

1921 U.S. and Canadian legislation authorizing the private bridge and that the State Department's presidential permit process is unconstitutional.⁴

Proposed Keystone Pipeline. Meanwhile, the Department of State continues deliberations on an application for a permit authorizing the proposed Keystone XL Pipeline to cross the international boundary with Canada.⁵ The proposed pipeline is intended to carry heavy crude from tar sands developments in Alberta to refineries on the U.S. Gulf Coast.⁶ In April 2013, the department conducted a public hearing in Grand Island, Nebraska, to receive comments on the project and the draft supplemental environmental impact statement (EIS) intended to assess its impacts.⁷ The hearing drew a crowd of nearly one thousand persons, including many opposed to the project on environmental grounds.⁸ Shortly after the hearing, the U.S. Environmental Protection Agency wrote to the Department of State sharply criticizing the draft EIS for underestimating the climate change effects of tar sands development⁹ and questioning the draft's assessment that tar sands development will continue even if the pipeline is not built.¹⁰

USE OF FORCE AND ARMS CONTROL

President Obama Outlines Shifts in U.S. Counterterrorism Policy

In a major address at the U.S. National Defense University in May 2013,¹ President Barack Obama discussed multiple aspects of U.S. counterterrorism policy. Obama outlined a shift away from the concept of a "global war on terror" to more proportional and nuanced policies in several areas. In general terms, he outlined policies aimed at limiting the use of drone strikes; the number of such strikes has reportedly declined sharply since peaking at about 120 in 2010.² Obama also lifted a ban on the transfer to Yemen of Yemeni Guantánamo detainees previously cleared for release and called for lifting statutory provisions effectively requiring continued

⁴ *New Windsor-Detroit Bridge*, *supra* note 1; Spangler, *supra* note 1; Gallagher, *supra* note 2.

⁵ Juliet Eilperin & Steven Mufson, *Opposing Sides Muster Arguments on Keystone*, WASH. POST, Jan. 18, 2013, at A14; John M. Broder, *Governor of Nebraska Backs Route for Pipeline*, N.Y. TIMES, Jan. 23, 2013, at A11; Steven Mufson & Anne Gearan, *Kerry Suggests Action Is Near on Proposed Keystone XL Pipeline*, WASH. POST, Feb. 9, 2013, at A14; John M. Broder, Clifford Krauss & Ian Austen, *Obama Faces Risks in Pipeline Decision*, N.Y. TIMES, Feb. 18, 2013, at B1.

⁶ See John R. Crook, *Contemporary Practice of the United States*, 105 AJIL 568, 610 (2011), 106 AJIL 360, 374 (2012) & 106 AJIL 643, 683 (2012).

⁷ U.S. Dep't of State Press Release No. 2013/0346, *Public Meeting in Grand Island, Nebraska on the Proposed Keystone XL Pipeline* (Mar. 27, 2013), at <http://www.state.gov/r/pa/prs/ps/2013/03/206724.htm>.

⁸ Dan Frosch, *Keystone Pipeline Foes Vent in Nebraska*, N.Y. TIMES, Apr. 19, 2013, at A12; Lenny Bernstein, *U.S. Hosts Hearing on Keystone*, WASH. POST, Apr. 19, 2013, at A19.

⁹ Juliet Eilperin & Steven Mufson, *State Dept. Says Keystone XL Would Have Little Effect on Climate Change*, WASH. POST, Mar. 2, 2013, at A2.

¹⁰ John M. Broder, *State Department Criticized by E.P.A. on Pipeline Report*, N.Y. TIMES, Apr. 23, 2013, at A15; Lenny Bernstein & Juliet Eilperin, *EPA Wants State to Rework Analysis of Keystone XL Oil Pipeline*, WASH. POST, Apr. 23, 2013, at A18; Editorial, *E.P.A.'s Keystone Report Card*, N.Y. TIMES, Apr. 27, 2013, at A18.

¹ See White House Press Release, *Fact Sheet: The President's May 23 Speech on Counterterrorism* (May 23, 2013), at <http://www.whitehouse.gov/the-press-office/2013/05/23/fact-sheet-president-s-may-23-speech-counterterrorism>.

² Scott Shane, *Debate Aside, Drone Strikes Drop Sharply*, N.Y. TIMES, May 22, 2013, at A1.

detentions at Guantánamo Bay, Cuba.³ (The United States currently holds about 166 detainees there. Eighty-six, about two-thirds from Yemen, were cleared for release by an interagency task force during Obama's first term, but remain in detention. About 100 detainees have engaged in hunger strikes to mark their frustration and to seek greater public awareness of their situation.⁴ As of early June 2013, 41 detainees are reportedly being force-fed.⁵)

Early in his address, Obama described the declining strength of Al Qaeda in Afghanistan and Pakistan, the emergence of Al Qaeda affiliates and other extremist groups elsewhere, and the threat from radicalized individuals inside the United States. He further stated that "we must define our effort not as a boundless 'global war on terror,' but rather as a series of persistent, targeted efforts to dismantle specific networks of violent extremists that threaten America."⁶ He then addressed U.S. use of drones against terrorists.

[D]espite our strong preference for the detention and prosecution of terrorists, sometimes this approach is foreclosed. Al Qaeda and its affiliates try to gain [a] foothold in some of the most distant and unforgiving places on Earth. . . .

In some of these places—such as parts of Somalia and Yemen—the state only has the most tenuous reach into the territory. In other cases, the state lacks the capacity or will to take action. And it's also not possible for America to simply deploy a team of Special Forces to capture every terrorist.

. . . .

So it is in this context that the United States has taken lethal, targeted action against al Qaeda and its associated forces, including with remotely piloted aircraft commonly referred to as drones.

. . . .

To begin with, our actions are effective. Don't take my word for it. In the intelligence gathered at bin Laden's compound, we found that he wrote, "We could lose the reserves to enemy's air strikes. We cannot fight air strikes with explosives." . . .

Moreover, America's actions are legal. We were attacked on 9/11. Within a week, Congress overwhelmingly authorized the use of force. Under domestic law, and international law, the United States is at war with al Qaeda, the Taliban, and their associated forces. We are at war with an organization that right now would kill as many Americans as they could if we did not stop them first. So this is a just war—a war waged proportionally, in last resort, and in self-defense.

³ Scott Wilson, *Obama to Address Security Measures*, WASH. POST, May 19, 2013, at A8; Charlie Savage & Peter Baker, *Obama, in a Shift, to Limit Targets of Drone Strikes*, N.Y. TIMES, May 23, 2013, at A1; Peter Baker, *Reviving Debate on Nation's Security, Obama Seeks to Narrow Terror Fight*, N.Y. TIMES, May 24, 2013, at A1; Editorial, *The End of Perpetual War*, N.Y. TIMES, May 24, 2013, at A20; Karen DeYoung & Greg Miller, *Obama Points to 'Crossroads' in Terrorism Fight*, WASH. POST, May 24, 2013, at A1; Editorial, *The Nature of War*, WASH. POST, May 24, 2013, at A18; Peter Baker, *In Terror Shift, Obama Took a Long Path*, N.Y. TIMES, May 28, 2013, at A1.

⁴ Peter Finn, *Military, Detainees Clash at Guantanamo Bay*, WASH. POST, Apr. 14, 2013, at A16; Peter Finn & Julie Tate, *Signs of Growing Frustrations at Guantanamo Bay*, WASH. POST, Mar. 17, 2013, at A3; Charlie Savage, *Despair Drives U.S. Detainees to Stage Revolt*, N.Y. TIMES, Apr. 25, 2013, at A1; Peter Finn & Julie Tate, *Protest Spotlights Indefinite Detention*, WASH. POST, May 3, 2013, at A5.

⁵ Peter Finn, *Number of Protesting Guantanamo Detainees Being Force-Fed Grows to 41*, WASH. POST, June 7, 2013, at A6.

⁶ White House Press Release, *supra* note 1.

And yet, as our fight enters a new phase, America's legitimate claim of self-defense cannot be the end of the discussion. To say a military tactic is legal, or even effective, is not to say it is wise or moral in every instance. . . . And that's why, over the last four years, my administration has worked vigorously to establish a framework that governs our use of force against terrorists—insisting upon clear guidelines, oversight and accountability that is now codified in Presidential Policy Guidance that I signed yesterday.

In the Afghan war theater, we must—and will—continue to support our troops until the transition is complete at the end of 2014. And that means we will continue to take strikes against high value al Qaeda targets, but also against forces that are massing to support attacks on coalition forces. But by the end of 2014, we will no longer have the same need for force protection, and the progress we've made against core al Qaeda will reduce the need for unmanned strikes.

Beyond the Afghan theater, we only target al Qaeda and its associated forces. And even then, the use of drones is heavily constrained. America does not take strikes when we have the ability to capture individual terrorists; our preference is always to detain, interrogate, and prosecute. America cannot take strikes wherever we choose; our actions are bound by consultations with partners, and respect for state sovereignty.

America does not take strikes to punish individuals; we act against terrorists who pose a continuing and imminent threat to the American people, and when there are no other governments capable of effectively addressing the threat. And before any strike is taken, there must be near-certainty that no civilians will be killed or injured—the highest standard we can set.

Now, this last point is critical, because much of the criticism about drone strikes—both here at home and abroad—understandably centers on reports of civilian casualties. There's a wide gap between U.S. assessments of such casualties and nongovernmental reports. Nevertheless, it is a hard fact that U.S. strikes have resulted in civilian casualties, a risk that exists in every war. And for the families of those civilians, no words or legal construct can justify their loss. . . .

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. . . Any U.S. military action in foreign lands risks creating more enemies and impacts public opinion overseas. Moreover, our laws constrain the power of the President even during wartime, and I have taken an oath to defend the Constitution of the United States. The very precision of drone strikes and the necessary secrecy often involved in such actions can end up shielding our government from the public scrutiny that a troop deployment invites. It can also lead a President and his team to view drone strikes as a cure-all for terrorism.

And for this reason, I've insisted on strong oversight of all lethal action. After I took office, my administration began briefing all strikes outside of Iraq and Afghanistan to the appropriate committees of Congress. Let me repeat that: Not only did Congress authorize the use of force, it is briefed on every strike that America takes. Every strike. That includes the one instance when we targeted an American citizen—Anwar Awlaki, the chief of external operations for [Al-Qaeda in the Arabian Peninsula (AQAP)].

This week, I authorized the declassification of this action, and the deaths of three other Americans in drone strikes, to facilitate transparency and debate on this issue and to dismiss some of the more outlandish claims that have been made.⁷ For the record, I do not believe it would be constitutional for the government to target and kill any U.S. citizen—with a drone, or with a shotgun—without due process, nor should any President deploy armed drones over U.S. soil.

But when a U.S. citizen goes abroad to wage war against America and is actively plotting to kill U.S. citizens, and when neither the United States nor our partners are in a position to capture him before he carries out a plot, his citizenship should no more serve as a shield than a sniper shooting down on an innocent crowd should be protected from a SWAT team.

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Going forward, I've asked my administration to review proposals to extend oversight of lethal actions outside of warzones that go beyond our reporting to Congress. Each option has virtues in theory, but poses difficulties in practice. For example, the establishment of a special court to evaluate and authorize lethal action has the benefit of bringing a third branch of government into the process, but raises serious constitutional issues about presidential and judicial authority. Another idea that's been suggested—the establishment of an independent oversight board in the executive branch—avoids those problems, but may introduce a layer of bureaucracy into national security decision-making, without inspiring additional public confidence in the process. But despite these challenges, I look forward to actively engaging Congress to explore these and other options for increased oversight.⁸

Obama then raised possible revision of the 2001 Authorization to Use Military Force⁹ (AUMF).

Now, all these issues remind us that the choices we make about war can impact—in sometimes unintended ways—the openness and freedom on which our way of life depends. And that is why I intend to engage Congress about the existing Authorization to Use Military Force, or AUMF, to determine how we can continue to fight terrorism without keeping America on a perpetual wartime footing.

The AUMF is now nearly 12 years old. The Afghan war is coming to an end. Core al Qaeda is a shell of its former self. Groups like AQAP must be dealt with, but in the years to come, not every collection of thugs that labels themselves al Qaeda will pose a credible threat to the United States. Unless we discipline our thinking, our definitions, our actions, we may be drawn into more wars we don't need to fight, or continue to grant Presidents unbound powers more suited for traditional armed conflicts between nation states.

So I look forward to engaging Congress and the American people in efforts to refine, and ultimately repeal, the AUMF's mandate. And I will not sign laws designed to expand this mandate further. Our systematic effort to dismantle terrorist organizations must continue.

⁷ [Editor's note: see *U.S. Attorney General Confirms Deaths of Four Americans in U.S. Counterterrorism Operations*, this issue.]

⁸ White House Press Release, Remarks by the President at the National Defense University (May 23, 2013), at <http://www.whitehouse.gov/the-press-office/2013/05/23/remarks-president-national-defense-university> [hereinafter NDU Remarks].

⁹ Authorization for the Use of Military Force, Pub. L. No. 107-40, 115 Stat. 224 (2001).

But this war, like all wars, must end. That's what history advises. That's what our democracy demands.¹⁰

Obama concluded by discussing detention of terrorism suspects and his wish to end detentions at Guantánamo.¹¹

During the past decade, the vast majority of those detained by our military were captured on the battlefield. In Iraq, we turned over thousands of prisoners as we ended the war. In Afghanistan, we have transitioned detention facilities to the Afghans, as part of the process of restoring Afghan sovereignty. So we bring law of war detention to an end, and we are committed to prosecuting terrorists wherever we can.

The glaring exception to this time-tested approach is the detention center at Guantanamo Bay. The original premise for opening GTMO—that detainees would not be able to challenge their detention—was found unconstitutional five years ago. In the meantime, GTMO has become a symbol around the world for an America that flouts the rule of law. Our allies won't cooperate with us if they think a terrorist will end up at GTMO.

During a time of budget cuts, we spend \$150 million each year to imprison 166 people—almost \$1 million per prisoner. . . .

As President, I have tried to close GTMO. I transferred 67 detainees to other countries before Congress imposed restrictions to effectively prevent us from either transferring detainees to other countries or imprisoning them here in the United States.¹²

These restrictions make no sense. After all, under President Bush, some 530 detainees were transferred from GTMO with Congress's support. When I ran for President the first time, John McCain supported closing GTMO—this was a bipartisan issue. No person has ever escaped one of our super-max or military prisons here in the United States—ever. Our courts have convicted hundreds of people for terrorism or terrorism-related offenses, including some folks who are more dangerous than most GTMO detainees. They're in our prisons.

. . . .

Today, I once again call on Congress to lift the restrictions on detainee transfers from GTMO.

I have asked the Department of Defense to designate a site in the United States where we can hold military commissions. I'm appointing a new senior envoy at the State Department and Defense Department whose sole responsibility will be to achieve the transfer of detainees to third countries.¹³

¹⁰ NDU Remarks, *supra* note 8.

¹¹ Charlie Savage, *Obama Renews Effort to Close Prison in Cuba*, N.Y. TIMES, May 1, 2013, at A1; Scott Wilson & Zachary A. Goldfarb, *Obama Will Try Again to Shut Guantanamo*, WASH. POST, May 1, at A4; Peter Finn & Julie Tate, *New Guantanamo Plan Faces Same High Hurdles*, WASH. POST, May 24, 2013, at A4; Peter Finn & Scott Wilson, *A 2009 Redux on Guantanamo*, WASH. POST, May 25, 2013, at A4.

¹² [Editor's note: see John R. Crook, *Contemporary Practice of the United States*, 105 AJIL 333, 351 (2011).]

¹³ [Editor's note: The Department of State office previously charged with negotiating repatriation of detainees was closed in January 2013. Charlie Savage, *Office Working to Close Guantánamo Is Shuttered*, N.Y. TIMES, Jan. 29, 2013, at A14.]

I am lifting the moratorium on detainee transfers to Yemen so we can review them on a case-by-case basis. To the greatest extent possible, we will transfer detainees who have been cleared to go to other countries.¹⁴

....

Now, even after we take these steps one issue will remain—just how to deal with those GTMO detainees who we know have participated in dangerous plots or attacks but who cannot be prosecuted, for example, because the evidence against them has been compromised or is inadmissible in a court of law. But once we commit to a process of closing GTMO, I am confident that this legacy problem can be resolved, consistent with our commitment to the rule of law.¹⁵

Several Republican leaders criticized Obama's speech. Some attacked the speech as showing a lack of resolve and understanding, while others reiterated opposition to bringing any Guantánamo detainees to the United States.¹⁶

U.S. Attorney General Confirms Deaths of Four Americans in U.S. Counterterrorism Operations

In a May 22, 2013, letter to Senator Patrick Leahy, the chairman of the Senate Judiciary Committee, and other congressional leaders, U.S. Attorney General Eric Holder disclosed that four U.S. citizens had been killed by U.S. counterterrorism activities outside of zones of active hostility during the years of the Obama administration.¹ (Nearly four hundred drone strikes have reportedly been conducted by U.S. agencies in Pakistan, Somalia, and Yemen since 2009.²) An excerpt from Holder's letter follows:

I am writing to disclose to you certain information about the number of U.S. citizens who have been killed by U.S. counterterrorism operations outside of areas of active hostilities. Since 2009, the United States, in the conduct of U.S. counterterrorism operations against al-Qa'ida and its associated forces outside of areas of active hostilities, has specifically targeted and killed one U.S. citizen, Anwar al-Aulaqi. The United States is further aware of three other U.S. citizens who have been killed in such U.S. counterterrorism operations over that same time period: Samir Khan, 'Abd al-Rahman Anwar al-Aulaqi, and Jude Kenan Mohammed. These individuals were not specifically targeted by the United States.

As I noted in my speech at Northwestern,³ "it is an unfortunate but undeniable fact" that a "small number" of U.S. citizens "have decided to commit violent attacks against their own country from abroad." Based on generations-old legal principles and Supreme Court decisions handed down during World War II, as well as during the current conflict,

¹⁴ [Editor's note: see Charlie Savage, *Obama Lifts Moratorium on Transfer of Detainees*, N.Y. TIMES, May 24, 2013, at A8.]

¹⁵ NDU Remarks, *supra* note 8.

¹⁶ Baker, *Reviving Debate*, *supra* note 3; Sheryl Gay Stolberg, *Republicans Say Obama's Strategy Shows Misunderstanding of Terrorist Threat*, N.Y. TIMES, May 27, 2013, at A4.

¹ Letter from U.S. Attorney General Eric Holder to Senator Patrick Leahy, Chairman, U.S. Senate Committee on the Judiciary (May 22, 2013), available at <http://www.nytimes.com/interactive/2013/05/23/us/politics/23holder-drone-lettter.html> [hereinafter Holder Letter]; see also Charlie Savage & Peter Baker, *Obama, in a Shift, to Limit Targets of Drone Strikes*, N.Y. TIMES, May 23, 2013, at A1; Karen DeYoung & Peter Finn, *4 Americans Killed in Drone Strikes Since '09*, WASH. POST, May 23, 2013, at A1.

² DeYoung & Finn, *supra* note 1.

³ [Editor's note: see John R. Crook, *Contemporary Practice of the United States*, 106 AJIL 643, 673 (2012).]