government had tried unsuccessfully to kill al-Awlaki in Yemen through a drone strike and that al-Awlaki had been placed on a specific list of persons as to whom lethal force was pre-authorized.<sup>214</sup> On behalf of al-Awlaki's father, the ACLU and CCR filed a civil suit seeking declaratory and injunctive relief, arguing that killing al-Awlaki without judicial process, "far from any field of armed conflict," and without the presence of exigent circumstances involving a strictly imminent threat to life would violate both international law and the Constitution.<sup>215</sup>

Ultimately, the district judge dismissed the suit on two primary grounds.<sup>216</sup> First, he concluded that al-Awlaki's father had no standing to act on his behalf in this *ex ante* setting.<sup>217</sup> Second, he concluded that the issues presented constituted a political question as to which courts should not exercise jurisdiction.<sup>218</sup> He also nodded favorably in the direction of a third argument—that the state-secrets privilege would ultimately preclude litigation of the claims—without actually relying on it.<sup>219</sup>

The ACLU and CCR did not appeal, perhaps mindful that doing so might simply result in a more authoritative and influential but equally hostile ruling from the court of appeals. And so the issue appeared to come to rest, with no realistic prospect that judges would ever engage the LOAC and organizational boundary issues in a use-of-force setting. It would not be prudent, however, to assume that this was the last word.

In July 2012, the ACLU and CCR filed a new suit, this time in the form of a wrongful death action in the wake of drone strikes that killed al-Awlaki, his teenage son, and another American citizen involved in AQAP, Samir Khan.<sup>220</sup> The standing issue is no longer a serious obstacle in light of the relatively clear capacity of the decedent's relatives to act in this wrongful death-style setting, thus removing one linchpin of the earlier ruling. The political question and state-secrets obstacles remain as before, though, and hence the prospects for the suit making it to the merits are not strong. But pause to consider what effect might follow from increasing awareness of the destabilizing trends described above in Part III, including both the uncertainties associated with the enemy's organizational boundaries and the larger embrace of the shadow war model. These developments do not directly undermine the doctrinal foundations of the political question analysis in the

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214. See, e.g., Dana Priest, *U.S. Military Teams, Intelligence Deeply Involved in Aiding Yemen on Strikes*, WASH. POST, Jan. 27, 2010, at A01, available at [http://www.washingtonpost.com/wp-dyn/content/article/2010/01/26/AR2010012604239\\_pf.html](http://www.washingtonpost.com/wp-dyn/content/article/2010/01/26/AR2010012604239_pf.html).

215. Complaint for Declaratory and Injunctive Relief at 1–2, *Al-Aulaqi v. Obama*, 727 F. Supp. 2d 1 (D.D.C. 2010) (No. 1:10-cv-01469), available at [http://www.aclu.org/files/assets/alaulaqi\\_v\\_obama\\_complaint\\_0.pdf](http://www.aclu.org/files/assets/alaulaqi_v_obama_complaint_0.pdf).

216. See *Al-Aulaqi*, 727 F. Supp. 2d 1.

217. *Id.* at 14–35.

218. *Id.* at 44–52.

219. *Id.* at 52–54.

220. See Complaint, *Al-Aulaqi v. Panetta*, No. 1:12-cv-01192-RMC (D.D.C. July 18, 2012), available at [http://www.aclu.org/files/assets/tk\\_complaint\\_to\\_file.pdf](http://www.aclu.org/files/assets/tk_complaint_to_file.pdf).



prior suit, nor do they chip away at the state-secrets considerations lurking as the next obstacle for the plaintiffs. And yet it is not so difficult to imagine that when these issues eventually come before a court of appeals or the Supreme Court several years from now, the unfolding of these trends will have had a sufficiently unsettling impact so as to give considerable pause to some judges or justices—potentially enough to tip the scales against continued application of those threshold avoidance doctrines.<sup>221</sup>

That is, of course, a speculative leap of some distance. But it would be foolish to dismiss the prospect out of hand; similar skepticism once surrounded the efforts of Guantanamo detainees to establish habeas jurisdiction after all. As we progress toward the shadow war model, it takes us ever further from the paradigmatic conventional-war model with which maximized judicial deference has traditionally been associated. Insofar as courts grow increasingly attracted to the notion that the legal framework for targeting can and should be closely linked to that for detention, the existing judicial beachheads relating to the latter could have the effect of making a breakout into targeting jurisdiction conceptually less shocking and more plausible.

#### B. *Options for Refining the Legal Architecture*

Are there realistic yet useful steps the government could take now, bearing in mind both the legal instability described above and the likelihood that those issues will be litigated? Or would it be wiser to simply stay the course, while continuing to defend the legal merits of current policy through public statements and preparing to do the same if and when litigation requires it?

The Obama Administration has been focused on the latter approach. Building on the precedent of public engagement set by State Department Legal Adviser John Bellinger during the Bush Administration's second term,<sup>222</sup> it has been commendably active in dispatching senior officials to give public speeches defending the legality of its detention and lethal force practices, with at least some emphasis on the elements of geographic and organizational uncertainty described above.<sup>223</sup> The Obama Administration has resisted, in contrast, taking affirmative steps to alter the legal status quo in a direction that might reduce that uncertainty.

To be sure, the Obama Administration did ultimately sign into law the NDAA FY12, but it did so quite reluctantly insofar as its detention-related

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221. Note, too, that efforts to stop or constrain drone strikes via litigation will not be confined to U.S. courts. See Adam Entous et al., *Drone Program Attacked by Human-Rights Groups*, WALL ST. J., Dec. 9, 2011, available at <http://online.wsj.com/article/SB10001424052970204319004577086841225927590.html> (describing plans by human rights groups to mount “a broad-based campaign that will include legal challenges in courts in Pakistan, Europe and the U.S.”).

222. See, e.g., Bellinger, *supra* note 160; John Bellinger, *Armed Conflict with Al Qaida?*, OPINIO JURIS (Jan. 15, 2007, 12:01 PM), <http://opiniojuris.org/2007/01/15/armed-conflict-with-al-qaida/>.

223. See Anderson, *supra* note 58.

measures were concerned. And its reluctance was directly connected to a mistaken sense that the legal architecture had already reached a point of stable equilibrium. The evidence for this can be found in a statement of administration policy (“SAP”) the White House issued in late 2011 while the NDAA FY12 was still pending. In reference to the bill’s detention-related provisions, the SAP stated,

Because the authorities codified in this section already exist, the Administration does not believe codification is necessary and poses some risk. *After a decade of settled jurisprudence on detention authority*, Congress must be careful not to open a whole new series of legal questions that will distract from our efforts to protect the country. While the current language minimizes many of those risks, future legislative action must ensure that the codification in statute of express military detention authority does not carry unintended consequences that could compromise our ability to protect the American people.<sup>224</sup>

The SAP quite properly observes that affirmative steps to alter the status quo would carry risks in the nature of unintended consequences (not coincidentally, the NDAA FY12 was in fact stuffed with problematic collateral measures designed to micromanage and constrain the president’s ability to make decisions regarding the disposition of military detainees).<sup>225</sup> That is a point well taken, raising the question of whether there is enough to be gained by change to offset such risks. The SAP’s negative answer, alas, depended explicitly on the assumption that the relevant law has already been “settled” thanks to years of detention case law and that there was thus nothing to be gained by revisiting the issue in legislation. This is, however, precisely the settlement that is unraveling due to the ongoing fragmentation of al Qaeda, the drawdown in Afghanistan, and the shift toward shadow war.

As we have seen, the NDAA FY12 ultimately did become law, yet it did little to amend the legal architecture for detention—let alone for lethal force—to account for looming instability. Could more have been done? I close with a handful of preliminary suggestions, in hopes of informing further debate.<sup>226</sup>

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224. *Statement of Administration Policy, S. 1867—National Defense Authorization Act for FY 2012*, WHITE HOUSE 1–2 (Nov. 17, 2011), [http://www.whitehouse.gov/sites/default/files/omb/legislative/sap/112/saps1867s\\_20111117.pdf](http://www.whitehouse.gov/sites/default/files/omb/legislative/sap/112/saps1867s_20111117.pdf) (emphasis added).

225. See also Spencer Ackerman, *Pentagon Isn’t Hot for New Law to Bless Al-Qaida War*, WIRED (Mar. 17, 2011, 2:55 PM), <http://www.wired.com/dangerroom/2011/03/pentagon-isnt-hot-for-a-new-law-blessing-al-qaeda-war/> (reporting that the administration was generally fearful of congressional constraints on its discretion to “use nonmilitary means of confronting al-Qaida”). Ackerman observed at the time that one cost of this approach was increased vulnerability of the detention legal architecture in light of al Qaeda’s evolution and the passage of time. See *id.* (citing, inter alia, similar concerns expressed by Rep. Mac Thornberry).

226. A truly complete answer to that question of course calls for a very broad discussion indeed, one that begins from a well-grounded sense of the strategic goals that the United States seeks to advance in its counterterrorism policy, the relation of that policy to other and perhaps larger strategic aims, and so forth. This Article, however, is not the place for such a discussion. My narrow aim in the concluding pages instead is to outline a handful of steps specifically responsive to the disruptions described above, in hopes of fueling a larger and

### 1. Clarifying the Enemy

There are two legal dimensions to the problem of increasing organizational uncertainty: disagreement as to the boundaries of al Qaeda as such and disagreement as to whether the use of force or detention in any event should extend to *other* groups. The NDAA FY12 did nothing to address the first issue, as it made no attempt to define al Qaeda. As for the second issue, the NDAA FY12 *did* formally recognize a category of “associated forces,” but it did not actually define that phrase and hence did nothing to advance understanding of its content. The Obama Administration, for its part, has indicated that we may flesh out the “associated force” concept by reference to the international law concept of cobelligerency. Unfortunately, this approach on close inspection does not actually yield particularly helpful yardsticks when mapped onto the context of clandestine nonstate actors. Nor does it speak at all to the initial question of how to determine whether a particular group is part of al Qaeda to begin with, bearing in mind the fragmentation trend. And it also will be of little use if and when we reach the point that al Qaeda itself is effectively destroyed, thus removing the predicate for a cobelligerency type of analysis.

More could be done. First, with respect to the problem of al Qaeda’s increasingly uncertain organizational boundaries, Congress could specify a statutory standard that the executive branch could then bring to bear in light of the latest intelligence, with frequent reporting to Congress as to the results of its determinations. The trick, of course, is in specifying the proper standard: A functional test turning on whether al Qaeda’s senior leadership in fact exercises direction and control over another group’s activities, at least at a high level of generality? A formal test turning on whether the other group has formally proclaimed obedience to al Qaeda’s senior leaders? It may be that the best approach is to specify both tests as alternative sufficient conditions. In any event, periodic decisions by the executive branch regarding the application of these tests to particular groups should then be reported in a timely fashion to Congress (something the NDAA FY12 already requires vis-à-vis “associated forces” determinations), along with both detailed classified explanations of the underlying analysis and a corresponding unclassified statement informing the public of the determination and as much of the underlying rationale as is consistent with proper protection of sources and methods.

Second, with respect to the problem of identifying separate organizations (beyond al Qaeda) against whom force or detention might be directed, Congress could abandon the “associated forces” concept altogether in favor

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more sustained debate, building on earlier contributions by authors including BENJAMIN WITTES, *DETENTION AND DENIAL* (2011); Anderson, *supra* note 58; Daskal, *supra* note 62; and Philip Zelikow, Address, *Codes of Conduct for a Twilight War*, 49 Hous. L. Rev. 1, 44–50 (2012).

of an alternative approach. It could, for example, explicitly name the additional entities against which force is authorized,<sup>227</sup> much as the NDAA FY12 names al Qaeda and the Afghan Taliban. This approach has the virtue of maximum clarity and hence improved democratic accountability. It also has the virtue of not artificially attempting to tie all threats back to al Qaeda, the AUMF, and the ever-receding 9/11 attacks themselves. Of course, some might object to this approach on the ground that fast-paced changes in the field could require Congress to repeatedly return to the task of making such designations, possibly at the cost of slowing or disrupting the executive branch's willingness to act in the interim. One might respond, however, that the executive branch may always fall back on its inherent Article II authority to act in defense of the nation when circumstances truly warrant it, at least when it comes to the use of force. Moreover, if instead the matter is a question of long-term detention authority, then there will be, by definition, ample time for Congress to act after all.<sup>228</sup>

## 2. Sidestepping the LOAC Dilemma

Can Congress also make a useful contribution in terms of reducing uncertainty regarding the relevance of LOAC? This is a more complicated matter.

The answer is probably no if we are speaking of Congress literally overriding the field-of-application debate by simply asserting that LOAC by its *own* terms applies across the board in the shadow war context. It is doubtful that a federal court in some future habeas case or other proceeding would feel bound by such a determination (and it certainly would do nothing to quell criticisms from allies and others who take a more restrictive view of LOAC's field of application). That said, there are other ways in which Congress might usefully speak to LOAC-related questions.

Congress could require, as a matter of domestic law, that all relevant uses of force or military detention be subject to LOAC rules, even if LOAC is not applicable of its own force. And Congress could clarify that it intends to

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227. Note, in this respect, that there are some who question the need to take such steps in relation to every entity that may emerge as having ties to al Qaeda. See, e.g., John Mueller, *Why Al-Qaeda May Never Die*, NAT'L INT. (May 1, 2012), <http://nationalinterest.org/blog/the-skeptics/why-al-qaeda-may-never-die-6873>.

228. Article II arguably confers on the president at least some degree of authority to use lethal force in limited circumstances as a matter of self-defense, even absent conditions of armed conflict formally triggering LOAC. See Kenneth Anderson, *Targeted Killing in U.S. Counterterrorism Strategy and Law* 18–23 (Series on Counterterrorism and Am. Statutory Law, Working Paper, 2009), available at [http://www.brookings.edu/~media/research/files/papers/2009/5/11%20counterterrorism%20anderson/0511\\_counterterrorism\\_anderson](http://www.brookings.edu/~media/research/files/papers/2009/5/11%20counterterrorism%20anderson/0511_counterterrorism_anderson). Indeed, it is possible that on some occasions drone strikes may have been quietly predicated on such a theory. Cf. Becker & Shane, *supra* note 195 (reporting that the internal debate over whether it would be proper to target the leader of Tehrik-i-Taliban—the Pakistani Taliban—ended after a determination that he posed a threat to American personnel in Pakistan). The much harder question is whether Article II self-defense authority can also be cited as the foundation for employing military *detention*, particularly for detention lasting a long period of time.

authorize all actions that can be taken compatible with that rubric. This would substantially reduce, if not eliminate, the possibility that a judge at some point would conclude that detention or lethal force was not authorized in a given context solely on the ground that LOAC's field-of-application test was not satisfied after all. And in doing so, Congress might specifically state that the resulting availability of detention authority does not depend on the continuation of U.S. involvement in conflict in Afghanistan but rather depends on the continued hostilities between the United States and the statutorily identified group as to which a given detainee is linked.<sup>229</sup>

Of course, none of that would appeal at all to those who object to the U.S. government's existing practice of claiming LOAC authority to justify detention or lethal force beyond the political borders of specific areas of high-intensity conflict such as Afghanistan; on the contrary, those critics would surely object fiercely, no doubt arguing that such actions by Congress would place the United States in violation of international law. One might reply that the uncertain status quo is actually worse, in that it arguably incentivizes reliance on rendition, detention by other governments, and the use of lethal force in lieu of detention.<sup>230</sup> One might add, moreover, that resistance to application of LOAC norms, if successful, will not automatically produce a situation in which the U.S. government accepts that its actions instead are subject to international human rights law instruments such as the International Covenant on Civil and Political Rights ("ICCPR"). After all, the U.S. government currently takes the position that the ICCPR does not apply outside U.S. sovereign territory.<sup>231</sup> Successful resistance to the LOAC model, from this perspective, might leave international law entirely on the sidelines, except perhaps for constraints of necessity and proportionality that might follow should the U.S. government be acting under the rubric of self-defense.<sup>232</sup>

There are additional steps, however, that Congress might take to address rights-oriented concerns. As an initial matter, Congress could clarify that the LOAC rules are binding on all U.S. government entities, including the CIA. Supporters of the status quo should not object to this specification, for if the

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229. Cf. Rick Pildes, *The Fundamental Transformation in the Law, Morality and Politics of War: Individuating the Responsibility of "Enemies"*, LAWFARE (July 24, 2012, 3:02 PM), <http://www.lawfareblog.com/2012/07/the-fundamental-transformation-in-the-law-morality-and-politics-of-war-individuating-the-responsibility-of-enemies/>.

230. See, e.g., KLAIMAN, *supra* note 1, at 126 ("The mission was a success . . . . But it also masked deeper concerns. Rumors swirled through the Pentagon that Nabhan had been killed because the White House didn't want to face the tangled and politically fraught detention issues."); Becker & Shane, *supra* note 195 (describing congressional concerns along these lines, and also noting the preservation of the rendition option during the Obama Administration); cf. WITTES, *supra* note 226.

231. See John Bellinger, *Administration Submits ICCPR Report, Punts on Extraterritorial Application*, LAWFARE (Jan. 19, 2012, 10:46 AM), <http://www.lawfareblog.com/2012/01/administration-submits-iccpr-report-punts-on-extraterritorial-application/> (discussing the most recent statement of the U.S. government's position on the matter).

232. See Robert Chesney, *Who May Be Killed? Anwar al-Awlaki as a Case Study in the International Legal Regulation of Lethal Force*, 13 Y.B. INT'L HUMANITARIAN L. 3, 26 (2011).

recent spate of speeches by Obama Administration officials is an accurate guide, it would not actually alter current U.S. government practices.<sup>233</sup> Additionally, Congress might entrench in statute the proposition that lethal force will not be used in a given location without the consent of the host government except in circumstances where the host government is unable or unwilling to take reasonable steps to suppress a threat.<sup>234</sup> This too would reflect existing U.S. government practice,<sup>235</sup> yet the absence of a more formal expression of the policy creates space for critics to argue that the United States might soon conduct drone strikes on the streets of Paris.

Congress might also consider embracing rather than fleeing from the involvement of the judiciary. I have in mind two steps. First, Congress could expressly extend Guantanamo-style habeas jurisdiction to all persons held under color of the authorization described above—no matter where they are held—with the sole exception being persons captured and held in Afghanistan prior to the end of the drawdown process.<sup>236</sup> As noted above, this is the result that will likely attach in any event by the extension of *Boumediene*. And one should not forget that after years of government resistance to judicial involvement at Guantanamo, the net result of the habeas process has done more than a little to quell concerns about the legitimacy and legality of detention there (notwithstanding that some critics remain). Second, Congress might also consider judicial involvement at the back end, making periodic determinations of whether specific individuals ought to be released notwithstanding their initial eligibility for detention—something that under the NDAA FY12 and executive branch practice has thus far been a purely executive branch affair.<sup>237</sup>

This brings us to a particularly vexing question: What, if anything, should Congress say regarding Americans and actions undertaken in U.S. territory? The interaction of these questions with constitutional rights is a large topic, well beyond the scope of this Article. At a minimum, however, it would be sound for Congress to specify that any force it has authorized does not extend to the use of lethal force within the United States barring exigent circumstances.

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233. See, e.g., Stephen W. Preston, Gen. Counsel of the Central Intelligence Agency, Remarks at Harvard Law School on the CIA and the Rule of Law (Apr. 10, 2012), available at <http://www.cfr.org/rule-of-law/cia-general-counsel-stephen-prestons-remarks-rule-law-april-2012/p27912> (indicating that CIA uses of force would comport with necessity, proportionality, and other LOAC rules, while remaining arguably uncommitted as to the extent of compliance with non-LOAC international law rules), cited in Anderson, *supra* note 58.

234. Ashley S. Deeks, “Unwilling or Unable”: Toward a Normative Framework for Extra-territorial Self-Defense, 52 VA. J. INT’L L. 483 (2012).

235. Harold Hongju Koh, *The Obama Administration and International Law*, U.S. DEP’T OF STATE (Mar. 25, 2010), <http://www.state.gov/s/l/releases/remarks/139119.htm>, cited in Anderson, *supra* note 58.

236. Should a new Afghanistan— or Iraq—style overt combat deployment occur, of course, Congress would be able to revisit the scope of this exception to avoid judicial intrusion into conventional battlefield settings.

237. See National Defense Authorization Act for Fiscal Year 2012, Pub. L. No. 112-81, § 1023, 125 Stat. 1298, 1564–65 (2011).

It is tempting to continue in this vein, advocating additional measures such as the removal of the draconian constraints on detainee transfers and criminal prosecution that have made Guantanamo an undesirable destination even if one is not opposed to using the facility in principle. But my aim in this Section is not to provide a comprehensive solution. Rather, I hope to spark a larger conversation that I believe must occur in light of the unfolding dynamics of the second post-9/11 decade. I therefore will end here simply by noting that if Congress were to adopt the arrangements I have described or something like them, it would be well advised to sunset the whole thing—and to do so at a time designed *not* to fall directly into the teeth of some future election campaign season.

#### CONCLUSION

I intend this Article as a wake-up call. At first blush, the legal architecture relating to detention and lethal force in the counterterrorism setting today appears stable, the beneficiary of a remarkable amount of cross-branch and cross-party consensus. This pleases some and enrages others. For better or worse, however, the underpinnings of this stability are rapidly eroding in the face of long-term trends involving the strategic posture of both al Qaeda and the United States. Change looms—indeed, the effects can already be felt—and it is past time to recognize precisely how that change will disrupt the status quo and to grapple seriously with the options for refining the legal architecture in response.