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Responses to the Ten Questions

Gregory S. McNeal

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RESPONSES TO THE TEN QUESTIONS

Gregory S. McNeal†

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1. WOULD PRESIDENT OBAMA HAVE THE AUTHORITY TO HOLD A U.S. CITIZEN WITHOUT CHARGE IN A MILITARY BRIG FOR SIX MONTHS IF THAT CITIZEN—WHO LIVES IN MINNESOTA—IS SUSPECTED OF LINKS TO AL QAEDA FOLLOWING A ONE-MONTH TRIP TO SOMALIA?

In response to the 9/11 attacks on the World Trade Center and the Pentagon, Congress enacted the Authorization for the Use of Military Force (AUMF), which gave then President George W. Bush authority to “use all necessary and appropriate force against those nations, organizations, or persons he determine[d] planned, authorized, committed, or aided the terrorist attacks.”¹ In addition, the resolution recognized that the President had the constitutional authority “to take action to deter and prevent acts of international terrorism against the United States.”² One of the more controversial actions taken by then President Bush, under this grant of authority, was to place two American citizens—Yaser Esam Hamdi and Jose Padilla—in military detention as enemy combatants.³ The asserted purposes of the detention were to prevent Hamdi and Padilla from rejoining terrorist groups and to interrogate them about al Qaeda, the Taliban, and related terrorist groups.⁴

This question of whether the President can detain an American citizen, in the United States, involves the scope of presidential and judicial powers.⁵ Critics argue that military detention is unconstitutional because it is “indefinite.”⁶ Military detention is only “indefinite” because there is no criminal conviction and sentence; therefore, “indefinite” does not mean “forever.”⁷ Critics also contend that detention without knowledge amounts to cruel and inhumane treatment. John Yoo argues that this assertion “flies in the

1. Authorization for Use of Military Force, Pub. L. No. 107-40, § 2(a), 115 Stat. 224 (2001) (codified at 50 U.S.C. § 1541 (Supp. V 2005)).

2. *Id.*

3. Detention, Treatment, and Trial of Certain Non-Citizens in the War Against Terrorism, 66 Fed. Reg. 57,833, 57,834 (Nov. 13, 2001).

4. H.L. POHLMAN, TERRORISM AND THE CONSTITUTION: THE POST-9/11 CASES 75 (2008).

5. SUE MAHAN & PAMALA L. GRISET, TERRORISM IN PERSPECTIVE 347 (2d ed. 2008). I do not directly address the legitimacy of such detention, merely the legality of such detention. For a discussion of legitimacy, see Gregory S. McNeal, *Institutional Legitimacy and Counterterrorism Trials*, 43 U. RICH. L. REV 967 (2009).

6. JOHN YOO, WAR BY OTHER MEANS: AN INSIDER'S ACCOUNT OF THE WAR ON TERROR 147 (2006) (citation omitted).

7. *Id.*

face of centuries of wartime practice.”⁸ Under the rules of war, “nations have always held enemy combatants until ‘the cessation of active hostiles.’”⁹ Yoo asserts that until the Supreme Court ruled in *Hamdi*, there had never been any suggestion that there was a requirement of a fixed period to detain the enemy, nor any requirement of a “trial” to fix any such “sentence.”¹⁰ While the war with al Qaeda has been going on for a long period, this does not mean that the United States should lose its right to detain captured enemy combatants.¹¹ The war will end at some point, and only then should detainees be released.¹²

In *Hamdi*, the Supreme Court plurality of four Justices argued that a U.S. citizen who had been designated as an enemy combatant—a person who is a “part of or supporting forces hostile to the United States or coalition partners”¹³—could be detained by the President. The plurality reasoned that Congress’s resolution authorizing the President to use “necessary and appropriate force” to counter the attacks of 9/11 was sufficient authorization for the President to detain an enemy combatant for the duration of the conflict in which he was involved.¹⁴ However, those detained were deemed entitled to a “fair opportunity” to rebut the facts on which their detentions were based in front of a “neutral decisionmaker.”¹⁵ Because of its decision on that ground, the plurality did not reach the issue of whether the President possesses plenary power to detain under Article II of the Constitution.¹⁶ Justice Clarence Thomas disagreed with the plurality’s “balancing act,” arguing that the compromise was an unjustified intrusion into executive power.¹⁷ Justice Antonin Scalia also disagreed, arguing that a detained U.S. citizen is entitled to a full criminal trial as long as Congress has not suspended habeas corpus.¹⁸

The *Padilla* case involved a U.S. citizen, arrested in Chicago, who was alleged to be involved in a plot to detonate a “dirty bomb”

8. *Id.*

9. *Id.* (citation omitted).

10. *Id.* This has since been mooted by the 2005 Detainee Act.

11. *Id.* at 148.

12. *Id.*

13. *Hamdi v. Rumsfeld*, 542 U.S. 507, 516 (2004).

14. *Id.* at 521.

15. *Id.* at 533.

16. *Id.* at 516–17.

17. *Id.* at 579 (Thomas, J., dissenting).

18. *Id.* at 554 (Scalia, J., dissenting).

in the United States.¹⁹ In preparation for this case, the Attorney General's Office requested a memorandum from the U.S. Department of Justice, Office of Legal Counsel, addressing whether presidential detention of a U.S. citizen as an "enemy belligerent" violated 18 U.S.C. § 4001(a) (2000).²⁰ The DOJ answered in the negative. When the issue reached the Supreme Court, it held, in a 5-4 decision, that there was no jurisdiction and vacated the Second Circuit's decision in Padilla's favor.²¹ Four Justices would have found jurisdiction based on the exceptional circumstances of the case and affirmed the holding below that detention of this sort is prohibited under 18 U.S.C. § 4001(a).²² Subsequently, the Fourth Circuit overruled a district court judgment, which held that Padilla's detention by the President was not supported in law.²³ The court held that Padilla's detention was expressly authorized by Congress through the AUMF.²⁴

Similarly, Ali Saleh Kahlah al-Marri, a legal resident of the United States and citizen of Qatar, was arrested at his home by FBI agents and held as a material witness in the Government's investigation into the attacks of 9/11.²⁵ On June 23, 2003, the Government sought to dismiss the indictment against al-Marri and transferred him to military custody based on an order signed by President Bush declaring al-Marri to be an enemy combatant who was closely associated with al Qaeda. Al-Marri challenged his detention, and the Fourth Circuit ultimately held that the Government can "maintain [a] terrorist suspect in military custody if the facts, as alleged by the government, were true, but that there must be sufficient due process to determine the veracity of those allegations."²⁶ The case was appealed to the U.S. Supreme Court, but was mooted by Presi-

19. JENNIFER K. ELSEA, DETENTION OF AMERICAN CITIZENS AS ENEMY COMBATANTS 27 (2008).

20. Memorandum from John C. Yoo, Deputy Assistant Att'y Gen., Office of Legal Counsel, to Daniel J. Bryant, Assistant Att'y Gen., Office of Legislative Affairs, Applicability of 18 U.S.C. § 4001(a) to Military Detention of United States Citizens (June 27, 2002), available at <http://www.justice.gov/opa/documents/memodetentionuscitizens06272002.pdf>.

21. *Rumsfeld v. Padilla*, 542 U.S. 426, 451 (2004).

22. *Id.* at 455 (Stevens, J., dissenting).

23. *Padilla v. Hanft*, 423 F.3d 386, 397 (4th Cir. 2005), *cert. denied*, 547 U.S. 1062 (2006).

24. *Id.*

25. *See al-Marri v. Pucciarelli*, 534 F.3d 213 (4th Cir. 2008).

26. DAN E. STIGALL, COUNTERTERRORISM AND THE COMPARATIVE LAW OF INVESTIGATIVE DETENTION 76 (2009).

dent Obama's decision to transfer al-Marri from military to civilian custody. Thus, the issue of presidential power to detain citizen enemy combatants is unclear. Although the practice of detention for the remainder of the conflict in which the enemy was involved has been used throughout history, the new era of long-term conflict, introduced by the War on Terror, may lead to a significant shift in detention practices.

2. WOULD IT BE LEGAL FOR THE OBAMA ADMINISTRATION TO LAUNCH A PREDATOR STRIKE ON OSAMA BIN LADEN IF HE HAS BEEN TRACKED TO A HOUSE ON THE OUTSKIRTS OF KARACHI, PAKISTAN?

Determining the legality of U.S. MQ-1 Predator and MQ-9 Reaper drone strikes within Pakistan is a complicated issue that takes into account a number of variables, which must be weighed independently to determine whether a drone attack is legal and perhaps more importantly "prudent." Challenges to the legality of the United States's use of Predator or Reaper drones to attack al Qaeda targets within Pakistani territory typically fall into one of three categories. The first legal challenge arises out of the potential violations of Pakistani territorial integrity and sovereignty by launching drones from airfields inside of Afghanistan and crossing into Pakistani airspace to conduct strikes on suspected insurgents and al Qaeda targets.²⁷ The second challenge to the use of drones arises out of alleged violations of customary international law and the laws of war. The laws of war require a subjectively particularized degree of proportionality and military necessity when attacking a target.²⁸ The legal allegation is that the use of drones is inherently disproportional and thus constitutes a violation of international law. The final legal challenge to the use of drones also arises out of customary international law and the laws of war and is closely related to the second challenge to the drone program. However, it can be considered its own category, in that the drone program fails to sufficiently mitigate civilian casualties and collater-

27. A violation of sovereignty of this nature is in violation of Article 2, paragraph 4 of the U.N. Charter, which reads in pertinent part: "All Members shall refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any state, or in any other manner inconsistent with the Purposes of the United Nations." U.N. Charter art. 2, para. 4; *see also* U.N. Charter art. 51.

28. *See generally* Geneva Convention Relative to the Treatment of Prisoners of War, Aug. 12, 1949, 6 U.S.T. 3316, 75 U.N.T.S. 135.

al damage as is required by the Geneva Conventions and customary international law.²⁹

I. VIOLATION OF SOVEREIGNTY AND TERRITORIAL INTEGRITY

The first legal challenge to the drone program arises from potential violations of Pakistani airspace as the drones may cross the internationally recognized border between the two nations without clearance or permission from the Pakistani government and kill insurgent targets and/or substantially injure Pakistani civilians and property.³⁰ Such violations of sovereignty would be in violation of the U.N. Charter Article 2, paragraph 4. The conclusion seems to be rather straightforward that such an action is a violation of the U.N. Charter, and is technically an act of war against Pakistan, however this neglects the reality of the private interaction between the United States and Pakistan. Perhaps most importantly a large amount of evidence suggests that U.S. drones are not located in Afghanistan, but rather are stationed principally at Shamsi and Jacobabad airbases within Pakistan.³¹ This suggests a deeper relationship exists between the United States and Pakistan as it relates to the operation of drones within Pakistani airspace. “[T]he Pakistani government apparently has tacitly agreed that these strikes may be undertaken without specific consent to each operation, so long as they target ‘foreign fighters’ and not Pakistani Taliban, though the existence of that tacit consent is disputed.”³² There is additional evidence, which suggests that this relationship has been expanded

29. *Id.*

30. See U.N. Charter art. 2, para. 4. Of course, it is entirely possible that the Pakistani government has privately authorized such strikes even if they publicly denounce them.

31. See generally Farhan Bokhari, *Officials Confirm CIA Drones in Pakistan*, CBS NEWS, Feb. 19, 2009, <http://www.cbsnews.com/blogs/2009/02/19/world/worldwatch/entry4812368.shtml>; Habibullah Khan & Nick Schifrin, *Allegations That CIA Predator Drones Have Bases in Pakistan*, ABC NEWS, Feb. 23, 2009, <http://abcnews.go.com/International/story?id=6938365&page=1>; Greg Miller, *Feinstein Comment on U.S. Drones Likely to Embarrass Pakistan*, L.A. TIMES, Feb. 13, 2009, <http://articles.latimes.com/2009/feb/13/world/fg-uspakistan13?pg=1>; Jeremy Page, *Google Earth Reveals Secret History of US Base in Pakistan*, TIMES ONLINE, Feb. 19, 2009, <http://www.timesonline.co.uk/tol/news/world/asia/article5762371.ece>.

32. See Sean D. Murphy, *The International Legality of U.S. Military Cross-Border Operations from Afghanistan into Pakistan* 14 (The George Washington U. Law Sch. Pub. Law & Legal Theory Working Paper Group, Paper No. 451, 2008), available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1296733 (citation omitted).

to allow Pakistani military and intelligence officers a greater role in the drone program.³³ The implication being that while the Pakistani government may publicly protest the drone attacks, they are in fact privately approving and participating in them thereby removing any claims arising from a violation of sovereignty.

Additional weaker arguments can be made that the Security Council, in their resolutions concerning Afghanistan, the Taliban, al Qaeda, and the International Security Assistance Force (ISAF), has authorized such cross-border actions against insurgent forces. However, none of the attendant resolutions have explicitly authorized cross-border action into Pakistan by either the U.S. military or the ISAF.³⁴

An additional and far more complicated argument for such an attack, as hypothesized above, can be made that such action is authorized by Article 51 of the U.N. Charter, which states in pertinent part "that the prohibition on the use of force embedded in Article 2(4) may be justified when acting in self-defense."³⁵ Given that the United States's operation in Afghanistan has been continuous since the al Qaeda attack on 9/11, the argument can be made that the cross-border drone strike was a permissible extension of self-defense arising out of the original act even though it occurred several years later.³⁶ The basis for such an argument is significantly strengthened by the unquestioned responsibility of Osama bin Laden for the 9/11 attacks. However, such claims of self-defense may be negated by violations of third-party sovereignty. Nonetheless, even if this is a breach of United States's obligations under international law, it may be justified as an "efficient breach." Efficient breach holds that striking a known terrorist such as Osama bin La-

33. See generally Julian E. Barnes, *U.S. Acknowledges Joint Drone Program with Pakistan*, L.A. TIMES, May 14, 2009, at A23; Julian E. Barnes & Greg Miller, *Pakistanis Get a Say in Airstrikes; Islamabad and the U.S. Military Team Up to Carry Out Drone Attacks on Militants. It Marks New Roles for Both*, L.A. TIMES, May 13, 2009, at A1.

34. See generally S.C. Res. 1368, U.N. Doc. S/RES/1368 (Sept. 12, 2001); S.C. Res. 1373, U.N. Doc. S/RES/1373 (Sept. 28, 2001); The Secretary-General, *Agreement on Provisional Arrangements in Afghanistan Pending the Re-establishment of Permanent Government Institutions, addressed to the President of the Security Council*, U.N. Doc. S/2001/1154 (Dec. 5, 2001); S.C. Res. 1386, ¶ 1, U.N. Doc. S/RES/1368 (Dec. 20, 2001); S.C. Res. 1413, ¶ 2, U.N. Doc. S/RES/1413 (May 23, 2002); S.C. Res. 1833, U.N. Doc. S/RES/1833 (Sept. 22, 2008); S.C. Res. 1510, ¶ 1, U.N. Doc. S/RES/1510 (Oct. 13, 2003).

35. See Murphy, *supra* note 32, at 28 (citing U.N. Charter art. 51).

36. Compare *id.* at 28-29, with Jordan J. Paust, *Use of Armed Force against Terrorists in Afghanistan, Iraq, and Beyond*, 35 CORNELL INT'L L.J. 533, 540-43 (2002).

den is preferable to allowing terrorists to remain at large solely out of fear of infringing on territorial sovereignty.³⁷

II. PROPORTIONALITY

The international laws of war speak of the rule of proportionality. The principle of proportionality in international laws of war prohibits the use of any kind or degree of force that exceeds that needed to accomplish the military objective. Proportionality compares the military advantage gained to the harm inflicted while gaining this advantage. Proportionality requires a balancing test between the concrete and direct military advantage anticipated by attacking a legitimate military target and the expected incidental civilian injury or damage. Under this balancing test, excessive incidental losses are prohibited. Proportionality seeks to prevent an attack in situations where civilian casualties would clearly outweigh military gains. This principle encourages combat forces to minimize collateral damage—the incidental, unintended destruction that occurs as a result of a lawful attack against a legitimate military target.³⁸

Under the theory of proportionality the question becomes whether a drone attack upon Osama bin Laden is a proportional response to the threat that he poses and the attacks he has masterminded. Facially it appears to be an open-and-shut case. A drone attack upon the mastermind of the 9/11 attacks and head of an international terrorist organization responsible for numerous attacks around the world appears to be a proportional response. However, it may be legally significant that such an attack would occur within the borders of a third-party nation. Pakistan bears no responsibility for the attacks that precipitated the United States's armed response into Afghanistan.³⁹ The United States cannot rely upon the principals of proportionality that allowed their prior intervention into Afghanistan. The analysis would be no different if a drone operating in Tunisia or Canada had found Osama.⁴⁰

37. See Gregory S. McNeal & Brian J. Field, *Snatch-and-Grab Ops: Justifying Extraterritorial Abduction*, 16 *TRANSNAT'L L. & CONTEMP. PROBS.* 491, 520 (2007); see also Jeffery L. Dunoff & Joel P. Trachtman, *Economic Analysis of International Law*, 24 *YALE J. INT'L L.* 1, 31 (1999).

38. Rod Powers, *Law of Armed Conflict: The Rules of War*, ABOUT.COM, <http://usmilitary.about.com/cs/wars/a/loac.htm>.

39. See Murphy, *supra* note 32, at 40–41.

40. See *id.*

However, an argument does exist that such action is warranted because it is a military necessity,⁴¹ and every nation has a right to protect itself against international terrorism.⁴² This theory of defense is further strengthened by the nature and importance of the target that Osama bin Laden presents. The theory does not discount the potential violations of sovereignty, but as outlined above, Pakistan's level of complicity in the drone program may obviate any issues arising out of potential violation of sovereignty claims.

III. CIVILIAN CASUALTIES AND COLLATERAL DAMAGE

The United States has signed and ratified the Geneva Convention Relative to the Protection of Civilian Persons in Time of War, dated August 12, 1949. Legally, the United States is required to mitigate civilian casualties and collateral damage when attacking the enemy. Such concerns are also expressed in the theories of military necessity and proportionality. The current drone program has caused a number of civilian casualties and collateral damage, yet it has continued. It is these collateral damages, which have drawn a great amount of international attention to the drone program. In the hypothetical, it is reasonable to expect that such civilian casualties and collateral damage could potentially exist. Under international law, military forces are not required to reduce civilian casualties to zero, but only mitigate and apply the theories of proportionality and military necessity. Overall, the program may have some legal liability for such damages under international human rights law. However, the significance of the target and the demonstrated difficulty in locating Osama bin Laden over nearly a decade will likely outweigh the potential collateral damage and civi-

41. Military necessity is defined as follows:

Military necessity requires combat forces to engage in only those acts necessary to accomplish a legitimate military objective. Attacks shall be limited strictly to military objectives. In applying military necessity to targeting, the rule generally means the United States Military may target those facilities, equipment, and forces which, if destroyed, would lead as quickly as possible to the enemy's partial or complete submission.

Powers, *supra* note 38.

42. See Murphy, *supra* note 32, at 43-44. See also Rein Müllerson, *Jus ad Bellum and International Terrorism*, 79 INT'L L. STUD. 75, 107, 109 (2003) (finding that "terrorism belongs to the domain of jus ad bellum as terrorist attacks may constitute a specific, non-traditional . . . form of an armed attack that gives rise to the right of self-defense . . . [and] the right to self-defense today includes measures undertaken against non-state entities"); Sean D. Murphy, *Self-Defense and the Israeli Wall Advisory Opinion: An Ipse Dixit from the ICJ?*, 99 AM. J. INT'L L. 62 (2005).

lian casualties that may result from attacking a house on the outskirts of Karachi. It is important to note that over the multi-year span of the drone program, no legal challenges to any attack have been formally brought.⁴³

IV. CONCLUSION

The first legal issue, which concerns potential violations of sovereignty, is mitigated by two major factors. First, the drone is most likely to be launched from a location inside Pakistan. Second, the Pakistani government appears to have consented to the drone program, and additional evidence suggests that they have been taking an increasing role in the program as a result of the fundamentalist insurgency within their borders. The last two legal challenges to such a strike arise out of customary international law and the laws of war. Largely, U.S. strikes against al Qaeda have been accepted as proportional to the 9/11 attacks. Such proportionality and self-defense assessments are complicated by the fact that such a strike will occur in a third-party country. The consensus opinion is that such a strike would negate any proportionality or self-defense arguments. However, the conclusion is not so clear-cut, as Pakistan is an active participant in the War on Terror, and in the drone program itself. Additionally, the transnational nature of al Qaeda and the threat that it poses not only to America, but also to Pakistan and various other nations, will likely present a valid defense that the strike was necessary, an act of self-defense, and otherwise justifiable as an "efficient breach." The last challenge is closely related to the second in that it stems from accepted practices of warfare, which require the mitigation of civilian casualties. This legal challenge is largely conjecture and based on the overall history of the drone program, which has caused some civilian casualties and collateral damage. These problems are more political than legal. While there is a duty to mitigate civilian casualties, there is no legal requirement under the laws of war to reduce civilian casualties to

43. See generally Irfan Ahmad, *Role of Airpower for Counterinsurgency in Afghanistan and FATA (Federally Administered Tribal Areas)* (June 2009) (unpublished M.A. thesis, Naval Postgraduate School), <http://www.dtic.mil/cgi-bin/GetTRDoc?AD=ADA501136&Location=U2&doc=GetTRDoc.pdf> (discussing in detail the drone program, the numbers of casualties, and overall negative treatment towards the drone program); see also Bill Roggio & Alexander Mayer, *US Predator Strikes in Pakistan: Observations*, THE LONG WAR J., July 21, 2009, http://www.longwarjournal.org/archives/2009/07/us_predator_strikes_3.php (presenting a comprehensive numerical assessment of the drone program).

zero. The high value nature of the target (Osama bin Laden) is likely to outweigh any concerns presented under these three legal constructs.

8. DOES AL QAEDA POSE AN EXISTENTIAL THREAT TO THE UNITED STATES?

I. INTRODUCTION

As can be expected when determining whether al Qaeda presents an existential threat to the United States, there are two diametrically opposed schools of thought. On the one hand there is a significant group of experts, which believe that al Qaeda is a threat and will continue to present a threat to the United States for potentially the next twenty years.⁴⁴ On the other hand, there is a group that believes al Qaeda has been significantly weakened and faces significant, if not insurmountable, difficulties in mounting additional attacks upon the American homeland.⁴⁵ However, portions of this group do acknowledge that al Qaeda does present a threat to other geographical locations.⁴⁶ For purposes of organization, I will first present the core argument of the first expert group who contends al Qaeda still presents a significant threat to the United States. Subsequently, I present the alternative argument which addresses the position that al Qaeda does not present an existential threat to the United States. I conclude by definitively answering whether al Qaeda still presents an existential threat to the national security in such a manner that the United States should concern itself with actively defending against that threat.

44. See Jeff Bliss & Tony Capaccio, *Al-Qaeda Will Pose a Threat for 20 Years*, *Top Spy Official Says*, BLOOMBERG.COM, Aug. 5, 2009, <http://www.bloomberg.com/apps/news?pid=20601103&sid=aKKnTMPGelvw>.

45. See generally Michael Jacobson, *The Changing and Expanding al-Qaeda Threat*, THE WASHINGTON INST. FOR NEAR EAST POLY, July 25, 2007, <http://www.washingtoninstitute.org/templateC05.php?CID=2639>; KENNETH KATZMAN, CONGRESSIONAL RESEARCH SERVICE, *AL QAEDA: PROFILE AND THREAT ASSESSMENT* (2005).

46. See generally KATZMAN, *supra* note 45; Megan McArdle, *Existential Threats*, THE ATLANTIC, June 25, 2008, http://meganmcardle.theatlantic.com/archives/2008/06/existential_threats.php (discussing terrorism threats to the United States in general); John Mueller, *The US Terrorist Threat is Overblown*, NEW PERSP. Q., Summer 2008, http://www.digitalnpq.org/archive/2008_summer/18_mueller.html.

II. AL QAEDA PRESENTS AN EXISTENTIAL THREAT TO THE UNITED STATES

The most recent Congressional Research Service Report to specifically address the issue of whether al Qaeda presents a threat to the United States summed up this first group's perspective:

Al Qaeda leadership remains in contact with, and possibly even in control of numerous Islamic militant cells and groups that continue to commit acts of terrorism, such as the July 7, 2005 bombings of the London underground transportation system. According to those who subscribe to this view, Al Qaeda as an organization has not been weakened to the degree that some Administration officials assert, and the global effort against Islamic terrorism would benefit significantly from finding and capturing Al Qaeda founder Osama bin Laden and his top associate, Ayman al-Zawahiri. Subscribers to this view believe that a coordinated attack on the scale of September 11 should not be ruled out because the remaining Al Qaeda structure is sufficiently well-organized to conduct an effort of that magnitude.⁴⁷

While al Qaeda has been significantly restricted in its operations since 2001 due to U.S. military operations and coordinated global action by law enforcement agencies, the very nature of al Qaeda's leadership model has allowed them to consistently replace fallen or captured leaders.⁴⁸ Regardless of the individual leadership, the group remains dedicated to terrorist acts upon the United States, and prevailing intelligence has shown their desire to obtain weapons of mass destruction and detonate them inside the United States.⁴⁹

Declassified elements of the 2007 National Security Estimate contends that al Qaeda is for all intents and purposes a resurgent organization, recovered from the initial shock of the United States's response to the 9/11 attacks. The terrorist organization has all "elements needed to plan and carry out an attack against the United States, including key leadership, operational lieutenants, and a safe haven in the federally administered tribal areas of Pakistan. The NIE suggests that any al Qaeda attack inside the United

47. KATZMAN, *supra* note 45, at Summary.

48. Bliss & Capaccio, *supra* note 44.

49. *Id.*

States would likely involve operatives coming from outside.”⁵⁰

III. AL QAEDA DOES NOT PRESENT AN EXISTENTIAL THREAT TO THE UNITED STATES

The Congressional Research Service defines this second group of al Qaeda analysts as those who:

[B]elieve that the Al Qaeda organization and its leadership are no longer as relevant to assessing the global Islamic terrorist threat as they were on September 11, 2001. Some believe U.S. and allied counter efforts have weakened Al Qaeda’s central leadership structure and capabilities to the point where Al Qaeda serves more as inspiration than as an actual terrorism planning and execution hub. According to this view, the threat from Al Qaeda has been replaced by a threat from a number of loosely affiliated cells and groups that subscribe to Al Qaeda’s ideology but have little, if any, contact with remaining Al Qaeda leaders. Those who take this view believe that catastrophic attacks similar to those on September 11, 2001 are unlikely because terrorist operations on that scale require a high degree of coordination.⁵¹

Essentially, this second group asserts that although al Qaeda once presented an existential threat to the United States, it no longer does so. Operational losses in both Iraq and Afghanistan, as well as increased global pressure on terrorist groups, have effectively changed the global terrorism landscape. The current trend in international terrorism is “homegrown” terrorists that have little if any affiliation with al Qaeda.⁵² Overall, the terrorist organization has been forced to reassess both its mission and role. While al Qaeda is still an operational threat, its focus has shifted to more of a leadership role of the larger jihadist movement with al Qaeda leadership serving to direct the ideological, motivational, and propaganda campaigns as an umbrella organization.⁵³ As a result of its presently limited capabilities, al Qaeda has chosen to focus upon these new leadership functions as well as direct its operational efforts towards “fomenting unrest in Iraq, Afghanistan, the Per-

50. Jacobson, *supra* note 45.

51. KATZMAN, *supra* note 45, at Summary.

52. RAPHAEL PERL, CONGRESSIONAL RESEARCH SERVICE, TRENDS IN TERRORISM: 2006 (2006).

53. *Id.* at Summary.

sian Gulf states, and countries neighboring Israel."⁵⁴

John Mueller, in his assessment of al Qaeda's threat, presents a unique numerical analysis, which relies upon assessments and analysis by University of Pennsylvania professor and retired intelligence officer Marc Sageman. Sageman contends that there are essentially three groups of al Qaeda members. The first group numbers a few dozen members left over from the Soviet invasion of Afghanistan. The second group consists of perhaps 100 fighters from the 1990's. The third group consists of sympathizers and potential jihadists spread over the world that remain connected via the Internet.⁵⁵ Mueller contends that terrorism violence outside of warzones which can be attributed to al Qaeda has totaled between 200–300 persons, less than the number of persons who drown in U.S. bathtubs ever year.⁵⁶ Additionally, since 2001, the FBI has yet to uncover an al Qaeda terrorist cell in the United States. All told, the numbers and abilities of al Qaeda do not add up to an existential threat against the United States.⁵⁷

IV. CONCLUSION

The vast amount of empirical evidence strongly suggests that al Qaeda has shifted their focus to leading and mentoring the global jihadist movement, which has become arguably a loose confederation of terrorist organizations principally concerned with local operations. However, al Qaeda has not renounced their desire to carry out operations inside the United States. The evidence does not suggest that this shift in operational focus is a permanent one. Rather, it may only be a temporary strategy designed to maintain their global extremist influence while endeavoring to strike again at the American homeland. The organization has already demonstrated its ability to do so. Until such time when there exists concrete evidence that al Qaeda is effectively shattered and no longer has the means and capabilities to strike at America, considering them anything but an existential threat to the United States would be a gross underestimation of their demonstrated strategic resilience, resourcefulness, and deadly dedication to their cause.

54. CHRISTOPHER M. BLANCHARD, CONGRESSIONAL RESEARCH SERVICE, *AL QAEDA: STATEMENTS AND EVOLVING IDEOLOGY* (2007).

55. Mueller, *supra* note 46.

56. *Id.*

57. *Id.*