

**“The conflict against al Qaeda and its affiliates:  
how will it end?”**

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**November 30, 2012**

Thank you for inviting me. It is a privilege for me to stand here, in the same place, before the same Union, as the Prime Ministers, Presidents, and other world notables who have preceded me.

I am the General Counsel of the U.S. Defense Department. If I had to summarize my job in one sentence: it is to ensure that everything our military and our Defense Department do is consistent with U.S. and international law. This includes the prior legal review of every military operation that the Secretary of Defense and the President must approve.

My counterpart here in the United Kingdom is Ms. Frances Nash, the legal adviser to the U.K. Ministry of Defence. Like Ms. Nash, I am a civilian, not a member of the military, consistent with the principle in both our countries of civilian oversight of the military. Unlike Ms. Nash, who is a civil servant and a long-time official of the Ministry of Defence, I am a political appointee. This means I serve at the pleasure of the current President, and have no expectation of serving for any other.

Here in the United Kingdom, you refer to July 7, 2005, the day of the terrorist suicide bombings of the London subway, as “7/7.” I am a New Yorker and a personal witness to the events of “9/11.” I was a private citizen then, and like many others that day, wandered the streets of Manhattan asking: “what can I do to help?”

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<sup>1</sup> With the valuable research assistance of David A. Simon, Special Counsel to the General Counsel (J.D., Harvard Law School; M.Phil., International Relations, Oxford University).

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Over the last 46 months as a public official, I have tried to answer that question.

There is a quote from the Brookings Institution in Washington, which motivates my own public service:

*American government was designed to be led by citizens who would step out of private life for a term of office, then return to their communities enriched by service and ready to recruit the next generation of citizen servants. The Founding Fathers believed in a democracy led by individuals who would not become so enamored of power and addicted to perquisites that they use government as an instrument of self-aggrandizement.*

Indeed, it was the British poet Lord Byron who called our First President, George Washington, the “Cincinnatus of the West” for his decision to surrender his personal power after the American Revolution and retire to his farm on Mount Vernon.<sup>2</sup>

As a member of the Obama Administration for the last four years, I have been privileged to witness many transformational and historic events in the national security of the United States.

We ended the combat mission in Iraq.

We increased the number of combat forces in Afghanistan and have reversed much of the Taliban’s momentum in the country. Challenges remain, but violence is down across the country. We have a timetable for transitioning our efforts in Afghanistan to the Afghans’ own security forces, and we are adhering to it. And though we have disagreed with our Afghan partners from time to time, as of this date we have negotiated and signed understandings with the Afghan government on detention

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<sup>2</sup> George Gordon, Lord Byron, “Ode to Napoleon Buonaparte.” Available at: <http://theotherpages.org/poems/2001/byron0101.html>

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operations,<sup>3</sup> special operations<sup>4</sup> and an overall strategic partnership,<sup>5</sup> representing major milestones toward the day when the peace and security of that country is fully in the hands of the Afghan people and their government.

I was in Afghanistan last week, to spend Thanksgiving with the troops. While there I encountered a number of Her Majesty's armed forces. The British subjects here should be proud of them all. The British hospital I visited at Camp Bastion was first-rate and amazing. And the very good news on that particular day was, at three separate hospitals, I saw not a single U.S. or UK casualty, except for a U.S. soldier in need of an appendectomy, a British soldier with a bad knee, and many bored and happy trauma teams standing around with nothing to do.

We banned “enhanced interrogation techniques,” consistent with the calls of many in our country, including our own military, that great nations simply do not treat other human beings that way. These controversial practices have been banned, yet we continue to gather valuable intelligence in a manner consistent with our Army Field Manual, the Detainee Treatment Act, and international law.

We worked with our Congress to enact the Military Commissions Act of 2009, which reformed our system of military commissions to ensure due process and fairness for the accused. Today, our system of military commissions prosecutions of Khalid Sheik Mohammed and the other alleged organizers of the September 11 attacks is more credible,

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<sup>3</sup> Memorandum of Understanding between The Islamic Republic of Afghanistan and the United States of America On Transfer of U.S. Detention Facilities in Afghan Territory to Afghanistan, March 9, 2012.

<sup>4</sup> Memorandum of Understanding between The Islamic Republic of Afghanistan and the United States of America on Afghanization of Special Operations on Afghan Soil, April 8, 2012.

<sup>5</sup> Enduring Strategic Partnership Agreement between the Islamic Republic of Afghanistan and the United States of America, May 1, 2012.

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sustainable and transparent. One of our nation's finest military lawyers, and a Rhodes Scholar, Brigadier General Mark Martins, is now the chief prosecutor in that system.

We worked with our Congress to pass the Don't Ask, Don't Tell Repeal Act of 2010, such that gay and lesbian members of the U.S. military can now be open and honest about their sexual orientation without fear of being separated for that reason. In the words of one gay servicemember: "you took a knife out of my back; you have no idea what it is like to serve in silence."

And, finally, we have, in a manner consistent with our laws and values, taken the fight directly to the terrorist organization al Qaeda, the result of which is that the core of al Qaeda is today degraded, disorganized and on the run. Osama bin Laden is dead. Many other leaders and terrorist operatives of al Qaeda are dead or captured; those left in al Qaeda's core struggle to communicate, issue orders, and recruit.

But, there is still danger and there is still much to do. Al Qaeda's core has been degraded, leaving al Qaeda more decentralized, and most terrorist activity now conducted by local franchises, such as Al Qaeda in the Arabian Peninsula (based in Yemen) and Al Qaeda in the Islamic Maghreb (operating in north and west Africa). So, therefore, in places like Yemen, and in partnership with that government, we are taking the fight directly to AQAP, and continually disrupting its plans to conduct terrorist attacks against U.S. and Yemeni interests.

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Al Qaeda has sought to attack the UK on a number of occasions. Two years ago, Her Majesty's government assessed:

“We face a real and pressing threat from international terrorism, particularly that inspired by Al Qaeda and its affiliates . . . Al Qaeda remains the most potent terrorist threat to the UK.”<sup>6</sup>

Our efforts against al Qaeda have involved multiple instruments of the U.S. government, including the military, civilian law enforcement, and intelligence services, in partnership with the United Kingdom and other nations.

It is the U.S. military's efforts against al Qaeda and associated forces that has demanded most of my time, generated much public legal commentary, and presented for us what are perhaps the weightiest legal issues in national security. It is the topic I will spend the balance of my remarks on tonight.

The United States government is in an armed conflict against al Qaeda and associated forces, to which the laws of armed conflict apply. One week after 9/11, our Congress authorized our President to “to use all necessary and appropriate force” against those nations, organizations and individuals responsible for 9/11. President Obama, like President Bush before him, as Commander-in-Chief of our Armed Forces, has acted militarily based on that authorization. In 2006, our Supreme Court also endorsed the view that the United States is in an armed conflict with al Qaeda.<sup>7</sup> Therefore, all three branches of the United

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<sup>6</sup> “A Strong Britain in an Age of Uncertainty: The National Security Strategy,” presented to Parliament by the Prime Minister by Command of Her Majesty, October 2010, available on <http://www.official-documents.gov.uk/>

<sup>7</sup> *Hamdan v. Rumsfeld*, 548 U.S. 557, 630-31 (2006) (holding that the United States is in a non-international armed conflict with al Qaeda).

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States government – including the two political branches elected by the people and the judicial branch appointed for life (and therefore not subject to the whims and political pressures of the voters) – have endorsed the view that our efforts against al Qaeda may properly be viewed as an armed conflict.

But, for the United States, this is a new kind of war. It is an unconventional war against an unconventional enemy. And, given its unconventional nature, President Obama – himself a lawyer and a good one - has insisted that our efforts in pursuit of this enemy stay firmly rooted in *conventional* legal principles. For, in our efforts to destroy and dismantle al Qaeda, we cannot dismantle our laws and our values, too.

The danger of al Qaeda is well known. It is a terrorist organization determined to commit acts of violence against innocent civilians. The danger of *the conflict* against al Qaeda is that it lacks conventional boundaries, against an enemy that does not observe the rules of armed conflict, does not wear a uniform, and can resemble a civilian.

But we refuse to allow this enemy, with its contemptible tactics, to define the way in which we wage war. Our efforts remain grounded in the rule of law. In this *unconventional* conflict, therefore, we apply *conventional* legal principles – conventional legal principles found in treaties and customary international law.

As in armed conflict, we have been clear in defining the enemy and defining our objective against that enemy.

We have made clear that we are not at war with an idea, a religion, or a tactic. We are at war with an organized, armed group -- a group determined to kill innocent civilians.

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We have publicly stated that our enemy consists of those persons who are part of the Taliban, al-Qaeda or associated forces,<sup>8</sup> a declaration that has been embraced by two U.S. Presidents, accepted by our courts,<sup>9</sup> and affirmed by our Congress.<sup>10</sup>

We have publicly defined an “associated force” as having two characteristics: (1) an organized, armed group that has entered the fight alongside al Qaeda, and (2) is a co-belligerent with al Qaeda in hostilities against the United States or its coalition partners.<sup>11</sup>

Our enemy does not include anyone solely in the category of activist, journalist, or propagandist.

Nor does our enemy in this armed conflict include a “lone wolf” who, inspired by al Qaeda’s ideology, *self-radicalizes* in the basement of his own home, without ever actually becoming part of al Qaeda. Such persons are dangerous, but are a matter for civilian law enforcement, not the military, because they are not part of the enemy force.

And, we have publicly stated that our goal in this conflict is to “disrupt, dismantle, and ensure a lasting defeat of al Qaeda and violent extremist affiliates.”<sup>12</sup>

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<sup>8</sup> See Respondent’s Memorandum Regarding the Government’s Detention Authority Relative to Detainees Held at Guantanamo Bay, *In re: Guantanamo Bay Detainee Litig.*, Misc. No. 08-0442, at 1 (D.D.C. March 13, 2009).

<sup>9</sup> See *e.g.*, *Al-Adahi v. Obama*, 613 F.3d 1102, 1103 (D.C. Cir. 2010), *cert. denied*, 131 S. Ct. 1001 (2011); *Awad v. Obama*, 608 F.3d 1, 11-12 (D.C. Cir. 2010), *cert. denied*, 131 S. Ct. 1814 (2011).

<sup>10</sup> See Section 1021 of the National Defense Authorization Act for Fiscal Year 2012, Pub. L. 112-81, 125 Stat. 1298 (December 31, 2011).

<sup>11</sup> Remarks by Jeh Charles Johnson, Dean’s Lecture at Yale Law School, “National Security Law, Lawyers and Lawyering in the Obama Administration,” (February 22, 2012).

<sup>12</sup> Remarks by John Brennan, Assistant to the President for Homeland Security and Counterterrorism, Woodrow Wilson Center, Washington, DC, April 30, 2012, available at: <http://www.whitehouse.gov/the-press-office/remarks-assistant-president-homeland-security-and-counterterrorism-john-brennan-csi>

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Some legal scholars and commentators in our country brand the detention by the military of members of al Qaeda as “indefinite detention without charges.” Some refer to targeted lethal force against known, identified individual members of al Qaeda as “extrajudicial killing.”

Viewed within the context of law enforcement or criminal justice, where no person is sentenced to death or prison without an indictment, an arraignment, and a trial before an impartial judge or jury, these characterizations might be understandable.

Viewed within the context of conventional armed conflict -- as they should be -- capture, detention and lethal force are traditional practices as old as armies. Capture and detention by the military are part and parcel of armed conflict.<sup>13</sup> We employ weapons of war against al Qaeda, but in a manner consistent with the law of war. We employ lethal force, but in a manner consistent with the law of war principles of proportionality, necessity and distinction. We detain those who are part of al Qaeda, but in a manner consistent with Common Article 3 of the Geneva Conventions and all other applicable law.<sup>14</sup>

But, now that efforts by the U.S. military against al Qaeda are in their 12<sup>th</sup> year, we must also ask ourselves: how will this conflict end? It is an unconventional conflict, against an unconventional enemy, and will not end in conventional terms.

Conventional conflicts in history tend to have had conventional endings.

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<sup>13</sup> *Hamdi v. Rumsfeld*, 542 U.S. 507, 519 (2004) (“detention to prevent a combatant’s return to the battlefield is a fundamental incident of waging war”).

<sup>14</sup> Geneva Convention Relative to the Treatment of Prisoners of War, art. 3, Aug. 12, 1949, 6 U.S.T. 3316, 75 U.N.T.S. 135.

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Two hundred years ago, our two Nations fought the War of 1812. The United States lost many battles, Washington, DC was captured, and the White House was set ablaze. By the winter of 1814 British and American forces had strengthened their forts and fleets, and assumed that fighting would resume between them in the spring. But, the war ended when British and American diplomats in Belgium came to a peace agreement on December 24, 1814. Diplomats from both sides then joined together in a Christmas celebration at Ghent cathedral. Less than eight weeks later, the U.S. Senate provided advice and consent to that peace treaty, which for the United States legally and formally terminated the conflict.<sup>15</sup>

In the American Civil War, the Battle of Appomattox was the final engagement of Confederate General Robert E. Lee's great Army of Northern Virginia, and one of the last battles of that war. After four years of war, General Lee recognized that "[i]t would be useless and therefore cruel to provoke the further effusion of blood." Three days later the Army of Northern Virginia surrendered.<sup>16</sup> Lee's army then marched to the field in front of Appomattox Court House, and, division by division, deployed into line, stacked their arms, folded their colors, and walked home empty-handed.<sup>17</sup>

The last day of the First World War was November 11, 1918, when an armistice was signed at 5:00 a.m. in a railroad carriage in France, and a ceasefire took effect on the eleventh hour of the eleventh day of the eleventh month of 1918.

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<sup>15</sup> Treaty of Peace and Amity (Treaty of Ghent), U.S.-Gr. Brit., art. IX, Dec. 24, 1814, 8 Stat. 218. The treaty entered into force for the United States on February 17, 1815. The parties to the Treaty were Britain and the United States.

<sup>16</sup> U.S. Library of Congress, *Today in History: April 9*, available at <http://memory.loc.gov/ammem/today/apr09.html>.

<sup>17</sup> *Id.* at 630-631

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The Second World War concluded in the Pacific theater in August 1945, with a ceremony that took place on the deck of the USS Missouri.

During the Gulf War of 1991, one week after Saddam Hussein's forces set fire to oil wells as they were driven out of Kuwait, U.S. General Schwarzkopf sat down with Iraqi military leaders under a tent in a stretch of the occupied Iraqi desert a few miles from the Kuwaiti border. General Schwarzkopf wanted to keep discussions simple; he told his advisors: "I just want to get my soldiers home as fast as possible . . . I want no ceremonies, no handshakes."<sup>18</sup> In the space of two hours they had negotiated the terms of a permanent cease-fire to end the First Gulf War.<sup>19</sup>

We cannot and should not expect al Qaeda and its associated forces to all surrender, all lay down their weapons in an open field, or to sign a peace treaty with us. They are terrorist organizations. Nor can we capture or kill every last terrorist who claims an affiliation with al Qaeda.

I am aware of studies that suggest that many "terrorist" organizations eventually denounce terrorism and violence, and seek to address their grievances through some form of reconciliation or participation in a political process.<sup>20</sup>

Al Qaeda is not in that category.

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<sup>18</sup> SHYAM BHATIA, DANIEL MCGRORY, BRIGHTER THAN THE BAGHDAD SUN: SADDAM HUSSEIN'S NUCLEAR THREAT TO THE UNITED STATES, available at: <http://tinyurl.com/8rttl4v>.

<sup>19</sup> Encyclopedia Britannica, *Persian Gulf War*, available at: <http://www.britannica.com/EBchecked/topic/452778/Persian-Gulf-War>; History.Com, *Topic: Persian Gulf War*, available at: <http://www.history.com/topics/persian-gulf-war>. *Gulf War: Background Briefing*, CBS News, available at: [http://www.cbsnews.com/2100-500164\\_162-2524.html](http://www.cbsnews.com/2100-500164_162-2524.html). Philip Shenon, *After The War: Cease-Fire Meeting; A Hard-Faced Schwarzkopf Sets Terms at Desert Meeting*, New York Times, March 4, 1991, available at: <http://www.nytimes.com/1991/03/04/world/after-war-cease-fire-meeting-hard-faced-schwarzkopf-sets-terms-desert-meeting.html>

<sup>20</sup> Seth G. Jones & Martin C. Libicki, *How Terrorist Groups End: Lessons for Countering al Qaeda* 13 (2d ed. 2008) (RAND Corp.).

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Al Qaeda's radical and absurd goals have included global domination through a violent Islamic caliphate, terrorizing the United States and other western nations from retreating from the world stage,<sup>21</sup> and the destruction of Israel. There is no compromise or political bargain that can be struck with those who pursue such aims.

In the current conflict with al Qaeda, I can offer no prediction about *when* this conflict will end, or whether we are, as Winston Churchill described it, near the "beginning of the end."

I do believe that on the present course, there will come a tipping point – a tipping point at which so many of the leaders and operatives of al Qaeda and its affiliates have been killed or captured, and the group is no longer able to attempt or launch a strategic attack against the United States, such that al Qaeda as we know it, the organization that our Congress authorized the military to pursue in 2001, has been effectively destroyed.

At that point, we must be able to say to ourselves that our efforts should no longer be considered an "armed conflict" against al Qaeda and its associated forces; rather, a counterterrorism effort against *individuals* who are the scattered remnants of al Qaeda, or are parts of groups unaffiliated with al Qaeda, for which the law enforcement and intelligence resources of our government are principally responsible, in cooperation with the international community – with our military assets available in reserve to address continuing and imminent terrorist threats.

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<sup>21</sup> Remarks by John Brennan, Assistant to the President for Homeland Security and Counterterrorism, Paul H Nitze School of Advanced International Studies, Washington, DC, June 29, 2011, available at <http://www.whitehouse.gov/the-press-office/2011/06/29/remarks-john-o-brennan-assistant-president-homeland-security-and-counter>.

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At that point we will also need to face the question of what to do with any members of al Qaeda who still remain in U.S. military detention without a criminal conviction and sentence. In general, the military's authority to detain ends with the "cessation of active hostilities."<sup>22</sup> For this particular conflict, all I can say today is that we should look to conventional legal principles to supply the answer, and that both our Nations faced similar challenging questions after the cessation of hostilities in World War II, and our governments delayed the release of some Nazi German prisoners of war.<sup>23</sup>

For now, we must continue our efforts to disrupt, dismantle and ensure a lasting defeat of al Qaeda. Though severely degraded, al Qaeda remains a threat to the citizens of the United States, the United Kingdom and other nations. We must disrupt al Qaeda's terrorist attack planning before it gets anywhere near our homeland or our citizens. We must counter al Qaeda in the places where it seeks to establish safe haven, and prevent it from reconstituting in others. To do this we must utilize every national security element of our government, and work closely with our friends and allies like the United Kingdom and others.

Finally, it was a warfighting four-star general who reminded me, as I previewed these remarks for him, that none of this will ever be possible if we fail to understand and address what attracts a young man to an

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<sup>22</sup> See Geneva Convention Relative to the Treatment of Prisoners of War, art. 118, Aug. 12, 1949, 6 U.S.T. 3316, 75 U.N.T.S. 135 ("Prisoners of War shall be released and repatriated without delay after the cessation of active hostilities.").

<sup>23</sup> Regarding post-hostilities detention during the conclusion of World War II, see *Ludecke v. Watkins* 335 U.S. 160 (1948) (holding that the President's authority to detain German nationals continued for over six years after the fighting with Germany had ended); See also Alien Enemy Act of 1798 50 U.S.C. §§21-24 (2000). See James Richards, British Broadcasting Corporation, *Life in Britain for German Prisoners of War*, (noting that by the end of 1947, 250,000 of the prisoners of war were repatriated, and the last repatriation took place in November 1948); available at: [http://www.bbc.co.uk/history/british/britain\\_wwtwo/german\\_pows\\_01.shtml](http://www.bbc.co.uk/history/british/britain_wwtwo/german_pows_01.shtml).

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organization like al Qaeda in the first place. Al Qaeda claims to represent the interests of all Muslims. By word and deed, we must stand with the millions of people within the Muslim world who reject Al Qaeda as a marginalized, extreme and violent organization that does *not* represent the Muslim values of peace and brotherhood. For, if al Qaeda can recruit new terrorists to its cause faster than we can kill or capture them, we fight an endless, hopeless battle that only perpetuates a downward spiral of hate, recrimination, violence and fear.

“War” must be regarded as a finite, extraordinary and unnatural state of affairs. War permits one man – if he is a “privileged belligerent,” consistent with the laws of war -- to kill another. War violates the natural order of things, in which children bury their parents; in war parents bury their children. In its 12<sup>th</sup> year, we must not accept the current conflict, and all that it entails, as the “new normal.” Peace must be regarded as the norm toward which the human race continually strives.

Right here at Oxford you have the excellent work of the Changing Character of War program: leading scholars committed to the study of war, who have observed that analyzing war in terms of a continuum of armed conflict -- where military force is used at various points without a distinct break between war and peace -- is counterproductive. Such an approach, they argue, results in an erosion of “any demarcation between war and peace,” the very effect of which is to create uncertainty about how to define war itself.<sup>24</sup>

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<sup>24</sup> The Changing Character of War 10-11 (Hew Strachan & Sibylle Scheipers eds., Oxford University Press 2011).

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I did not go to Oxford. I am a graduate of a small, all-male historically black college in the southern part of the United States, Morehouse College. The guiding light for every Morehouse man is our most famous alumnus, Martin Luther King, who preached the inherent insanity of all wars. I am therefore a student and disciple of Dr. King – though I became an imperfect one the first time I gave legal approval for the use of military force. I accepted this conundrum when I took this job. But, I still carry with me the words from Dr. King: “Returning hate for hate multiplies hate, adding deeper darkness to a night already devoid of stars ... violence multiplies violence, and toughness multiplies toughness in a descending spiral of destruction ... The chain reaction of evil—hate begetting hate, wars producing more wars—must be broken, or we shall be plunged into the dark abyss of annihilation.”<sup>25</sup>

Thank you again for the honor and the opportunity to be in this special place, and thank you for listening to me.

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<sup>25</sup> MARTIN LUTHER KING, JR., *LOVING YOUR ENEMIES* 53 (1981).