

“How to End the Forever War?”

Harold Hongju Koh*

Oxford Union, Oxford, UK

May 7, 2013

Thank you, Mr. President and Members of the Union, for inviting me here to speak. I am honored to return to this University, where I first came 38 years ago, and to this Union, where over the centuries, so many thoughtful individuals have discussed and debated so many serious issues.

As your President said, until a few months ago, I had the honor of serving for nearly four years as Legal Adviser to the U.S. Department of State, giving advice to President Obama and Secretary of State Clinton on issues of both international and domestic law. For four years, my job was to promote, ensure and defend the legality of the foreign policy of the United States of America.

But tonight, let me emphasize that what I say here represents my personal views. After four intense years, I have many friends in all branches of the U.S. government who work extraordinarily hard, every day, on the most difficult problems facing U.S. foreign policy. In particular, I support President Obama and the current Secretary of State John Kerry and I wish them success. But tonight, I speak only for myself, not for anyone in the State Department or the U.S. government.

Only four months from now, this coming September 11, the United States' armed conflict with Al Qaeda will turn twelve years old. That is eight years longer than the Civil War or World War II, and nearly four years longer than the Revolutionary War. So much ink has been spilled on such topics as torture, Afghanistan, Guantanamo and drones, that this conflict has come to feel like a Forever War: it has changed the nature of our foreign policy and consumed our new Millennium. It has made it hard to remember what the world was like before September 11.

* Sterling Professor of International Law and former Dean (2004-09), Yale Law School; former Legal Adviser, U.S. Department of State (2009-13); former Assistant Secretary of State for Democracy, Human Rights and Labor (1998-2001). As noted in text, these remarks reflect only my personal views, not that of any institution of which I am or have been affiliated.

Now that I have returned to the academy, I tend to hear three common misperceptions from friends on both the left and the right: first, that what some call the Global War on Terror has become a perpetual state of affairs; second, that “the Obama approach to that conflict has become just like the Bush approach;” and third, that we have no available strategy to bring this conflict to an end in the near future. Tonight, let me reject all three propositions.

Let me ask what the real question is that faces us, suggest the right approach to addressing it, and outline three elements of an answer. In a nutshell, our question should be: “How to End the Forever War?” Our Approach should be what I would call: “Translate, not Black Hole.” And our three-part answer should be: “(1) Disengage from Afghanistan, (2) Close Guantanamo, and (3) Discipline Drones.”

First and most important, our overriding goal should be to *end* this Forever War, not to engage in a perpetual “global war on terror,” without geographic or temporal limits. As this Administration has acknowledged, we are not fighting against everyone—past, present, and future—who ever has or will dislike the United States or wish it harm. Instead, ever since Congress passed its Authorization for the Use of Military Force (AUMF) one week after September 11, we have engaged in an armed conflict with a knowable enemy—the Taliban, al-Qaeda, and associated forces—that does not limit its activities to a single country’s borders.¹ Our public declaration “that our enemy consists of those persons who are part of the Taliban, al-Qaeda or associated forces ... has been embraced by two U.S. Presidents, accepted by our courts, and affirmed by our Congress.”²

Second, in conducting this conflict, the United States is bound by law. It is not free and it never has been free to conduct that conflict outside the law.

¹ The AUMF authorized the President “to use all necessary and appropriate force against those nations, organizations, or persons he determines planned, authorized, committed, or aided the terrorist attacks that occurred on September 11, 2001 ... in order to prevent any future acts of international terrorism against the United States by such nations, organizations or persons.” In a March 2009 Memorandum filed by the Justice Department, the Obama Administration clarified that the President has “the authority to detain persons who were part of, or substantially supported, Taliban or al-Qaida forces or associated forces that are engaged in hostilities against the United States or its coalition partners.”

² Jeh Charles Johnson, Jr., “The Conflict Against Al Qaeda and its Affiliates: How Will It End?,” Speech to the Oxford Union, November 30, 2012, <http://www.lawfareblog.com/2012/11/jeh-johnson-speech-at-the-oxford-union/>.

This conflict is not a legal black hole where anything goes. Instead, as this Administration has repeatedly acknowledged, the U.S. must fight this conflict consistent with both domestic and international law.³ But precisely what the legal rules are has been debated. The Geneva Conventions envisioned two types of conflict—first, international armed conflicts between nation-states and second, non-international armed conflicts between states and insurgent groups within a single country—for example, a government versus a rebel faction located within that country. But September 11 made clear that the term “non-international armed conflicts” include transnational battles that are not between nations: for example, between a nation-state (the United States) and the transnational nonstate armed group (Al Qaeda) that attacked it. As our Supreme Court has instructed, instead of treating this situation as a “black hole” to which no law applies because the Geneva Conventions are considered “quaint,” our task is to translate the existing laws of war to this different type of “non-international” armed conflict.⁴

Third, this is not a conflict without end. At this very podium last November, my friend and former colleague Jeh Johnson, then-General Counsel of the United States Department of Defense, gave an important speech called “The Conflict Against Al Qaeda and its Affiliates: How Will It End?” He said, in words with which I agree:

³As I told the American Society of International Law in March 2010, “We live in a time, when, as you know, the United States finds itself engaged in several armed conflicts. As the President has noted, in the conflict occurring in Afghanistan and elsewhere, we continue to fight the perpetrators of 9/11: a non-state actor, al-Qaeda (as well as the Taliban forces that harbored al-Qaeda). . . . *Let there be no doubt: the Obama Administration is firmly committed to complying with all applicable law, including the laws of war, in all aspects of these ongoing armed conflicts.*” Harold Hongju Koh, The Obama Administration and International Law, March 25, 2010, <http://www.state.gov/s/l/releases/remarks/139119.htm> (emphasis in original).

⁴ In applying the international law of armed conflict to the post-9/11 situation in *Hamdan v. Rumsfeld*, 548 U.S. 557 (2006), the Supreme Court conducted just such a translation exercise, reasoning that the “term ‘conflict not of an international character’ is used here in contradistinction to a conflict between nations,” adopting a residual view of the applicability of Common Article 3. It found that this provision “affords some minimal protection, falling short of full protection under the Conventions, to individuals associated with neither a signatory nor even a nonsignatory [state] who are involved in a conflict ‘in the territory of’ a signatory. The latter kind of conflict is distinguishable from the conflict described in Common Article 2 chiefly because it does not involve a clash between nations (whether signatories or not). In context, then, the phrase ‘not of an international character’ bears its literal meaning.”

“[O]n 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.⁵

As I know Jeh Johnson would acknowledge, the key question going forward will thus be whether or not we treat new groups that rise up to commit acts of terror as “associated forces” of Al Qaeda with whom we are already at war. The U.S. Government has made clear that an “associated force” must be (1) an organized, armed group that (2) has actually entered the fight alongside al Qaeda against the United States, thereby becoming (3) a co-belligerent with al Qaeda in its hostilities against America. Just because someone hates America or sympathizes with Al Qaeda does not make them our lawful enemy. Under both domestic and international law, the United States has ample legal authority to respond to new groups that would attack it without declaring war forever against anyone who is hostile to us. But make no mistake: if we are too loose in who we consider to be “part of” or “associated with” Al Qaeda going forward, then we will always have new enemies, and the Forever War will continue forever.

My second point: in reviewing where we have been, it should be clear that the Obama Administration’s approach to these issues has not been just like George W. Bush’s. To state just the three most obvious differences:

First, the Obama Administration has not treated the post-9/11 conflict as a Global War on Terror to which no law applies, in which the United States is authorized to use force anywhere, against anyone. Instead, it has acknowledged that its authority under domestic law derives from Acts of

⁵ See Johnson speech, *supra* note 2 (emphasis in original).

Congress, not just the President's s vague constitutional powers. Under international law, this Administration has expressly recognized that U.S. actions are constrained by the laws of war. So rather than treating this conflict as a Black Hole, this Administration has worked to translate the spirit of those laws and apply them to this new situation.

Second, in conducting this more limited conflict, the Obama Administration has shown an absolute commitment to the humane treatment of Al Qaeda suspects. You have not heard claims that this Administration has conducted torture, waterboarding, or enhanced interrogation tactics. To underscore that commitment, this would be an opportune moment, as Vice President Joe Biden pointed out on April 26, to make public the Senate Select Intelligence Committee's as-yet-unreleased six-thousand-page report regarding the CIA's former notorious "enhanced interrogation" program.

A third critical difference between this Administration and its predecessor is the Obama Administration's determination *not* to address Al Qaeda and the Taliban solely through the tools of war. As Secretary Clinton made clear on the tenth anniversary of September 11, in the short-term, we have an inescapable need for "precise and persistent force [that] can significantly degrade ... al-Qaida. So we will continue to go after its leaders and commanders, disrupt their operations and bring them to justice. ... attack its finances, recruitment, and safe havens." But our longer term objective must be what Secretary Clinton called a "smart power" approach: using force for limited and defined purposes within a much broader nonviolent frame, with our broad objective being to use diplomacy, development, education, and people-to-people outreach to challenge Al Qaeda's "ideology, counter its propaganda, and diminish its appeal, so that every community recognizes the threat that extremists pose to them and ... deny them protection and support. [In doing so, she said, w]e need effective international partners in government and civil society who can extend this effort to all the places where terrorists operate."⁶

Because force makes up only part of a much broader "smart power" approach, this Administration has not rejected Law Enforcement tools in favor of exclusive use of tools of war. Instead, it has combined a Law of War approach with Law Enforcement and other approaches to bring all

⁶ Secretary of State Hillary Rodham Clinton, Smart Power Approach to Counterterrorism (September 9, 2011), <http://www.state.gov/secretary/rm/2011/09/172034.htm> .

available tools to bear against Al Qaeda. Thus, if the United States should encounter an Al Qaeda leader like Osama bin Laden in a remote part of Afghanistan, a law of war approach might be appropriate; but if it should find him in London or New York, a law enforcement approach would obviously be more fitting. In either case, the relevant question would not be one of *labels*—i.e., “should we call this person an “Enemy Combatant?”—but rather, one of *facts*: “Do the facts show that this particular person is actually “part of” Al Qaeda or Associated Forces”? The U.S. response to a particular person thus turns critically on *who he is and what he has done*, not on what label he is given. It is because these decisions are so fact-intensive that I spent a sobering, but crucial, part of my last four years learning not the resumes of promising students like you, but rather, the names of Al Qaeda leaders of roughly your age, learning their life stories, and grasping how their life trajectories led them not to education and political leadership, as yours will, but to desperate terrorist missions of violence and hatred.

To be clear, the United States is not at war with any idea or religion, with mere propagandists or journalists, or even with sad individuals—like the recent Boston bombers-- who may become radicalized, inspired by al Qaeda’s ideology, but never actually join or become part of al Qaeda. As we have seen, such persons may be exceedingly dangerous, but they should be dealt with through tools of civilian law enforcement, not military action, because they are not part of any enemy force recognizable under the laws of war.

That brings me to the third and final part of this lecture: if we want to end the Forever War, through a “Translate, not Black Hole” approach, our three-part answer should be: (1) Disengage from Afghanistan, (2) Close Guantanamo, and (3) Discipline Drones. What few realize is that all three goals already happen to be announced aims of U.S. policy. So the main question going forward is how the Obama Administration can fully implement its previously announced objectives?

As I speak, the first goal—disengaging from Afghanistan—is fully underway. To end the conflict in Afghanistan – in President Obama’s words a “conflict that America did not seek, ... in which we are joined by forty-three other countries...in an effort to defend ourselves and all nations from

further attacks”⁷ -- we need a security transition, a political transition, and an economic transition, particularly implementation of an economic plan now known as “The New Silk Road.” The Administration has outlined a three-part plan to further those transitions, consisting of: (1) Declining Military Engagement; (2) Continued Civilian Engagement, with enhanced efforts to develop the Afghan economy and civil society; and (3) a sustained and intense Diplomatic Surge to build a regional architecture for a secure, stable Afghanistan. That diplomatic surge started in 2010 in Lisbon, intensified in 2011 in Istanbul and Bonn, and reached fruition in 2012 at the Chicago NATO and Tokyo Economic Summits. In that robust diplomatic sequence, Afghanistan and its international partners charted a blueprint for a full transfer of security responsibility: in the Strategic Partnership Agreement that went into effect in 2012, Afghanistan’s designation as a major non-NATO ally of the United States, and the negotiation of agreements on bilateral security, detention transfer and the like.

No part of this disengagement will be easy, but three particular challenges stand out. First, in transferring control of detention facilities, the U.S. must ensure that transfers comply with our obligations under international law not to return detainees to persecution or torture, and that future detentions comply with fair process and treatment obligations. Second, the U.S. must work closely with the Afghans to help secure what Secretary Kerry has called a “credible, safe, secure, all-inclusive, ... transparent, and accountable presidential election” to succeed Hamid Karzai in 2014.⁸ Third, the Afghan government must tackle the difficult and controversial task of negotiating with the Taliban, as President Karzai recently proposed to do in Doha, Qatar. Understandably, many human rights defenders fear that such negotiations may trigger regression to grotesque Taliban abuses. But as Secretary Clinton described in her February 2011 speech to the Asia Society:

“ [S]ecurity and governance gains produced by the military and civilian surges have created an opportunity to get serious about a responsible reconciliation process, led by Afghans and supported by intense regional diplomacy and strong U.S.-backing. Such a process would have to be

⁷ Remarks by President Barack Obama at the Acceptance of the Nobel Peace Prize, Oslo, Norway, December 10, 2009.

⁸ Secretary's Remarks: Remarks With President Hamid Karzai After Their Meeting, Presidential Palace, Kabul, Afghanistan, March 25, 2013

accepted by all of Afghanistan's major ethnic and political blocs. For ... this effort to succeed there are three "unambiguous red lines for reconciliation with the insurgents: They must renounce violence; they must abandon their alliance with al-Qaida; and they must abide by the constitution of Afghanistan [as] necessary outcomes of any negotiation."⁹

Our crucial emphasis must be on building upon advances in Afghan civil society that have occurred in the last decade. Ordinary Afghans must believe that even if some Taliban return, their society need not regress to the bleak days before September 11. A recent United Nations report showed that Afghanistan has made faster gains in human development over the last 10 years than any other country in the world.¹⁰ When Afghan civil society development resumed a decade ago, there were few in school and almost no women. Now there are nearly 10 million attending school, almost evenly divided between men and women. Kabul is the fifth fastest-growing city in the world. In the last decade, the GDP (Gross Domestic Product) of Afghanistan has nearly quintupled. Health facilities like hospitals have quadrupled; access to electricity has tripled. Life expectancy is up 50 percent. In the last decade, more roads have been built than in the entire previous history of this country. Cellphone contracts have gone from 20,000 to 3 million, and access to the internet has gone from nonexistent to more than 1.5 million users.¹¹ This, in short, is what a smart-power strategy looks like. As more and more Afghans become convinced that they, and not the Taliban, control their political, economic, and security future, they will see U.S. disengagement as necessary to give them ownership of their own country and to bring civil society closer to self-reliance, self-determination, and self-governance.¹²

What about the second plank of this plan: closing Guantanamo? As I speak, 166 detainees remain at Guantanamo, 76 fewer than when the

⁹ Hillary Rodham Clinton, Secretary of State, Remarks at the Launch of the Asia Society's Series of Richard C. Holbrooke Memorial Addresses, February 18, 2011, <http://www.state.gov/secretary/rm/2011/02/156815.htm>

¹⁰ Secretary's Remarks with President Karzai, supra note 8.

¹¹ Internet Usage Statistics: [Asia Internet Stats](#) > [Asia Links](#) > Afghanistan, at <http://www.internetworldstats.com/asia/af.htm> (Afghanistan has 1,520,996 Internet users as of June 30, 2012).

¹² Secretary's Remarks: Meeting With Staff and Families at U.S. Embassy Kabul, Afghanistan, March 26, 2013 .

President first took office.¹³ More than 100 of the detainees are on hunger strike, and many are being force-fed, a situation that President Obama acknowledged was “not sustainable” and “contrary to who we are.” As a human rights lawyer who first visited Guantanamo in 1991, I have long said that closing Guantanamo forever is long overdue. At his news conference last week, President Obama correctly declared:

I continue to believe that we’ve got to close Guantanamo. . . . Guantanamo is not necessary to keep America safe. It is expensive. It is inefficient. It hurts us in terms of our international standing. It lessens cooperation with our allies on counterterrorism efforts. It is a recruitment tool for extremists. It needs to be closed. . . .

I could not agree more. And so I applauded when he said, “I’m going to go back at this. I’ve asked my team to review everything that’s currently being done in Guantanamo, everything that we can do administratively, and I’m going to re-engage with Congress to try to make the case that this is not something that’s in the best interests of the American people.”

What the President’s team should recognize is that he does not need a new policy to close Guantanamo. He just needs to put the full weight of his office behind the sensible policy that he first announced in January 2009, reiterated at the National Archives in 2010, and reaffirmed in March 2011. To do that, he must take four steps:

First, and foremost, he must appoint a senior White House official with the clout and commitment to actually make Guantanamo closure happen. There has not been such a person at the White House since Greg Craig left as White House Counsel in early 2010. There must be someone close to the President, with a broad enough mandate and directly answerable to him, who wakes up each morning thinking about how to shrink the Guantanamo population and close the camp.

Second, this White House Envoy need not develop a new paradigm for closing Guantanamo. He or she merely needs to implement the National Archives framework that the President announced three years ago. The White House Envoy should lead the Administration’s efforts to implement the three-part framework for closure of the Guantanamo detention facility

¹³ The Guantanamo Docket, N.Y. Times, <http://projects.nytimes.com/guantanamo/> .

specified in the President's 2010 speech at the National Archives describing a framework for how this closure could happen: through diplomatic *transfers* of those individuals who could be safely transferred, *prosecution* of those who can be tried before civilian courts when possible and military commissions where that is the only option, and third, by commencing the long-overdue legally mandated *periodic review* of so-called Law of War Detainees to see if any can be released because of changes either in their attitude or in the conditions of the country to which they could be transferred.

As a start, the Special Envoy should work on the diplomatic steps needed to transfer either individually or *en bloc* some 86 detainees who were identified three years ago as eligible for repatriation to their home countries or resettlement elsewhere by an administration task force that exhaustively reviewed each prisoner's file. This was a task previously performed ably by State Department Special Envoy for Guantanamo Closure Ambassador Dan Fried. The President should send the Envoy to Yemen to negotiate the block transfer, to a local rehabilitation facility, of those Yemeni detainees who were cleared for transfer, before those transfers were put on hold because of instability in that country.

Starting in 2010, Congress has used authorization bills to impose a series of counterproductive restrictions on the transfer of Guantánamo prisoners. But some of those restrictions are subject to waiver requirements and all must be construed in light of the President's authority as commander-in-chief to regulate the movement of law of war detainees, as diplomat-in-chief to arrange diplomatic transfers, and as prosecutor-in-chief to determine who should be prosecuted and where. If Congress insists on passing such onerous and arguably unconstitutional conditions in the next National Defense Authorization Act, the President should call its bluff and forthrightly veto that legislation.

Third, those on Guantanamo who can be prosecuted should be prosecuted in civilian courts where possible, and in military commissions only if no other option remains. As two seasoned New York federal prosecutors have exhaustively documented, recent cases--like Warsame of Al Shababb, the "Shoe Bomber" Richard Reid, the "Christmas Day Bomber" Abdulmutallab, and the "Times Square Bomber" Faisal Shahzad-- all show that civilians

courts are more than able to handle and punish complex terrorism cases.¹⁴ While here too, Congress has tried to restrict the movement of Guantanamo detainees to the U.S. to stand trial, there is no reason why the plea bargains of Guantanamo detainees could not be taken in U.S. courts, followed by U.S. detention, or why, as my Yale colleagues Bruce Ackerman and Eugene Fidell have recently suggested, U.S. civilian judges could not be sent to Guantanamo to try the triable so that Guantanamo can be closed.¹⁵ And it is letting the tail wag the dog for Guantanamo to remain open so that military commissions cases can be heard there, when such cases may be safely heard in military bases on the continental United States such as the military base in South Carolina.

Fourth and finally, the Administration must begin the process of periodic review for about four dozen detainees who are not presently under charges but who an interagency task force concluded should remain held under rules of war that allow detention without charge for the duration of hostilities. In theory, this group could be moved to the mainland U.S., but many human rights advocates understandably oppose creating a new system of detention without charge for terrorism suspects on American soil. Here, we should recall Jeh Johnson's description of a "tipping point" where Al Qaeda would become so decimated that the armed conflict would be deemed over. If this became true, that would eliminate the legal justification for these law of war detentions without charge and further the claim that such long-term detainees should be released after more than a decade in custody.

Whether the core of Al Qaeda can in fact be decimated brings me to the final issue that has recently dominated public discussion: namely, disciplining drones. I am sometimes asked, "as a human rights advocate, how could you criticize torture, while as a government lawyer, you defended the legality of drones?" My answer is sad but simple: in all its forms, torture is always illegal as a matter of state policy. But as regrettable as killing always is, killing those with whom you are at war may be lawful, so long as

¹⁴ Richard B. Zabel & James J. Benjamin Jr., *In Pursuit of Justice: Prosecuting Terrorism Cases in the Federal Courts*, 2009 Update and Recent Developments (New York and Washington, DC: *Human Rights First*, 2009).

¹⁵ Bruce Ackerman & Eugene Fidell, *Send Judges to Guantánamo, Then Shut It*, *New York Times*, May 3, 2012, at <http://www.nytimes.com/2013/05/04/opinion/send-civilian-judges-to-guantanamo-then-shut-it.html?pagewanted=print>.

you strictly follow the laws of war. Few dispute that targeted killing may on balance promote human rights if it targets only sworn leaders—like bin Laden himself--to save the lives of many innocent civilians from unprovoked attack. As Legal Adviser, I found it the inescapable duty of the laws of war, and the government lawyers who administer it, to draw difficult lines: to police the line between those violent acts that are lawful and unlawful, and to distinguish between those uses of force that do and do not on balance promote the human rights of innocent civilians.

Some mistakenly think of drones as inherently evil, even though they are a weapon that if precisely and accurately targeted, could be far more discriminate and lawful than such inherently indiscriminate weapons as chemical weapons or nuclear bombs. To illustrate why, consider this thought experiment: Suppose we are back at Sept 18, 2001, and Congress has just passed the AUMF against Al Qaeda. Suppose the President –let’s assume it for the sake of argument that it was the winner of the popular vote, Al Gore--gives a speech where he says:

'We just have been attacked in the worst attack on our soil since Pearl Harbor. Some 3000 innocent people were killed, simply for going to work one day, in what all must acknowledge was an obscene human rights violation. We must respond firmly and lawfully, consistent with our values. As of today, we are at war with Al Qaeda, the Taliban and associated forces. Our aim must be to defeat Al Qaeda and to prevent it from proliferating. So here is what we will not do, and here is what we must do.

We will not do anything foolish, illegal or inconsistent with American values. That means we will not invade Iraq. We will not torture anyone. We will not open offshore prison camps like Guantanamo. We will not create military commissions, because our existing civilian and military courts can do the job. We will not violate foreign sovereignty or international law. We will not claim that we are in a Global War on Terror. We are in a particular battle with a particular foe—Al Qaeda—that we hope to defeat in time.

That is what we will not do. But here is what we must do.

We must incapacitate—by capture if possible, by killing if necessary — Osama bin Laden and his senior operational leaders –several hundred in

all--who pose a direct threat to the United States. We will use law enforcement methods when they are available and military measures when they are not. We will take every available step to prevent civilian casualties. *But we will also use every technological method available to us, including drones.*

In using these tools, we will work closely with our allies. We will be as transparent as we can be: we will keep Congress and the public fully informed. We will adhere to domestic and international law, and where that law is murky, we will work hard to clarify the governing international norms. We will reach out to moderate Islam and isolate extremists. And in all cases we will respect the US Constitution, international law, and the human rights of those who so grossly violated human rights.

This will not be easy. It will take time and lives will be lost. Nor will everything be public. But I pledge this will be a bipartisan effort. There is no political advantage in turning this into a political football. Unlike other wars, from which we could walk away, this is a conflict we must win if our families are to live free from fear. So please give us your support.”

I hope you will agree that that speech would have received a 100% approval rating. But that, sadly, was the road not taken. What this thought experiment should tell you is that the main problem is not drones, but that the Bush Administration grossly mismanaged its response to 9/11. Instead of acting firmly and surgically against Al Qaeda, it squandered global good will by invading Iraq, committing torture, opening Guantanamo, flouting domestic and international law, and undermining civilian courts. By taking the wrong path, the last Administration sacrificed legitimacy, and took its eye off the ball, leaving the next administration to pick up the pieces. President Obama’s Administration got off to a promising start with his January 2009 executive orders, his 2009 Nobel Prize speech, and his 2010 National Archives Speech. And in early 2010, I gave a speech to the American Society of International Law outlining the basic legal standards the U.S. government applied to such actions.

But since then, to be candid, this Administration has not done enough to be transparent about legal standards and the decisionmaking process that it has been applying. It had not been sufficiently transparent to the media, to

Congress, and to our allies. Because the Administration has been so opaque, a left-right coalition running from Code Pink to Rand Paul has now spoken out against the drone program, fostering a growing perception that the program is not lawful and necessary, but illegal, unnecessary and out of control. The Administration must take responsibility for this failure, because its persistent and counterproductive lack of transparency has led to the release of necessary pieces of its public legal defense too little and too late.

As a result, the public has increasingly lost track of the real issue, which is not drone *technology per se*, but the need for transparent, agreed-upon domestic and international legal process and standards. It makes as little sense to attack drone technology as it does to attack the technology of such new weapons as spears, catapults, or guided missiles in their time. Cutting-edge technologies are often deployed for military purposes; whether or not that is lawful depends on whether they are deployed consistently with the laws of war, *jus ad bellum* and *jus in bello*. Because drone technology is highly precise, if properly controlled, it could be more lawful and more consistent with human rights and humanitarian law than the alternatives. And finally, given that other technologies, particularly conflict with cybertools, are fast achieving more prominence, obsessing about drones may soon be overtaken by events, as drone technology gives way to even more technologically sophisticated tools of war such as cyberwar or more advanced robotics.

So what is to be done? In the area of cyberconflict, I have already argued as part of an official U.S. position, we must use a “translate, not black hole” approach of the kind I have urged here.¹⁶ With respect to drones, the Obama Administration should similarly be more transparent, more consultative, and more willing to discuss international legal standards for use of drones, so that our actions do not inadvertently empower other nations and actors who would use drones inconsistent with the law.

First, as President Obama has indicated he wants to do, the Administration should make public and transparent its legal standards and institutional processes for targeting and drone strikes. Second, it should make public its full legal explanation for why and when it is consistent with due process of law to target American citizens and residents. Third, it should

¹⁶ See Harold Hongju Koh, International Law in Cyberspace, <http://www.state.gov/s/l/releases/remarks/197924.htm> .

clarify its method of counting civilian casualties, and why that method is consistent with international humanitarian law standards. Fourth, where factual disputes exist about the threat level against which past drone strikes were directed, the Administration should release the factual record. By so doing it could explain what gave it cause to believe that particular threats were imminent, called for the immediate exercise of self-defense, and demonstrated—through the express consent of the territorial sovereign or the inability and unwillingness of those sovereigns to suppress a legitimate threat.

After transparency, the key is consultation. The Administration should send witnesses to explain its legal standards to Congress, consult with Congress about its methodologies, standards and processes, and patiently explain why the use of force was warranted in particular, well-publicized cases. The Administration should use those same facts and standards to consult with our allies on what the global standards on drone use should be going forward, to reassure them that we are not applying a standard that we would consider unlawful if espoused to justify the use of drones by say, China, North Korea, or Iran.

Most important, the Administration should remember that the real issue facing us is not drones, but how to end the Forever War. As suggested above, the war against Al Qaeda, the Taliban and Associated Forces is not one in which we can simply declare victory and go home. If the Obama Administration cannot persuade its citizens, Congress and its closest allies that its drone program is legal, necessary and under control, it will be hard for President Obama to see this war to its much-needed conclusion or to take the other steps necessary to secure the peace.

I strongly disagree with those who claim that new legislation is now necessary to authorize the Administration to fight against new enemies. The burden of proving that such legislation would be either necessary or wise should fall on the proponents. As a lifelong international and constitutional lawyer who has worked on these legal issues for a decade, I see no proof that the U.S. lacks legal authority to defend itself against those with whom we are genuinely at war or who pose to us a genuine and imminent threat. Significantly, Congress has never declared war against an enemy when the President has not asked for such a declaration. Nor would adopting new domestic legislation make actions in preemptive self-defense lawful under international law. And unless we can clearly define just who the new enemies are--and why existing legal authorities are insufficient to defend

ourselves against them--we have no basis for passing new laws that would perpetuate the Forever War against shadowy foes whose association with those who have attacked us on 9/11 cannot be proven.

In closing let me repeat: These issues are hard. Reasonable people can disagree. We are all weary of war and tired of fighting. But that is all the more reason to keep our eye on the real issues that face us: how to end “The Forever War,” the conflict between the United States and Al Qaeda, the Taliban, and Associated Forces originally triggered by the September 11, 2001 attacks. That attack launched neither a Perpetual nor a Global War on Terror. And while the Obama Administration’s approach has been far from perfect—and I have frankly discussed my disagreements with it—neither should it be confused with the misguided policies of its predecessor nor it is a policy with incorrect aspirations, as defined by President Obama himself.

In sum, it is still possible for President Obama to end the Forever War, piece by piece, during his second term. It is still possible to disengage from Afghanistan, to close Guantanamo and to discipline the use of drones through transparency, consultation, and international standard-setting. It is still possible in a time of terror to defend our security consistent with our values, without creating recruiting tools for our enemies or further staining our national record for obeying the law, safeguarding justice and protecting human rights.

Because I am an American who loves his country, I have served it for ten years of my professional career. My former professor and former Legal Adviser Abram Chayes once said, after he had sued the United States government from the academy “I have always thought there is nothing wrong with an American lawyer holding the United States to its own best standards.”¹⁷ It is in that spirit that tonight from this important podium, I call my country to its own best values and principles. As President Lincoln famously said, there is still time--indeed, it is high time-- for Americans once again to answer to the “better angels” of our national nature.¹⁸ As America’s closest ally with whom it enjoys a most special relationship, I hope you can join me in this call.

¹⁷ Professor Abram Chayes (1922-2000),
<http://www.law.harvard.edu/news/spotlight/ils/fellowships/professor-abram-chayes.html> .

¹⁸ President Abraham Lincoln, First Inaugural Address, March 4, 1861,
<http://www.bartleby.com/124/pres31.html> .

Thank you very much for your kind attention.