Written Statement of Professor Robert Chesney

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"Drones and the War on Terror:
When Can the United States Target
Alleged American Terrorists Overseas?"

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Chairman Goodlatte, Ranking Member Conyers, and members of the committee, thank you for the opportunity to testify today.

In the pages that follow, I consider whether there is a useful—and constitutional—role that the judiciary might play in connection with the use of lethal force against U.S. persons overseas for counterterrorism purposes. I conclude that there is, though that role is a narrow one requiring very careful calibration. Before explaining that conclusion, however, I wish to make two threshold points.

First, this conversation should focus on the use of lethal force against U.S. persons (*i.e.*, citizens and lawful permanent residents) without respect to the weapons or weapons platform that might be involved. It is true that we have grown accustomed to equating lethal force in the counterterrorism setting with the use of "drones" (*i.e.*, remotely-piloted aircraft). That is perhaps to be expected; drones are the focus of intense public curiosity and media scrutiny, and important policy questions arise as a result of their particular capacity for loitering, gathering intelligence, striking with immediacy, and projecting force into regions that are not easily accessible by ground forces. But if the task at hand is to identify the legal boundaries hemming in the government's capacity to use lethal force overseas against U.S. persons, then it is a mistake to frame the issue solely in terms of drones. The same issue would arise, after all, if we were speaking instead of missiles launched by manned aircraft, sea-launched missiles, shells from artillery, or bullets from a rifle. Below, therefore, I refer to the use of lethal force without specifying particular weapons or weapons platforms.

Second: Though I conclude below that some form of judicial review in this setting would be *permissible* as a constitutional matter and desirable as a matter of policy under certain conditions, I do not mean to suggest that such review is strictly *required* by current law, still less that the government acted unconstitutionally in using force in the particular case of Anwar al-Awlaki[1] or that the positions set forth in the Justice Department's White Paper are incorrect. On those matters, I am in general agreement with the views set forth by Benjamin Wittes and John Bellinger in their testimony today.

Having said that, I turn now to my primary focus: What can and should Congress do, going forward, with respect to the potential role of the judiciary in decisions to use lethal force against U.S. persons abroad for counterterrorism purposes? I start with an overview of the distinct constitutional issues implicated by this subject, and then turn to a survey of the options for judicial review. In addition, I also provide a concluding section that highlights larger trends

[1] For an overview of the *international* law issues raised by al-Awlaki's case, see Robert Chesney, *Who May Be Killed? Anwar al-Awlaki as a Case Study in the International Legal Regulation of Lethal Force*, 13 YEARBOOK OF INTERNATIONAL HUMANITARIAN LAW 3 (2010), http://ssrn.com/abstract=1754223.

that are destabilizing the overall legal architecture of U.S. counterterrorism policy, separate and apart from the issue of targeting U.S. persons in particular.

1. Clarifying the Constitutional Issued Raised by Targeting a U.S. Person

The prospect of the U.S. government purposefully killing known U.S. persons overseas, for counterterrorism purposes, raises issues under at least three distinct constitutional headings. First, it raises the question whether the category of persons subject to attack must be narrower when U.S. persons are at issue than would otherwise be the case, in light of the Fourth and Fifth Amendments. Second, it raises the question whether the Fifth Amendment requires some additional procedural safeguards to be employed in the course of determining whether a specific U.S. person falls into the category of persons notionally subject to attack. And third, it raises the question whether the Fifth Amendment separately requires some particular set of procedural safeguards when it comes to a decision actually to attack such a person in some specific manner.

a. The Substantive Scope of the Government's Targeting Authority

The first set of issues concern the substantive scope of the government's authority to use lethal force. That is, what actions or associations define the category of persons lawfully subject to targeting in general, and does the Constitution require that category to be construed more narrowly when the target is known to be a U.S. person?

Consider first the baseline question of how the government currently defines the scope of its targeting authority in general (*i.e.*, assuming no U.S. person in the fact pattern). It is, famously, a complicated and controversial subject, both at the organizational and individual levels.

Part of the problem stems from the fact that there are two distinct, but partially-overlapping, legal architectures at issue in the counterterrorism setting. First, there is the familiar claim that the United States is in an armed conflict with al Qaeda and the Afghan Taliban, as well as with their "associated forces." Under this heading, the United States claims authority to act consistent with the law of armed conflict, including (at least in some locations) authority to target based on the status of being a member of one of these groups (and perhaps also authority to target based on the conduct of providing support to such groups, though this is less certain). Second, there is the separate—and older—claim of authority to use force in national self-defense in order to prevent terrorist attacks, quite apart from whether a state of armed conflict can be said to exist. This rationale does not necessarily depend on a linkage to al Qaeda or the Afghan Taliban, though al Qaeda has long implicated it (and, indeed, this was the apparent basis for the use of lethal force against al Qaeda in 1998).

Even if we focus solely on the armed conflict model—and even if we set aside objections to the claimed relevance of this model, which will soon grow stronger thanks to the looming drawdown in Afghanistan—significant uncertainty arises. Part of the problem is increasing indeterminacy at the organizational level. I explain this phenomenon in detail in Part 4, below. For now, it suffices to say that there has long been some degree of uncertainty with respect to

which entities are properly thought of as either part-and-parcel of al Qaeda itself, or as an "associated force." That problem is growing worse.

Meanwhile, problems also arise at the individual level. In the Guantanamo habeas litigation, the courts have repeatedly approved the use of military *detention* in connection with persons shown to be members of al Qaeda, the Taliban, or associated forces, and in dicta the courts have suggested that the same may be true for non-member supporters of these groups. Whether this approach carries over lock, stock, and barrel to the targeting context is less clear, however. First, news accounts suggest sharp internal debate within the Obama administration with respect to the use of military detention in the case of a non-member supporter of al Qaeda arising outside of Afghanistan. If that is correct, it is hard to imagine that there is not at least as much debate when it comes to targeting a non-member supporter outside of Afghanistan. Second, Obama administration officials have suggested that, at least as a matter of policy, they do not support targeting on the basis of membership standing alone outside the "hot battlefield" context, but instead require additional showings to the effect that the person is currently involved in operational planning and that a capture operation would not be feasible.

Those two constraints—insisting upon involvement in current operational activity, and forbidding force when capture is a feasible alternative—are at the heart of the matter when we turn our attention to the question whether U.S. person status—and hence eligibility for constitutional protections—further constrains the scope of the government's authority to target. Simply put, the question is whether either the Fourth or Fifth Amendments make these conditions a matter of constitutional requirement, rather than just policy choice, when U.S. persons are purposefully targeted (as opposed to being harmed incidentally in the course of lawful attacks purposefully targeting others).

The better view is that some version of these limitations is indeed required. Some would disagree, arguing that U.S. persons who join the enemy in war should be subject to the same liabilities as are the rest of the enemy's forces, including status-based targeting and exposure to the use of force as a first resort. That may be so, but there is a problem with the analogy. The relevance of the armed-conflict model already is the subject of considerable dispute, particularly with respect to persons who are not connected with the relatively-conventional battlefields of Afghanistan—*i.e.*, precisely the fact patterns most likely to be relevant in the case of a U.S. person target. The armed-conflict model is growing ever more frayed, moreover, thanks to the declining U.S. commitment to sustained combat operations in Afghanistan and the accelerating threat posed by newly-emergent groups in other locations.

b. Procedural Safeguards at Stage 1: Determining If a U.S. Person Is Targetable

In any event, let us assume for the sake of discussion that we have clarity as to the substantive boundaries of the category of persons who in theory might be targeted. The next question is whether the Constitution requires the government to employ special safeguards in the course of determining whether a given U.S. person falls within that category.

Again, some might argue that the answer must be no, insofar as the government is acting under its war powers or otherwise in the name of national self-defense. That is, one might argue

that a U.S. person who joins the enemy cannot complain of receiving the same relatively-limited procedural safeguards that would be provided in the case of an attack on a non-U.S. person, because the Fifth Amendment is context-sensitive and is satisfied without more in that circumstance. And one might go further and argue that any effort by Congress to require something further would itself be unconstitutional as an infringement on the President's Article II authorities and obligations.

There are two problems with these perspectives, however. First, as noted above, at least some uses of force against U.S. persons for counterterrorism purposes will take place in circumstances that do not clearly justify the analogy to wartime practices. Second, and more significantly, it not clear that this analysis is correct even as to situations that indisputably amount to armed conflict. Consider, in this regard, the Supreme Court's decision in *Hamdi v. Rumsfeld*. Though a majority of the justices agreed that a U.S. citizen could be held without criminal charge as an enemy combatant if he was captured in Afghanistan as an arms-bearing fighter for the Taliban, a separate majority concluded that the Fifth Amendment required that he have a fair opportunity to contest the government's factual claims if he so desired. That is to say, the citizen in that case might well be subject to the same liabilities as other enemy fighters, but he nonetheless did have a clear constitutional right to additional procedural safeguards when it came to the fundamental question of whether he was an fact an enemy fighter in the first place.

To this one might respond that detention is different from targeting. That argument might seem counterintuitive, given that the consequences of targeting are more severe than for detention. Yet the idea that one gets *less* process when targeted does make sense from the point of view of the practicalities involved. The idea is that targeting involves little or no opportunity for sustained ex ante reflection, let alone complex safeguards along the lines of a judicial or administrative screening process. From that perspective, additional safeguards might be wholly impractical and unduly costly. Detention, in contrast, involves no temporal exigency at all from the government's viewpoint, thus leaving more room for insistence upon procedural safeguards.

The description of targeting as an activity associated with time pressure (perhaps intensely-exigent time pressure) makes perfect sense in some circumstances, particularly those that most readily come to mind if we are thinking of things through an armed conflict lens (though the same exigency can arise in pure law enforcement settings too, as when a police sniper must make a snap judgment in a hostage-rescue scenario). Take the example of a conventional armed conflict involving a clash between the professional armed forces of two states. For the soldier on patrol, the artillery officer, and the pilot circling overhead, targeting is not typically a matter of first identifying and assessing and then later locating and attacking specific, named individuals. The general idea, instead, is for forces in the field to use factors such as uniforms, location, and conduct to determine whether other persons in the field are part of the enemy force and hence subject to attack—and they may have very, very little time to make this determination.

But not all targeting-related decisions are like this, even during armed conflict. Consider settings such as Afghanistan, where soldiers in the field of course do engage in immediate target identification along the lines described above, but on a separate track substantial resources simultaneously are devoted to the systematic mapping of insurgent networks, including

determinations as to whether specific persons are in fact insurgents. The latter track gives rise to the possibility of two-stage targeting. At stage one, a determination is made that a specific, known person is in fact part of an enemy force (and may be the object of capture or attack if located). Stage two arises later, if and when intelligence points to some individual in the field who may actually be that pre-designated person. At that stage, decisions must be made as to whether there is sufficient reason to believe that the individual is in fact the previously-identified target, and if so whether and how to attack given the surrounding circumstances. Both stage one and stage two may be time-pressured, of course, but not typically in the same way as occurs with a soldier's obligation in the field to make a split-second decision whether to shoot.

That said, time pressure might continue to be an overriding practical concern if we were speaking here solely of the high-velocity cycle of integrated operations and intelligence exploitation pioneered by special operations forces in theater in Afghanistan over the past several years and in Iraq before that. But that does not appear to be the central issue when it comes to the possibility of using lethal force against U.S. persons in a counterterrorism setting.

While there is little in the way of an officially-acknowledged account of the process by which the U.S. government makes such determinations, there has been no shortage of accounts conveyed by insiders to journalists.[2] The resulting public record suggests that the baseline model for the U.S. military's use of lethal force outside of Afghanistan involves a Washington-centric, slower version of the two-stage, individualized targeting model described above. In this version, the stage one "nomination" process involves a substantial amount of interagency screening and debate as to whether the person in question falls within the targetable category and should in fact be targeted, followed by further review from the president's special assistant for homeland security and counterterrorism and then a final determination by the president himself. (Media accounts also suggest that the CIA operates its own two-stage model, albeit without the same interagency input at stage 1).[3]

The significance of all this, of course, is that the reported two-stage model associated with the use of lethal force outside Afghanistan is slow-paced enough at *stage one* to allow for a quasi-judicial process to unfold within the executive branch, with representatives of various agencies and departments reviewing the intelligence and debating its implications en route to multiple further stages of review. It does not follow that the Fifth Amendment therefore necessarily requires still further procedural safeguards be employed at this stage. It does suggest, however, that temporal exigency is no across-the-board objection.

c. Procedural Safeguards at Stage 2: Whether to Strike in a Particular Instance

Contrast that conclusion with the circumstances that are likely to prevail at stage two of the targeting process. At stage two, we assume that a particular person previously was

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[2] *See, e.g.,* http://www.lawfareblog.com/2013/02/klaidmans-chronology-of-changes-to-drone-strike-procedures/.

[3] Those same media accounts also suggest that in some locations outside Afghanistan the government has adopted a separate track permitting the use of "signature strikes," in which observations of behavior and location are used to identify categories of targetable persons rather than specifically-known individuals, in keeping with the conventional model described above. By definition, however, signature strikes do not involve the knowing attempt to kill a U.S. person—or any other known, specifically-identified person—and hence I do not treat them here.

nominated and approved for targeting, and that now there is intelligence suggesting the location of that person. The core issues now are whether the person under observation actually is the same individual as the one approved for targeting at stage one, and if so whether the particular circumstances would justify a strike bearing in mind a range of considerations such as the risk and likely magnitude of collateral damage. The important point here is that it seems far more likely at stage two than at stage one that the temporal-exigency obstacle will be present to a degree that sharply limits the range of options for additional procedural safeguards.

2. A Limited, Defensible Option for Judicial Involvement

Whether it makes sense for Congress to create a mechanism for judicial review in this context depends very much on the particulars of the proposal. Key variables include: whether the proposal is limited to U.S. persons; whether it is limited to certain geographic areas; what substantive standard the judge(s) may be asked to apply; what burden of proof the government will be asked to meet; whether the proceedings will be ex parte and in camera; and whether the review will come before or after an attack actually occurs.

a. Personal Scope: Whom Would Review Protect?

In theory, a judicial review mechanism need not be limited to the targeting of U.S. persons. But if Congress does enact a judicial-review system, it is far more likely to withstand constitutional challenge if it is so limited. Any proposal for judicial involvement in decisions to use force will prompt objections from those who view this as an unconstitutional interference with the President's Article II authorities and obligations. Legislation of this kind would be far more likely to survive if weighty constitutional considerations also rest on the other side of the balance—as would be the case if the system is designed to vindicate the Fourth and Fifth Amendment rights of U.S. persons. This approach also has the virtue of bringing judicial review into play only on rare occasions (at least on current reasonably-foreseeable trends), thus avoiding practical objections pertaining to the limited bandwidth of the judiciary or the burdens that might be placed on the government itself.

b. Subject-Matter Scope: What Exactly Would the Court Be Asked to Do?

Should Congress move forward with a plan to create a judicial review system for targeting U.S. persons, the most important task will be to carefully frame the question(s) that the court would be asked to answer. The more than such a system appears to call for judicial second-guessing of decisions that in the past have always been reserved to military commanders—*i.e.*, the more the system seems to interject judges into run-of-the-mill targeting decisions in the context of armed conflict, particularly those where time is of the essence—the more likely it will be to encounter fatal constitutional objections under Article II, not to mention biting policy criticisms. And so the question arises: is there a useful but narrow way to frame the task that might be put before the court?

One possible response would be to limit the court's jurisdiction to situations arising in specific geographic locations. This has superficial appeal insofar as it seems to resonate with notions that the United States is more clearly involved in armed conflict in some locations than

in others. Setting aside the point that the U.S. government does not claim to be in an armed conflict with al Qaeda solely in one or more limited geographic locations, this approach is undesirable in that it would very likely become both over- and under-inclusive over time. There is, fortunately, a better way to go about defining (and cabining) the scope of judicial review in this setting: extend it *only* to the "stage one" phase described above, where an initial determination is being made as to whether a specifically-identified individual is, notionally, within the scope of the government's targeting authority.

On this model, the court would be tasked with no more (and no less) than reviewing the government's determination that a particular U.S. person is in fact within the category of persons subject to targeting. Much like the Guantanamo habeas litigation, this would require judicial assessment of the abstract legal boundaries of that category (something that Congress could of course weigh in on in the course of creating the judicial review structure, it if it wished to address any of the questions noted above with respect to this substantive question), and then separately it would require a determination as to whether there is adequate information supporting the government's claim that the particular person in question falls within that category. These are precisely the same questions that the current interagency screening process already is grappling with in cases of this kind. Simply put, the idea here would be to duplicate that procedure, but this time with an independent decision maker in the form of an Article III federal judge.[4] The idea is most definitely *not* to interject judges into the time-sensitive decisions that arise at "stage two," when intelligence suggests that the person may have been located and time-sensitive questions arise as to whether an attack at that point would be lawful and desirable.

This approach is not without difficulties. Most obviously, it would still generate significant Article II objections. If limited to U.S. persons (thus bringing offsetting constitutional considerations to bear) and especially if confined to "stage one" circumstances detached from conventional combat decision-making, those objections might still have bite but would be less likely to prevail. It would help, in this regard, if the system were to be designed to operate within very strict time parameters, along with an emergency opt-out for genuinely exigent circumstances that might still arise even at "stage one."

More expansive forms of review are possible, but also more problematic on Constitutional and policy grounds. The most obvious extension would be to encompass not just stage one determinations, but also stage *two* determinations involving the immediate decision to strike at a particular time and place. This approach has the virtue of creating an opportunity to address errors with respect to whether a particular person in the field is in fact whom the government thinks him to be, but it seems especially vulnerable to criticism on temporal exigency grounds. Extension to this scenario also would run the risk of moving down the slippery slope towards judicial involvement in other aspects of targeting decisions, such as collateral-damage estimation. These costs are not worth incurring, especially since the core

[4] It is worth noting that this could certainly encompass a review of such matters as the person's alleged connection to and role within some particular terrorist group (if that is the predicate for the asserted authority to kill the individual). It would not make sense for "stage one" review to encompass the question of whether a capture operation is feasible, however, as that question cannot be determined until stage two arrives and the actual circumstances of the individual's location come to light.

concerns raised by the al-Awlaki example (*i.e.*, whether the intelligence sufficed to show that he was in fact within the category of targetable persons, and whether the government's understanding of the boundaries of that category) could be fully addressed with a "stage one" review.

Assuming these questions were settled, others would remain. Consider the burden of proof. It is difficult if not impossible to say that the Constitution clearly requires some particular calibration on this dimension. Courts might one day settle the matter if given the chance, but as an initial matter Congress has little choice (should it go down this road) but to take its own position on the subject. In the Guantanamo habeas setting, the courts were left to their own devices on the same issue, and largely settled on a preponderance of the evidence standard (though the D.C. Circuit has occasionally hinted that something less demanding might suffice). One might simply extend that approach to the targeting review, though a strong argument can be made that this is unrealistically demanding in this circumstance (which may not involve the exigent time pressures of "stage two," but also will not afford the same degree of leisure as in the detention-review context). That said, the standard must have some teeth if the exercise is to be worth the candle; a mere *de minimis* showing of "some evidence" might not be demanding enough.

Another matter of system design to be considered is the matter of adversariality. Many of the warrant proposals that have been floated recently have referred to the Foreign Intelligence Surveillance Court (the "FISC") as a model for judicial involvement in this arena, or perhaps even as the actual vehicle for it. There is much to be said for piggybacking on the FISC structure, including its demonstrated capacity for keeping secret highly-classified information about sources-and-methods and other sensitive information, as well as the fact that its judges through their FISC work have considerable exposure to questions concerning the linkages among various foreign terrorist organizations and the nature of individual connections to those groups. But it should be noted, too, that the FISC system is not just in camera (meaning the public may not observe its proceedings) but also ex parte (meaning that it is not an adversarial process, but rather one in which the government normally appears alone to argue its case). This is obviously central toward the security of the FISC system, and also to its constitutionality in the face of Article II objections. Ironically, however, it also draws attention to a very different constitutional objection to this entire enterprise: it might lie beyond the judicial power in light of the Article III case-or-controversy requirement.

In theory, the FISC avoids this problem at least in part for the same reason that ordinary search warrant proceedings do: there may well come a point down the line at which the warrant may be contested in an adversarial setting. This is, however, a razor-thin legal fiction. FISC-authorized surveillance is only very rarely contested in a subsequent criminal trial, and though on paper it is *possible* for the judge in a criminal trial to make such post-hoc review of the FISC's action adversarial in the sense of allowing the defendant (or at least defendant's counsel) access to the underlying FISC application, in actual practice this *never* actually happens; judges invariably decide such suppression motions on what amounts to an ex parte basis as well. Were Congress to extend the FISC's duties to encompass some form of "stage one" review, it would indeed raise questions under the case-or-controversy requirement—but they would not

necessarily have more bite than those already associated with the FISC over the past thirty-five years.

There are many more things that might be said about the pros and cons of this limited judicial-review option. For example, it is important to be realistic about the degree of deference judges involved in such a process likely would afford to the government—an indeterminate factor that is easy enough to invoke or mention yet notoriously difficult to quantify or control. Conventional wisdom holds that judges on the whole tend to defer to the executive in national security-related litigation, notwithstanding occasional exceptions that pointedly decline to do so. Whether judicial involvement in the context of targeting U.S. persons would be toothless thus is a function not just of the burden of proof, as noted above, but also judicial willingness to second-guess the determinations of government officials in this especially high-stakes environment. My initial inclination was to think that this would indeed render review largely toothless, but upon further reflection—including consideration of the independence that district judges in particular demonstrated in the course of assessing evidentiary claims in the Guantanamo habeas litigation—I am persuaded that this would not be the case. In the final analysis, I would expect judicial disagreement with the executive to be rare, but by no means impossible—and hence worthwhile without being unduly disruptive.

3. A Larger Set of Concerns: The Destabilizing Legal Architecture of Counterterrorism

Here at the conclusion of my remarks, I wish to switch gears to emphasize a point of broader significance. Though our focus in today's hearing is on the legal questions that arise when the government's uses force against U.S. persons in particular, it is important to bear in mind that the larger legal architecture of counterterrorism is destabilizing quite apart from the U.S person/non-U.S. person distinction.

The first post-9/11 decade was shot-through with legal debates concerning detention, interrogation, and prosecution. By the end of that decade, however, things had begun to appear relatively stable from both a legal and a political perspective. Powerful elements of cross-party and cross-branch consensus emerged, as the Obama administration continued the bulk of the Bush administration programs and policies, Congress repeatedly legislated in support of those policies, and the courts began issuing rulings in the context of the Guantanamo habeas cases endorsing the combined executive-congressional view that there existed an armed conflict with al Qaeda. The appearance of stability was an illusion, however, for the most vexing legal issues not only remained unresolved, but were rapidly becoming both more difficult and more relevant.

These open issues fall under two headings. First, there remains sharp dispute regarding the relevance of the laws of war (i.e., the "law of armed conflict" or "international humanitarian law") to U.S. uses of force against terrorism suspects outside the geographic boundaries of Afghanistan. Second, there is dispute as well as to the precise identity of the enemy in this conflict. In the past, however, these issues were masked to a considerable extent by a pair of stabilizing factors, both of which have usually been present in the context of the highly-influential caselaw generated by the Guantanamo habeas litigation. The first stabilizing factor is the war in Afghanistan. The United States for more than a decade has been involved directly in an undisputed armed conflict in Afghanistan, with relatively-little doubt that the laws of war

were pertinent at least there. Because case after case arising out of Guantanamo traces back to Afghanistan, it has been deceptively easy to find the laws of war relevant as a framework for assessing the U.S. government's authority. The second stabilizing factor is similar. Whatever doubts there might be about the scope of the conflict at the organizational level, there has never been much dispute that it at least encompassed the original al Qaeda network and the Afghan Taliban—and case after case arising out of Guantanamo traces back to one or both of those entities.

These stabilizing factors are rapidly eroding, and increasingly irrelevant to the fact patterns that matter most in the counterterrorism setting. The United States is drawing down in Afghanistan, and though it may maintain forces there, it is more likely than not that the use of force in Afghanistan beyond 2014 will resemble current uses of force in Yemen, Somalia, or Pakistan—i.e., episodic, low-intensity uses of force that will generate dispute as to whether an armed conflict exists and whether the laws of war are relevant. This development of course runs with the grain of larger trends associated with American hard power, as a combination of budget pressure, domestic political fatigue, diplomatic conditions, and technological advances pulls the U.S. government toward the use of low-profile, low-commitment exercises of power and away from high-visibility, heavy-footprint engagements. In short, it is growing ever more difficult to avoid the always-contested questions associated with whether and when the laws of war are relevant for the use of force.

Meanwhile, the identity of the enemy grows ever less clear, thanks to the simultaneous decimation, diffusion, and fragmentation of al Qaeda. The lingering elements of the core al Qaeda network remain dangerous despite the extraordinary success of the United States and its allies in killing or capturing its personnel. But other dangerous groups have emerged in the interim, and more will follow. Some of these can fairly be described as descendants of regional al Qaeda cells, but with increasing degrees of tactical, operational, and even strategic independence. Al Qaeda in the Arabian Peninsula (AQAP) and al Qaeda in Iraq (AQI) arguably reflect this model. Other groups originate independently, but gravitate to an uncertain degree into the al Qaeda orbit, as in the case of al Shabaab and al Qaeda in the Islamic Maghreb. And of course not every group emerging out of the Salafist extremist milieu has even that degree of connection to al Qaeda. Recent events in North Africa illustrate the point. The upshot of it all is that, a dozen years removed from the post-9/11 AUMF, it is ever-more difficult to say that we have a clear conception—shared not just within the executive branch but also with the public and with allies—as to the identity of the enemy.

These trends have profoundly destabilizing implications for the legal architecture of U.S. counterterrorism policy. It is not that the U.S. government can no longer plausibly assert authority to detain or to kill when faced with threats outside of Afghanistan or involving groups on the fringes of the original al Qaeda organization. The point, rather, is that in such cases we should expect far more legal disagreement than has been the case in the recent past, with consequent increases in the friction the U.S. government encounters in terms of domestic politics, international cooperation on security matters, and—possibly—litigation. For a more thorough exploration of this topic, please see my forthcoming article *Beyond the Battlefield, Beyond al Qaeda: The Destabilizing Legal Architecture of Counterterrorism*, MICHIGAN LAW REVIEW (forthcoming 2013), available for free download at http://ssrn.com/abstract=2138623.