

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.<sup>14</sup>

....

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.<sup>15</sup>

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.<sup>16</sup>

*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.<sup>1</sup> (Nearly four hundred drone strikes have reportedly been conducted by U.S. agencies in Pakistan, Somalia, and Yemen since 2009.<sup>2</sup>) 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,<sup>3</sup> "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,

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

<sup>15</sup> NDU Remarks, *supra* note 8.

<sup>16</sup> 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.

<sup>1</sup> 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.

<sup>2</sup> DeYoung & Finn, *supra* note 1.

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

it is clear and logical that United States citizenship alone does not make such individuals immune from being targeted. Rather, it means that the government must take special care and take into account all relevant constitutional considerations, the laws of war, and other law with respect to U.S. citizens—even those who are leading efforts to kill their fellow, innocent Americans. Such considerations allow for the use of lethal force *in a foreign country* against a U.S. citizen who is a senior operational leader of al-Qa'ida or its associated forces, and who is actively engaged in planning to kill Americans, in the following circumstances: (1) the U.S. government has determined, after a thorough and careful review, that the individual poses an imminent threat of violent attack against the United States; (2) capture is not feasible; and (3) the operation would be conducted in a manner consistent with applicable law of war principles.

These conditions should not come as a surprise: the Administration's legal views on this weighty issue have been clear and consistent over time. The analysis in my speech at Northwestern University Law School is entirely consistent with not only the analysis found in the unclassified white paper the Department of Justice provided to your Committee soon after my speech,<sup>4</sup> but also with the classified analysis the Department shared with other congressional committees in May 2011—months before the operation that resulted in the death of Anwar al-Aulaqi. The analysis in my speech is also entirely consistent with the classified legal advice on this issue the Department of Justice has shared with your Committee more recently. . . .

Anwar al-Aulaqi plainly satisfied all of the conditions I outlined in my speech at Northwestern. Let me be more specific. Al-Aulaqi was a senior operational leader of al-Qa'ida in the Arabian Peninsula (AQAP), the most dangerous regional affiliate of al-Qa'ida and a group that has committed numerous terrorist attacks overseas and attempted multiple times to conduct terrorist attacks against the U.S. homeland. And al-Aulaqi was not just a senior leader of AQAP—he was the group's chief of external operations, intimately involved in detailed planning and putting in place plots against U.S. persons.<sup>5</sup>

Holder here described al-Aulaqi's activities involving planning and execution of attacks against the U.S. homeland.

Based on this information, high-level U.S. government officials appropriately concluded that al-Aulaqi posed a continuing and imminent threat of violent attack against the United States. Before carrying out the operation that killed al-Aulaqi, senior officials also determined, based on a careful evaluation of the circumstances at the time, that it was not feasible to capture al-Aulaqi. In addition, senior officials determined that the operation would be conducted consistent with applicable law of war principles, including the cardinal principles of (1) necessity—the requirement that the target have definite military value; (2) distinction—the idea that only military objectives may be intentionally targeted and that civilians are protected from being intentionally targeted; (3) proportionality—the notion that the anticipated collateral damage of an action cannot be excessive in relation to the anticipated concrete and direct military advantage; and (4) humanity—a principle that requires us to use weapons that will not inflict unnecessary suffering. The operation was also undertaken consistent with Yemeni sovereignty.<sup>6</sup>

<sup>4</sup> [Editor's note: see John R. Crook, Contemporary Practice of the United States, 107 AJIL 431, 462 (2013).]

<sup>5</sup> Holder Letter, *supra* note 1.

<sup>6</sup> *Id.*