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My Fellow Americans, We Are Going to Kill You: The Legality of Targeting and Killing U.S. Citizens Abroad

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I. INTRODUCTION: HELLFIRE

Silent and cold. At twenty thousand feet, the temperature is minus ten degrees Fahrenheit. At almost a thousand miles per hour, sound cannot keep up. Heat and noise struggle in the turbulence. Three miles away, seven thousand miles from American soil, an American citizen driving an empty road has ten seconds to live. As a leader in an organization actively engaged in armed conflict against the United States, this American citizen has become an enemy of the United States. In response to the threat he poses to his fellow Americans, his government added him to a kill list, targeted him, and launched a military operation against him. The Hellfire finds its mark. The heat and noise catch up.[1]

The United States targets and kills U.S. citizens,[2] but debate rages over the targeted killing program's legality.[3] The most recent case, *Al-Aulaqi v. Obama*, set the U.S. government against the American Civil Liberties Union ("ACLU") and the Center for Constitutional Rights ("CCR").[4] Around Christmas 2009, after the

1. This is based very loosely on actual events. *See* Dominic Rushe, Chris McGreal, Jason Burke & Luke Harding, *Anwar al-Awlaki Death: U.S. Keeps Role Under Wraps to Manage Yemen Fallout*, THE GUARDIAN, Sept. 30, 2011, http://www.guardian.co.uk/world/2011/sep/30/anwar-al-awlaki-yemen (describing the Predator drone strike that killed Al-Aulaqi at 9:55 a.m. while he was driving on a road outside Khasaf in the desert of Yemen's Jawf province); Charlie Savage, *Secret U.S. Memo Made Legal Case to Kill a Citizen*, N.Y. TIMES, Oct. 9, 2011, at A1, *available at* http://www.nytimes.com/2011/10/09/world/middleeast/secret-us-memo-made-legal-case-to-kill-a-citizen.html; *see also* Hamdi v. Rumsfeld, 542 U.S. 507, 597 (2004) (Thomas, J., dissenting) ("[A] Central Intelligence Agency (CIA) Predator drone fired a Hellfire missile at a vehicle in Yemen carrying an al-Qaeda leader, a citizen of the United States . . . .").

2. Savage, *supra* note 1; Interview by Michael Isikoff with Michael Leiter, Dir., Nat'l Counterterrorism Ctr., in Aspen, Colo. (June 30, 2010) (transcript available at http://www.nctc.gov/press_room/speeches/leiter_transcript_aspen_institute_063010.pdf).

3. This Note will only examine legality. The issue of morality is too large to address here.

4. Al-Aulaqi v. United States, 727 F. Supp. 2d 1, 8 (D.D.C. 2010) (dismissed because the father lacked standing to bring suit on behalf of his adult son).

government placed Anwar Al-Aulaqi on a kill list,[5] his father, Nasser Al-Aulaqi, challenged the placement. The legal battle saw substantial coverage in the popular and legal press,[6] but the issue was never decided on its merits. For Al-Aulaqi himself, the point is now moot—we already killed him.[7] After the killing, the U.S. Department of Justice's Office of Legal Counsel for the Obama Administration prepared a secret memo ("OLC memo")[8] detailing why it believed the practice was legal as applied to Al-Aulaqi.[9] The Supreme Court has not yet decided the legality of this type of targeted killing, but members of the Court considered it when deciding a related issue.[10]

This Note argues the U.S. government can conduct extrajudicial targeted killings of U.S. citizens legally by adhering to international law and domestic due process protections. This Note examines only targeted killings by the United States of its own citizens. Its focus is therefore different and more constrained than prior scholarship on targeted killing.[11] This Note's conclusions differ

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5. Savage, *supra* note 1.

6. *See, e.g.*, Spencer Hsu, *U.S. Officials Defend 'State Secrets' Claim in al-Aulaqi Suit*, WASH. POST, Sept. 26, 2010, at A2, *available at* http://www.washingtonpost.com/wp-dyn/content/article/2010/09/25/AR2010092503089.html (discussing the government's use of the state secret privilege to dismiss the lawsuit brought by Al-Aulaqi); Kenneth Anderson, *Judge Dismisses Al-Aulaqi Targeted Killing Case*, THE VOLOKH CONSPIRACY (Dec. 7, 2010), http://www.volokh.com/2010/12/07/judge-dismisses-al-aulaqi-targeted-killing-case/ (providing an initial reaction to the dismissal of the Al-Aulaqi case); Robert Chesney, *Outline of the Al-Aulaqi Opinion for Those in a Rush . . . .*, LAWFARE (Dec. 7, 2010), http://www.lawfareblog.com/2010/12/outline-of-the-al-aulaqi-opinion-for-those-in-a-rush (providing an overview of the various issues in the case, including excerpts from Judge Bates's opinion); Chez Pazienza, *Killing an Arab-American: The Debate over Anwar al-Aulaqi*, THE HUFFINGTON POST (Sept. 28, 2010), http://www.huffingtonpost.com/chez-pazienza/anwar-al-aulaqi-debate_b_741830.html (providing an overview of the Al-Aulaqi case and exploring the merits of the government's policy); *Times Topics: Anwar al-Awlaki*, N.Y. TIMES (Oct. 10, 2011), http://topics.nytimes.com/topics/reference/timestopics/people/a/anwar_al_awlaki/index.html (providing a biography and listing eighty articles in the *New York Times* on Al-Aulaqi).

7. Savage, *supra* note 1.

8. *Id.*

9. *Id.* It is worth noting that the OLC memo was prepared after President Barack Obama gave the order to kill Al-Aulaqi. Jesselyn Radack, *Bush Logic in Secret Memo to Assassinate American al-Awlaki*, DAILY KOS (Oct. 9, 2011), http://www.dailykos.com/story/2011/10/09/1024407/-Bush-Logic-in-Secret-Memo-to-Assassinate-American-al-Awlaki.

10. Members of the Court, however, briefly considered it when deciding a related issue. *See* Hamdi v. Rumsfeld, 542 U.S. 507, 597 (2004) (Thomas, J., dissenting) ("[A] Central Intelligence Agency (CIA) Predator drone fired a Hellfire missile at a vehicle in Yemen carrying an al Qaeda leader, a citizen of the United States.").

11. *See, e.g.*, David Kretzmer, *Targeted Killing of Suspected Terrorists: Extra-Judicial Executions or Legitimate Means of Defence?* 16 EUR. J. INT'L L. 171, 191 (2005) (focusing on the targeted killing of terrorists in general).

from more general examinations of targeted killing that based their conclusions on treaties to which the United States is not a party.[12]

Part I introduces targeted killing. Part II provides background information. It differentiates targeted killing from assassination and execution. It then examines the legality of targeted killing generally, under the frameworks of U.S. and international law. It describes some of the theories advanced in favor of and against targeted killing. Part II also establishes the minimum criteria under which targeted killing is legal. Part III analyzes the issues at the heart of this Note, identifying the additional protections afforded to American citizens and overlaying them onto the targeted killing framework established in Part II. It focuses primarily on the protections in the U.S. Constitution. Part IV draws on the law as established in Parts II and III to advocate the continued practice of targeted killing. It recommends additional protections when the target is an American citizen. Part V concludes that the U.S. government can effectively target and kill U.S. citizens who are participating in armed conflict against the United States abroad while maintaining due process protections for all citizens by notifying the target and affording him an opportunity for a hearing.

II. TARGETED KILLING IS A DISTINCT TYPE OF STATE ACTION REQUIRING DISTINCT RULES

A. Extrajudicial Killing

Targeted killing does not have an agreed-upon definition under international law.[13] For purposes of this Note, "targeted killing" denotes a state's intentional and premeditated use of lethal force through agents acting under color of law against a specific, reasonably

12. *See, e.g.*, Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts, Dec. 12, 1977, 1125 U.N.T.S. 3 [hereinafter Protocol I]; Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of Non-International Armed Conflicts, Dec. 12, 1977 [hereinafter Protocol II], 1125 U.N.T.S. 609. Both provide legal standards limiting the use of targeted killing beyond the degree to which the United States is bound, because the United States has not ratified these protocols to the Geneva Conventions.

13. Special Rapporteur on Extrajudicial, Summary or Arbitrary Executions, *Study on Targeted Killings*, ¶¶ 7–8, U.N. Doc. A/HRC/14/24/Add.6 (May 28, 2010) (by Philip Alston) [hereinafter Report of the Special Rapporteur], *available at* http://www2.ohchr.org/english/bodies/hrcouncil/docs/14session/A.HRC.14.24.Add6.pdf.

unobtainable individual.[14] It has become the preferred term for military operations of this nature. In the context of U.S. operations, targeted killing often involves a missile strike by an unmanned aerial vehicle, the Predator drone, against a known terrorist.[15] The government elects to kill individuals who have military importance. Targeted killings are extrajudicial, in that they do not require court approval.[16] Extrajudicial killings are not generally legal under international law.[17] However, this Note argues that they can be legal in certain extraordinary situations, including self-defense cases in which the state addresses due process concerns.

An extrajudicial killing is a "deliberated killing not authorized by a previous judgment pronounced by a regularly constituted court affording all the judicial guarantees which are recognized as indispensable by civilized peoples."[18] The term specifically excludes "any such killing that, under international law, is lawfully carried out under the authority of a foreign nation."[19] This exemption refers to

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14. This definition tracks closely to the definition offered by the U.N. Special Rapporteur on extrajudicial, summary, or arbitrary executions, with some important differences. I selected this definition because of the Rapporteur's opposition to the practice. The modifications constrain it to potentially legal targeted killing. *Cf. id.* ¶ 1 ("A targeted killing is the intentional, premeditated and deliberate use of lethal force, by States or their agents acting under colour of law, or by an organized armed group in armed conflict, against a specific individual who is not in the physical custody of the perpetrator.").

15. *See, e.g.*, Hamdi v. Rumsfeld, 542 U.S. 507, 597 (2004) (Thomas, J., dissenting) ("[A] Central Intelligence Agency (CIA) Predator drone fired a Hellfire missile at a vehicle in Yemen carrying an al Qaeda leader, a citizen of the United States . . . ."); Savage, *supra* note 1.

16. But, as opposed to "extrajudicial executions," they can be legal. Report of the Special Rapporteur, *supra* note 13, ¶ 10.

17. *See, e.g.*, European Convention on Human Rights art. 2, Nov. 4, 1950, 213 U.N.T.S. 221 ("Everyone's right to life shall be protected by law. No one shall be deprived of his life intentionally save in the execution of a sentence of a court following his conviction of a crime for which this penalty is provided by law."); Universal Declaration of Human Rights art. 3, G.A. Res. 217 (III) A, U.N. Doc. A/RES/217(III) (Dec. 10, 1948) ("Everyone has the right to life, liberty, and security of person."); International Covenant on Civil and Political Rights art. 6, G.A. Res. 2200A (XXI), U.N. GAOR, 21st Sess., Supp. No. 16, U.N. Doc. A/6316, at 52 (Dec. 16, 1966) ("Every human being has the inherent right to life. This right shall be protected by law."); African [Banjul] Charter on Human and Peoples' Rights art. 4, June 27, 1981, 1520 U.N.T.S. 217 ("Every human being shall be entitled to respect for his life and the integrity of his person. No one may be arbitrarily deprived of this right."); Organization of American States, American Convention on Human Rights art. 4, Nov. 21, 1969, O.A.S.T.S. No. 36, 1144 U.N.T.S. 123 ("Every person has the right to have his life respected. This right shall be protected by law. . . ."); American Declaration of the Rights and Duties of Man art. 1, O.A.S. Res. XXX (May 2, 1948) ("Every human being has the right to life, liberty and the security of his person.").

18. Torture Victim Protection Act of 1991, Pub. L. No. 102-256, §3(a), 106 Stat. 73 (1991). This definition is only legally binding with regard to this particular statute, but its clarity is persuasive.

19. *Id.*

killings that are lawful under International Humanitarian Law ("IHL"), which only applies to war, and Human Rights Law ("HRL"), which applies more generally.

B. Killings in Territories of Armed Conflict

Military strikes are most common in the context of armed conflict, so the discussion begins there. Within a territory engaged in armed conflict, targeted killing is a more clear-cut proposition. The familiar legal framework of IHL applies in armed conflicts whether of an international character or not of an international character.[20] With some exceptions,[21] the Geneva Conventions apply only in international armed conflicts.

Military commanders have greater latitude in zones of armed conflict than they have in peaceful areas.[22] Within zones of armed conflict, commanders can select lawful targets for attack. The OLC memo found that Al-Aulaqi's distance from the battlefield did not preclude a U.S. attack targeting him.[23] In the context of a global war,[24] commanders have always possessed authority to act that extends beyond the front lines.[25] Targeted killing is no different.

C. Targeted Killing vs. Assassination

Targeted killing and assassination are similar but distinct operations that commentators often conflate.[26] Specifically,

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20. In international law, and for purposes of this Note, "international" armed conflicts are those between states, and specifically between "high contracting parties" to the Geneva Conventions I–IV. *See* Robert Chesney & Jack Goldsmith, *Terrorism and the Convergence of Criminal and Military Detention Models*, 60 STAN. L. REV. 1079, 1084 (2008).

21. *See, e.g.*, Protocol II, *supra* note 12, at 1125 U.N.T.S. 609 (which applies to armed conflicts not of an international character, but to which, as of this writing, the United States is not a party); Geneva Convention Relative to the Treatment of Prisoners of War art. 3, Aug. 12, 1949, T.I.A.S. No. 3364 (concerning armed conflicts not of an international character).

22. *See Rise of the Drones II: Hearing Before the Subcomm. on Nat'l Security and Foreign Affairs of the H. Comm. on Gov't Oversight and Reform*, 111th Cong. 2–4 (2010) (testimony of Mary Ellen O'Connell), *available at* http://www.fas.org/irp/congress/2010_hr/042810oconnell.pdf (discussing the lawful use of combat drones).

23. Savage, *supra* note 1.

24. For the purpose of this Note, "global war" includes any ongoing armed action (the Global War on Terror for example), not merely declared wars.

25. *See* W. Hays Parks, *Air War and the Law of War*, 32 A.F. L. REV. 1, 18 (1990) (noting the practice of targeting noncombat areas when Hague Law was first being written).

26. *See* Savage, *supra* note 1 (describing the OLC position that the two operations are distinct); *cf.* Yasir Qadhi, *An Illegal and Counterproductive Assassination*, N.Y. TIMES, Oct. 1, 2011, http://www.nytimes.com/2011/10/02/opinion/sunday/

assassinations are killings that are politically motivated and use subterfuge, while targeted killings are military strikes.[27] This distinction is important because President Ronald Reagan's Executive Order 12,333 bans assassination.[28] In the section entitled "Prohibition on Assassination," President Reagan ordered, "No person employed by or acting on behalf of the United States Government shall engage in, or conspire to engage in, assassination."[29] The order also prohibits indirect participation in any "activities forbidden by [Executive Order 12,333]."[30] Therefore, targeted killing is only legal if it is distinct from assassination under Executive Order 12,333.

Although Executive Order 12,333 is just the latest in a series beginning with President Gerald Ford's Executive Order 11,905, none of the executive orders defines assassination.[31] Nonetheless, an analysis of how the executive orders refer to assassination is potentially enlightening. President Ford's 1976 Executive Order, for example, expressly prohibited "political assassination."[32] Both Presidents Jimmy Carter's and Ronald Reagan's subsequent orders, however, simply ban "assassination" without the modifier "political."[33] Two possible and contradictory interpretations arise from President

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assassinating-al-awlaki-was-counterproductive.html (describing the same drone attack as an assassination).

27. *See* Savage, *supra* note 1 (concluding that the Executive Order "blocked unlawful killings of political leaders outside of war, but not the killing of a lawful target in an armed conflict").

28. Exec. Order No. 12,333, 46 Fed. Reg. 59,941, 59,952 (Dec. 4, 1981).

29. *Id.* President Reagan's executive order, in force now for nearly three decades, is the latest in a series beginning with Executive Order 11,905 issued by President Gerald Ford in February of 1976. Exec. Order No. 11,905 § 5(g), 41 Fed. Reg. 7703, 7733 (Feb. 18, 1976). President Carter expanded the ban to include indirect participation with Executive Order 12,036 §§ 2-305, 2-307. 43 Fed. Reg. 3674, 3683, 3687 (Jan. 24, 1978); Exec. Order No. 12,333 § 2.11, 46 Fed. Reg. at 59,952.

30. Exec. Order No. 12,333 § 2.12, 46 Fed. Reg. at 59,952. It is worth noting that the text of Executive Order 12,333 differs between section 2.11 and section 2.12 in that section 2.11 enjoins *all* employees and agents of the U.S. government assassinating a person *directly*, but section 2.12 *only* enjoins members of the "Intelligence Community" from indirect participation in assassination. Therefore, on its face, Executive Order 12,333 permits other employees and agents of the U.S. government to participate in assassination indirectly so long as that participation does not rise to the level of "conspiracy." However, as this Note concerns direct participation by the U.S. government, further discussion of this issue is beyond its scope.

31. *Id.* at 46 Fed. Reg. at 59,941; Exec. Order No. 12,036, Exec. Order No. 11,905, 41 Fed. Reg. at 7733; Exec. Order No. 12,333, 43 Fed. Reg. at 3683, 3687. *See generally* ELIZABETH B. BAZAN, CONG. RESEARCH SERV., RS21037, ASSASSINATION BAN AND E.O. 12333: A BRIEF SUMMARY, at CRS-1 (offering a concise overview of U.S. assassination policy).

32. Exec. Order No. 11,905 § 5(g), 41 Fed. Reg. at 7733 (Feb. 18, 1976).

33. Exec. Order No. 12,333 § 2.11, 46 Fed. Reg. at 59,952; Exec. Order No. 12,036 § 2-305, 43 Fed. Reg. at 3683.

Carter's deletion of "political" from his order. He either meant the 1978 ban to include apolitical assassination or considered political motives inherent to the definition of assassination, making the modifier superfluous.[34] Based on the conduct of subsequent administrations, including the current administration, the second interpretation appears to be the one in force. Targeted killing is based strictly on security concerns; assassination is political.

Another area of contention is whether the term "assassination" applies to killings committed during armed conflict.[35] The drafting history of the three bans implies the orders apply only outside of armed conflict.[36] The reports to Congress on the bans repeatedly use language like "covert," "treacherous," or "surprise."[37] Hague law, the law of war, prohibits killing individuals "treacherously."[38] Treacherousness helps distinguish lawful killing from cloak-and-dagger assassination. Under Hague law, it is impermissible to kill a person by surprise in peacetime, but it is permissible to use a surprise attack to kill a person in war.[39]

Notwithstanding any of the above, the President can revoke or modify Executive Order 12,333 by issuing a new executive order. Executive orders do not bind executive practice any more than the President wants them to, and the President can keep executive orders secret if he so chooses.[40] Typically, new executive orders have to be published in the *Federal Register*.[41] However, when the President determines that as a result of an attack or a threatened attack on the United States, publication would be impracticable or would not "give appropriate notice to the public," the President can suspend this filing

34. The *Black's Law Dictionary* definition supports this view, defining assassination as "[t]he act of deliberately killing someone, esp. a public figure, usu. for hire or for political reasons." BLACK'S LAW DICTIONARY 130 (9th ed. 2009). Merriam-Webster defines the term as "to murder (a usually prominent person) by sudden or secret attack often for political reasons." MERRIAM-WEBSTER, WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY (3d ed. 1993).

35. BAZAN, *supra* note 31, at CRS-2.

36. *Id.* at CRS-2 to -3.

37. *Id.* at CRS-3 to -4.

38. Convention (IV) Respecting the Laws and Customs of War on Land and Its Annex: Regulations Concerning the Laws and Customs of War on Land art. 23(b), Oct. 18, 1907, 36 Stat. 2277, 187 Consol. T.S. 227 [hereinafter Hague Convention IV].

39. *Id.* art. 24 (permitting "ruses of war"); BAZAN, *supra* note 31, at CRS-4.

40. *See, e.g.*, James Risen & Eric Lichtblau, *Bush Lets U.S. Spy on Callers Without Courts*, N.Y. TIMES, Dec. 16, 2005, at A1, *available at* http://www.nytimes.com/2005/12/16/washington/16program.html (describing one such secret executive order once its existence was leaked).

41. 44 U.S.C. § 1505(a) (2006).

requirement.[42] So while targeted killing is distinct from assassination and, under currently published laws, must be distinct to be legal, the distinction matters little. Even classifying all targeted killings as assassinations within the meaning of Executive Order 12,333 would be of little practical importance, as any President who wished to continue the programs could secretly modify the order to carve out an exception for whatever activities he wished to conduct.

D. Targeting Killing vs. Execution

The first image to come to mind when picturing the U.S government killing a U.S. citizen is that of an execution. Targeted killing and execution are distinct from one another, but legal scholars often compare and conflate the two.[43] It is therefore worthwhile at the outset to distinguish targeted killing from execution.

Execution is a judicial, postconviction sentence reserved for a narrow subset of the most serious offenders within a narrow subset of all possible crimes. State law, as opposed to international law, governs execution.[44] Execution provides years of appellate process and judicial review. If targeted killing is execution, all feasible judicial review is woefully inadequate. To survive as a practice, therefore, targeted killing must be distinguished from execution.

Execution differs from targeted killing in terms of the person the government targets. States execute criminals who have, by definition, been convicted of crimes. The government reserves targeted killings for individuals of military significance who cannot be brought to justice by other means.[45] In the United States, the federal and state governments can execute criminals.[46] Execution is a judicial process

42. *Id.* § 1505(c).

43. *See, e.g.*, Kretzmer, *supra* note 11, at 173 (citing the Special Rapporteur of the Commission on Human Rights on the Situation of Human Rights in the Palestinian Territories Occupied by Israel Since 1967, *Question of the Violation of Human Rights in the Occupied Arab Territories, Including Palestine, Report of the Human Rights Inquiry Commission*, ¶¶ 53–64, Comm'n Hum. Rts., U.N. Doc. E/CN.4/2001/121 (Mar. 16, 2001)).

44. *See* Panetti v. Quarterman, 551 U.S. 930, 950 (2007) (describing the impact of state law violations on prisoner eligibility for execution); Furman v. Georgia, 408 U.S. 238, 241 (1972) (Douglas, J., concurring) (showing state law to govern except when in violation of the Constitution).

45. Savage, *supra* note 1 ("The legal analysis, in essence, concluded that Mr. Awlaki could be legally killed, if it was not feasible to capture him.").

46. *See, e.g.*, 18 U.S.C. § 1111 (2006) (allowing the death penalty for first-degree murder); 10 U.S.C. § 885 (2006) (allowing the death penalty for desertion in time of war).

and therefore has the protections inherent to a judicial process, while targeted killings are extrajudicial.

The federal government may target and kill individuals who have not been convicted of crimes, because targeted killing and execution serve different purposes. Execution is a punishment for a crime. Targeted killing is not a punishment. It is a military strike. The state does not intend to right a wrong but to further a military objective. Viewed in this light, prior judicial review of targeted killings—like prior judicial review of military decisions to kill enemies (U.S. citizens or not) on the battlefield—is unnecessary.

As a practical matter, the United States already engages in targeted killings. During questioning before Congress, Dennis Blair, while Director of National Intelligence, told then Representative Peter Hoekstra that if the government thinks "direct action will involve killing an American, we get specific permission to do that."[47] Targeted killings by the United States in the War on Terror take place inside and outside of regions of armed conflict.[48] The primary factors the U.S. intelligence community considers when deciding whether to direct a targeted killing against an American are, according to Blair, "whether that American is involved in a group that is trying to attack us, whether that American is a threat to other Americans."[49] Accordingly, the secret OLC memo concluded the government could kill Al-Aulaqi because it was not feasible to capture him, he posed a significant threat to Americans, and Yemeni authorities were unable or unwilling to stop him.[50]

III. THE LEGALITY OF DESIGNATING, TARGETING, AND KILLING AROUND THE WORLD

A. Is Targeted Killing Legal?

Targeted killing is legal, provided the state that conducts the killing meets certain criteria. The brief for the plaintiff in *Al-Aulaqi v. Obama*, prepared by the ACLU and the CCR, provides a restrictive

47. Ellen Nakashima, *Intelligence Chief Acknowledges U.S. May Target Americans Involved in Terrorism*, WASH. POST, Feb. 4, 2010, at A3.

48. Declaration of Ben Wizner ¶ 3, Al-Aulaqi v. Obama, 727 F. Supp. 2d 1 (D.D.C. 2010), *available at* http://ccrjustice.org/files/Wizner%20Declaration%20with%20Exhibits.pdf.

49. Nakashima, *supra* note 47.

50. Savage, *supra* note 1.

view of the circumstances under which targeted killing is legal.[51] The position the ACLU and CCR took in this brief, which sought to prevent a targeted killing, will be elaborated by reference to the Report of the Special Rapporteur, which likewise chose a narrow view of the permissibility of targeted killing.[52] Together, these will provide the ceiling on requirements for a legal targeted killing.

B. International Humanitarian Law

IHL is the law of armed conflicts. Targeted killing will often take place during armed conflicts. Neither the ACLU nor the Rapporteur considers armed conflict a necessary antecedent for targeted killing.[53] However, the presence of an armed conflict will lower the bar for other requirements because the presence of an armed conflict brings the killing under the IHL regime, which has relatively more permissible standards for killing than HRL regardless of whether there is an armed conflict of an international nature.[54]

For purposes of targeted killing and humanitarian law generally, armed conflict has a precise definition that excludes many violent "armed conflicts" in the colloquial sense.[55] The key threshold determination is the level of violence, which cannot be merely isolated or sporadic.[56]

Two circumstances that automatically create an armed conflict are (1) violence between states, specifically between the "High Contracting Parties" of the Geneva Conventions, and (2) violence meeting the threshold set out in Common Article 3 of the Geneva Conventions, specifically for armed conflict not of an international character.[57] The ACLU advocates for a narrow definition of armed conflict, including only regions controlled by the adversary. In the

51. Memorandum in Support of Plaintiff's Motion for a Preliminary Injunction at 10–16, Al-Aulaqi v. Obama, 727 F. Supp. 2d 1 (D.D.C. 2010), *available at* http://ccrjustice.org/files/PI%20Motion.pdf.

52. Report of the Special Rapporteur, *supra* note 13, ¶¶ 47–51.

53. *Id.*; Memorandum in Support of Plaintiff's Motion for a Preliminary Injunction, *supra* note 51, at 2.

54. Report of the Special Rapporteur, *supra* note 13, ¶¶ 47–51; Memorandum in Support of Plaintiff's Motion for a Preliminary Injunction, *supra* note 51, at 2.

55. *See* Report of the Special Rapporteur, *supra* note 13, ¶¶ 47–51 (discussing the distinction between international armed conflict and noninternational armed conflict).

56. Prosecutor v. Tadic, Case No. IT-94-1-T, Opinion and Judgment, ¶ 562 (Int'l Crim. Trib. for the Former Yugoslavia May 7, 1997); Report of the Special Rapporteur, *supra* note 13, ¶¶ 47–51.

57. Report of the Special Rapporteur, *supra* note 13, ¶¶ 47–51.

context of the current War on Terror, the ACLU position is that Iraq and Afghanistan would qualify as areas of armed conflict, but that areas like Yemen and Somalia would not.

The United States considers Yemen, Somalia, and similar areas to be permissible areas for targeted killing.[58] The United States thus takes the broader position that armed conflict extends wherever the participants go. This approach has intuitive appeal. The ACLU position, by contrast, creates geographically defined safe havens for terrorists.

C. Combatancy: Who Has the Right to Kill and Who May Be Killed?

"Combatant" is a term of art.[59] The standard definition of a combatant comes from the Geneva Conventions' qualifications for becoming a prisoner of war.[60] Combatants are either members of the armed forces of a state party to the conflict or part of an armed group under responsible command, wearing fixed distinctive insignia, carrying their arms openly, and conducting their operations in accordance with the laws and customs of war.[61] Protocol I to the Geneva Conventions, to which the United States is not a party, dilutes the fixed-insignia requirement.[62] It requires individuals only "to distinguish themselves from the civilian population while they are engaged in an attack or in a military operation preparatory to an attack" when possible and when not, merely to carry their arms openly.[63] Despite a majority of countries accepting these provisions,

58. *See* Eli Lake, *Dozens from U.S. Believed to Have Joined Terrorists: Threat Called 'Worrisome,'* WASH. TIMES, June 25, 2010, at A1 (quoting Deputy National Security Advisor for Homeland Security John O. Brennan saying, "If a person is a U.S. citizen, and he is on the battlefield in Afghanistan or Iraq trying to attack our troops, he will face the full brunt of the U.S. military response . . . . If an American person or citizen is in a Yemen [sic] or in a Pakistan [sic] or in Somalia or another place, and they [sic] are trying to carry out attacks against U.S. interests, they also will face the full brunt of a U.S. response. And it can take many forms.").

59. Many hypertechnical distinctions can influence the determination of a person or group's combatant status and the type of law that applies. *See* Kretzmer, *supra* note 11, at 191.

60. Benjamin J. Priester, *Return of the Great Writ: Judicial Review, Due Process, and the Detention of Alleged Terrorists as Enemy Combatants*, 37 RUTGERS L.J. 39, 49 (2005); *see also* Geneva Conventions (III) Relative to the Treatment of Prisoners of War art. 4, Aug. 12, 1949, 6 U.S.T. 3316, 75 U.N.T.S. 135 (providing the definition) [hereinafter Geneva Conventions III].

61. Geneva Conventions III, *supra* note 60, art. 4(A)(1)–(2).

62. *See* Protocol I, *supra* note 12, art. 44, ¶ 3 (describing conditions under which combatants may be released from the obligation to "distinguish themselves from the civilian population").

63. *Id.*

the provisions do not rise to the level of customary international law.[64] Therefore, because the United States is not a party, Protocol I does not affect U.S. law.[65]

Combatants engage in armed conflict. By virtue of their status, lawful combatants can legally kill and be killed by other lawful combatants.[66] It is never lawful to target and kill civilians.[67] When, however, a person participates in an armed conflict, he ceases to be simply a civilian; he becomes an unlawful combatant.[68] The converse, however, is not true; when a combatant ceases active participation in an armed conflict, he does not regain the status noncombatant civilians enjoy.[69] For example, when a soldier goes home on leave, he

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64. *Jus cogens* norms supersede all treaties. *See* Vienna Convention on the Law of Treaties, art. 53, May 23, 1969, 1155 U.N.T.S. 331 ("A treaty is void if, at the time of its conclusion, it conflicts with a peremptory norm of general international law."). *Jus cogens* develop "[b]y an ancient usage among civilized nations . . . gradually ripening into a rule of international law." The Paquete Habana, 175 U.S. 677, 686 (1900). Following the provisions in question is not a settled practice among all the nations of the world, nor is it believed to be obligatory. Even nations that ratified Protocol I to the Geneva Conventions do not necessarily believe in the revolving-door combatancy envisioned by provisions allowing participants to remain combatants only "for such time" as they participate in the armed conflict. Nations have opted not to include the phrase "for such time" when distinguishing violence against civilians from violence against belligerents, implying that an individual is either a civilian or a belligerent. *Cf.* Rome Statute of the International Criminal Court art. 8(2)(b)(i), July 17, 1998, 2187 U.N.T.S. 90 [hereinafter Rome Statute] (omitting any reference to "for such time" from the definition of the crime of violence against civilians). Finally, even if Protocol I or II could satisfy the objective requirement that a heavy majority of States follow the practice and the subjective requirement that they do so out of a sense of legal obligation, the U.S. would still be exempt as a persistent objector during the creation of the norm.

65. *See* Military and Paramilitary Activities in and Against Nicaragua (Nicar. v. U.S.), 1986 I.C.J. 14, ¶ 269 (June 27) ("[I]n international law there are no rules, other than such rules as may be accepted by the State concerned . . . ."); S.S. Lotus (Fr. v. Turk.), 1927 P.C.I.J. (ser. A) No. 10, at 18–19 (Sept. 7) (describing legal positivism as a fundamental principle of international law).

66. The Supreme Court distinguished between lawful combatants, who capturing states must afford prisoner of war status and eventually return to their home state despite having killed, and other combatants in *Ex parte Quirin*, 317 U.S. 1, 30–35 (1942) ("[T]he law of war draws a distinction between the armed forces and the peaceful populations of belligerent nations and also between those who are lawful and unlawful combatants."). It is illegal for an unprivileged belligerent to kill a soldier. 32 C.F.R. § 11.6(b)(3)(ii) (2010).

67. Geneva Conventions III, *supra* note 60, art. 3(1)(a).

68. *See* United States v. Khadr, 717 F. Supp. 2d 1215, 1222 (C.M.C.R. 2007) (discussing the difference between lawful and unlawful combatants); *Quirin*, 317 U.S. at 30–35 (describing how an individual who participates in military action without wearing an armed forces uniform is an unlawful combatant, there a spy); Bill Boothby, *"And for Such Time As": The Time Dimension to Direct Participation in Hostilities*, 42 N.Y.U. J. INT'L L. & POL. 741, 754 (2010) ("[C]ivilians who directly participate [in hostilities] do retain civilian status.") (citing Protocol I, *supra* note 12, art. 43).

69. *See Khadr*, 717 F. Supp. 2d at 1222 (permitting "civilian" unlawful combatants to be captured and tried for their crimes).

remains a lawful target.[70] To hold otherwise allows for revolving-door combatancy, making it lawful to target the combatant when he goes to war in the morning but unlawful when he comes back home at night.[71] President Reagan opposed revolving-door combatancy because to "grant combatant status to irregular forces even if they do not satisfy the traditional requirements . . . . would endanger civilians among whom terrorists and other irregulars attempt to conceal themselves."[72]

Individuals cannot have legal combatant status by virtue of membership in nonstate terrorist organizations.[73] Soldiers who fight for a state have "combatant immunity";[74] that is, they are "privileged belligerents" who may engage in hostilities without committing a crime.[75] Combatant immunity only exists in international armed conflicts or in armed conflicts of a noninternational character where a state is a participant. Individuals may still be legally privileged to kill in situations of self-defense or a *levée en masse*.[76] In the latter context, for which the French Partisans are the archetype, the legal privilege to kill comes from the state that the irregulars are fighting to protect.[77] Lawful combatants, and only lawful combatants, may kill without committing a crime.[78]

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70. *See* Boothby, *supra* note 68, at 754 (contrasting treaty protection of civilians with that afforded " 'members of organized armed groups' "); Michael N. Schmitt, *Humanitarian Law and Direct Participation in Hostilities by Private Contractors or Civilian Employees*, 5 CHI. J. INT'L L. 511, 536 (2005) (stating "combatants may be attacked anywhere they are found outside neutral territory," and giving the example of a soldier on leave).

71. *See* Chesney & Goldsmith, *supra* note 20, at 1124 (describing the difficulty of determining when a civilian is a " 'direct participa[nt] in hostilities' "); Parks, *supra* note 26, at 118 (describing the "revolving door provided by Protocol I"); Schmitt, *supra* note 70, at 535.

72. Letter of Transmittal from Ronald Reagan, The White House to the Senate of the United States (Jan. 29, 1987), *reprinted in* 81 AM. J. INT'L L. 910 (1987).

73. John C. Yoo & James C. Ho, *The Status of Terrorists*, 44 VA. J. INT'L L. 207, 218 (2003).

74. *See* Crimes and Elements for Trials by Military Commission, 32 C.F.R. § 11.5(a) (2010) ("Under the law of armed conflict, only a lawful combatant enjoys 'combatant immunity' or 'belligerent privilege' for the lawful conduct of hostilities during armed conflict.").

75. 32 C.F.R. § 11.5(a) ("Combatant immunity. Under the law of armed conflict, only a lawful combatant enjoys 'combatant immunity' or 'belligerent privilege' for the lawful conduct of hostilities during armed conflict."); *see Ex parte* Quirin, 317 U.S. 1, 30–35 (1942).

76. *See* Geneva Conventions III, *supra* note 60, art. 4(a)(6).

77. *See* Michael A. Newton, *Exceptional Engagement: Protocol I and a World United Against Terrorism*, 45 TEX. INT'L L.J. 323, 323, 337–40 (2009) (citing HUGO GROTIUS, 3 THE LAW OF WAR AND PEACE ch. xiix (1625), *available at* http://www.lonang.com/exlibris/grotius/gro-318.htm) (describing the evolution of combatant privilege from Rome to the modern era and the linkage between combatancy and the State).

78. 32 C.F.R. § 11.5(a); *see* United States v. Khadr, 717 F. Supp. 2d 1215, 1221 (C.M.C.R. 2007) ("[L]awful combatants enjoy 'combatant immunity.' "); Keith A. Petty, *Are You There, Geneva? It's Me, Guantanamo*, 42 CASE W. RES. J. INT'L L. 171, 174 (2009) (explaining that

Individuals who do not conform to the Geneva Conventions or the customary international definition of a soldier are unlawful belligerents.[79] States and privileged combatants may kill unlawful belligerents in self-defense.[80] Within the context of humanitarian law and international criminal law, "combatant" only applies to a subset of people who engage in combat. Terrorists are not legal combatants.[81] Even those states that ratified Protocol II to the Geneva Conventions recognize the legality of killing members of armed groups who are not lawful combatants.[82] Targeted killing therefore can be legal if performed by a state against an individual who is actively engaged in hostilities against that state. Neither geographic location nor citizenship status[83] is determinative of the permissibility of a targeted killing under IHL.

D. Human Rights Law

Targeted killing raises human rights issues. HRL is the legal regime generally applicable in all jurisdictions around the world.[84] It mandates that targeted killings only take place as a state's last resort.[85] Under HRL, the core of the last-resort element is that the

"lawful combatants enjoy combatant immunity and may not be prosecuted merely for taking part in hostilities").

79. Petty, *supra* note 78 at 175; *see* Geneva Conventions III, *supra* note 60, art. 4(A) (describing the prerequisites for being a prisoner of war).

80. U.N. Charter art. 51; *see* S.C. Res. 1368 U.N. Doc. S/RES/1368 (Sept. 12, 2001) ("[r]ecognizing the inherent right of individual or collective self-defense in accordance with the Charter."); Chesney & Goldsmith, *supra* note 20, at 1095 (explaining that al-Qaeda's actions in the 1990s "triggered the right of the United States to use armed force in self-defense").

81. Terrorists likely fall under the statutory definition of "unprivileged enemy belligerent." *See* 10 U.S.C.A. § 948a(7) (West 2011) (defining the term).

82. Protocol II, *supra* note 12, *construed in* International Committee of the Red Cross, Commentary, *Protocol II*, ¶ 4789, *available at* http://www.icrc.org/ihl.nsf/COM/475-760019?OpenDocument ("Those who belong to armed forces or armed groups may be attacked at any time.").

83. Even the ACLU concedes that a U.S. citizen who has taken up arms against the United States on a battlefield or poses an imminent threat off of a battlefield can be killed outright. *See Frequently Asked Questions About Targeting Killing*, AM. CIVIL LIBERTIES UNION (Aug. 30, 2010), http://www.aclu.org/national-security/frequently-asked-questions-about-targeting-killing.

84. *See* World Conference on Human Rights, June 14–25, 1993, *Vienna Declaration and Programme of Action*, ¶ 5, U.N. Doc. A/CONF.157/23 (July 12, 1993) (declaring that human rights are universal and requiring that the international community treat them with the same emphasis).

85. Michelle A. Hansen, *Preventing the Emasculation of Warfare: Halting the Expansion of Human Rights Law into Armed Conflict*, 194 MIL. L. REV. 1, 56 (2007).

killing be in self-defense.[86] Arguably, a party can invoke self-defense as a justification for killing in the "last window of opportunity" to prevent unlawful violence.[87] In the HRL context, a state may legally use lethal force only when it is proportionate and necessary.[88] For lethal force to be necessary within this definition, the state first must exhaust all feasible, nonlethal alternatives.[89]

There are certain minimum rights possessed universally at all times by all people. The Geneva Convention Common Article 3 outlines these rights.[90] Although it was born as a treaty among states, so many states now observe it, and do so out of a sense of legal obligation, that Common Article 3 is part of customary international law, mandatory even for nonsignatories.[91] Common Article 3 requires that "[p]ersons taking no active part in the hostilities . . . shall in all circumstances be treated humanely."[92] To that end, it specifically prohibits "violence to life and person, in particular murder."[93] It also prohibits "the passing of sentences and the carrying out of executions without previous judgment pronounced by a regularly constituted court affording all the judicial guarantees which are recognized as indispensable by civilized peoples."[94]

Targeted killings must be used either only against people taking active part in the hostilities or only following judgment by a

86. Tony Rock, *Yesterday's Laws, Tomorrow's Technology: The Laws of War and Unmanned Warfare*, 24 N.Y. INT'L L. REV. 39, 54 (2011) (discussing the *Caroline* incident, which forms the basis of many IHL arguments for preemptory self-defense).

87. Kretzmer, *supra* note 11, at 182. Kretzmer does not agree with this use of self-defense. He views the immediacy of an attack as a necessary justification on evidentiary grounds as, insofar as the attack is imminent, it is not necessary to prove that the suspected terrorist actually constitutes a threat or that this is the last window of opportunity. In his view, allowing the extrajudicial determination of when a suspect will commit an unlawful act of violence and when the last window of opportunity is to prevent this violence with lethal force creates a "limited exception" that swallows the rule. *See generally id.*

88. Report of the Special Rapporteur, *supra* note 13, ¶ 32.

89. *Id.*

90. Geneva Conventions III, *supra* note 60, art. 3. Article 3 is the same in Geneva Conventions I–IV, hence "common article 3." Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field art. 3, Aug. 12, 1949, 6 U.S.T. 3114, 75 U.N.T.S. 31; Geneva Convention for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea art. 3, Aug. 12, 1949, 6 U.S.T. 3217, 75 U.N.T.S. 85; Geneva Convention Relative to the Protection of Civilian Persons in Time of War art. 3, Aug. 12, 1949, 6 U.S.T. 3516, 75 U.N.T.S. 287.

91. *See* The Paquete Habana, 175 U.S. 677, 700–08 (1900) (describing the process by which law becomes customary international law).

92. Geneva Conventions III, *supra* note 60, art. 3(1).

93. *Id.* art. 3(1)(a).

94. *Id.* art. 3(1)(d).

regularly constituted court affording all indispensable judicial guarantees. The United States has opted to pursue the former course of action, killing only people who take active part in hostilities. In this manner, the targeted killing program can only survive as a military operation.

E. Authorization for Use of Military Force

Military action by the United States ultimately requires congressional authorization. On September 18, 2001, Congress passed the Authorization for the Use of Military Force ("AUMF"), which authorized the Global War on Terror.[95] Congress acted in response to the September 11, 2001, terrorist attacks against the World Trade Center in New York City, the Pentagon outside Washington, D.C., and United Airlines Flight 93, which crashed near Shanksville, Pennsylvania.[96] The sparse text of the bill authorizes the President to "use all necessary and appropriate force . . . to prevent any future acts of international terrorism against the United States."[97] The secret OLC memo concluded that the AUMF authorized a strike against Al-Aulaqi.[98]

F. International Criminal Law

Targeted killing of American citizens by the U.S. government is not a crime under International Criminal Law ("ICL"). The International Criminal Court ("ICC"), established by the Rome Statute of the ICC, is the primary international body with authority over ICL. The United States is not a party to the Rome Statute. Therefore, the ICC does not have jurisdiction over individual citizens of the United States unless the United States decides to grant it that jurisdiction, or the U.S. citizen is on the territory of a party to the ICC.[99] Even where it has jurisdiction, its jurisdiction is complementary, meaning that some other state also has jurisdiction

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

96. *See, e.g.*, Sara Rimer & Jere Longman, *After the Attacks: The Pennsylvania Crash; Searchers Find Plane Cockpit Voice Recorder*, N.Y. TIMES, Sept. 14, 2001, http://www.nytimes.com/2001/09/15/us/after-attacks-pennsylvania-crash-searchers-find-plane-cockpit-voice-recorder.html.

97. Authorization for the Use of Military Force § (2)(a).

98. Savage, *supra* note 1.

99. Rome Statute, *supra* note 64, art. 12.

over the case; that is, it must determine whether it should hear the case, a consideration it calls "admissibility."[100] Charges against U.S. citizens in the ICC will be inadmissible. Even if the ICC obtained jurisdiction over an American citizen, the ICC prosecutor can only bring a case if every other party with jurisdiction, which in the case of a U.S. citizen would always include the United States, was "unwilling or unable genuinely" to investigate or prosecute the charge.[101] Because of the U.S. network of agreements under Article 98 of the Statute, which bars other states from sending U.S. citizens to the court without U.S. consent, the ICC would have great difficulty physically obtaining a U.S. citizen even if his case was admissible.[102] Further, targeted killing as such is not a crime under the ICC statute.[103]

G. Sovereignty Concerns

Because the United States conducts targeted killings in foreign territories, issues of sovereignty arise.[104] The United States can overcome these issues if either (a) the foreign state consents,[105] or (b) the United States has the right to enter the state's territory and conduct military operations there on other grounds.[106] The self-defense justification holds merit when the United States' response to an armed attack is necessary and proportionate.[107] The United States can invoke self-defense prior to an actual attack.[108]

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100. *Id.* art. 17.

101. *Id.* art. 17(1)(a).

102. *Id.* art. 98; *see, e.g.*, Agreement Between the Government of the United States of America and the Government of Democratic Socialist Republic of Sri Lanka Regarding the Surrender of Persons to the International Criminal Court, U.S.-Sri Lanka, Nov. 22, 2002, *available at* http://www.state.gov/documents/organization/152450.pdf.

103. *See* Rome Statute, *supra* note 64, art. 5–9 (detailing the crimes under the statute).

104. U.N. Charter art. 2, para. 4 (banning Members from using force in the territory of another state).

105. It appears that Yemen granted the United States permission to fire a missile in its territory. Savage, *supra* note 1.

106. *E.g.*, self-defense, U.N. Charter art. 51; at the behest of the Security Council exercising its Chapter VII authority, etc. JAMES CRAWFORD, THE INTERNATIONAL LAW COMMISSION ARTICLES ON STATE RESPONSIBILITY: INTRODUCTION, TEXT, AND COMMENTARIES 163 (2002).

107. U.N. Charter art. 51; Report of the Special Rapporteur, *supra* note 13, ¶ 39.

108. The United States has invoked preemptory self-defense before, most notably under the Bush Administration. *See* GEORGE W. BUSH, THE NATIONAL SECURITY STRATEGY OF THE UNITED STATES OF AMERICA 15 (2002) (invoking self-defense as a justification for force even when "uncertainty remains as to the time and place of the enemy's attack"). Preemptive self-defense in American jurisprudence traces its roots back to the *Caroline* case and continues through to the Bush doctrine, which does away with some of the imminence requirements traditionally associated with preemptive self-defense, and on to the present day. Andrew S. Williams, *The*

H. The ACLU's Wish List

Throughout its brief for the plaintiff in *Al-Aulaqi v. Obama*, the ACLU declares that targeted killing is unlawful unless the target poses a threat of death or serious physical injury that is "concrete, specific, and imminent."[109] In support of its claim that the threat should be concrete, specific, and imminent, the ACLU applies a standard taken from domestic law enforcement.[110] The differences between these cases and targeted killing are numerous. The government actors are different: line law enforcement officers in the cited cases as opposed to senior government officials in the case of targeted killing.[111] The suspects are different, too: common criminals in the cited cases versus members of international terrorist organizations. The crimes are also different: relatively minor infractions like reckless driving in the cited cases as opposed to treasonous terrorist operations.[112] Most importantly, the purpose of killing is different. In the cited cases, the police may use lethal force to protect themselves and others from the immediate threat that the suspect poses and not from future operations that the suspect is preparing. If the purpose is to protect the citizenry from an immediate threat, but there is no immediate threat, then killing by domestic law enforcement is not permissible. The purpose of a targeted killing is to protect citizens from an attack that is being prepared, where waiting until the threat is temporally immediate is not feasible.

The other cases the ACLU cited in support of its proposition, that the threat should be concrete, specific, and imminent, deserve even less weight than the domestic law enforcement cases it mentioned. The remaining cases it cited are not only distinguishable, but they also are not from U.S. courts and therefore have only limited

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Interception of Civil Aircraft over the High Seas in the Global War on Terror, 59 A.F. L. REV. 73, 81–84 (2007).

109. Memorandum in Support of Plaintiff's Motion for a Preliminary Injunction, *supra* note 51, at 2.

110. *Id.* at 13–14 (citing Wilkinson v. Torres, 610 F.3d 546, 550 (9th Cir. 2010)) ("Case law has clearly established that an officer may not use deadly force to apprehend a suspect where the suspect poses no immediate threat to the officer or others."); Cordova v. Aragon, 569 F.3d 1183, 1190 (10th Cir. 2009) ("When an officer employs such a level of force that death is nearly certain, he must do so based on more than the general dangers posed by reckless driving."); *cf.* Hundley v. District of Columbia, 494 F.3d 1097 (D.C. Cir. 2007) (holding that jury could not find officer's use of lethal force against a suspect reasonable in light of the jury's specific finding that the suspect did not lunge at police officer in a threatening manner).

111. Memorandum in Support of Plaintiff's Motion for a Preliminary Injunction, *supra* note 51, at 13–14.

112. *Id.* at 3–4, 14.

persuasive authority.[113] One problem with reasoning from foreign cases to determine U.S. obligations is that, particularly with regard to immediacy, two of the countries in the cited cases, Cyprus and Peru, signed and ratified Protocol I, which contains an immediacy requirement.[114] Protocol I is not part of U.S. law; therefore, the immediacy requirement contained within it does not apply in the United States.[115] The foreign courts upheld their nations' treaty obligations, which the United States does not share.

The OLC memo authorizing the killing of Al-Aulaqi opted to stretch the definition of imminence to include risks posed by an enemy leader who is in the business of attacking the United States whenever possible, even if he is not in the midst of launching an attack when he is found.[116] This definition tracks the idea of preemptory self-defense. At first blush, it appears to do violence to the idea of imminence by redefining it broadly enough to include attacks decades off. However, when read with the OLC memo provision that only allows the government to kill individuals it cannot capture,[117] the definition limits the government to killing individuals who will attack the United States before it is feasible to stop them in another way, which is a less strained definition of imminence.

IV. U.S. CITIZENS DESERVE GREATER PROTECTION THAN NONCITIZENS FROM TARGETED KILLING BY THE UNITED STATES

Just as Roman citizens could declare "*Civis Romanus sum*"[118] anywhere throughout their world and know they retained the protection of Rome, so too do U.S. citizens possess rights as citizens

113. *Id.* at 28 (citing Aytekin v. Turkey, App. No. 22880/93, Eur. Comm'n H.R., ¶¶ 95–96 (1997) (in the absence of specific circumstances justifying the fatal shooting of a suspect, finding that "the fact that the area was subject to terrorist activity does not of its own accord give the security forces the right to open fire upon people or persons that they deem suspicious")); Andronicou and Constantinou v. Cyprus, App. No. 25052/94, Eur. Ct. H.R., ¶ 191 (1997) (finding that a fatal shooting was justified in light of a perceived "real and immediate danger" to life); Neira-Alegría v. Peru, Merits, Inter-Am. Ct. H.R. (ser. C) No. 20, ¶ 74 (Jan. 19, 1995) (finding that the actual danger under the circumstances did not justify the use of lethal force even where the targets were "highly dangerous and [] in fact armed").

114. INT'L COMM. OF THE RED CROSS, State Parties / Signatories, Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts (Protocol I), June 8, 1977, http://www.icrc.org/ihl.nsf/WebSign?ReadForm&id=470&ps=P (last visited Oct. 2, 2011).

115. *Id.*; *see also* Part III.C *supra*.

116. *See* Savage, *supra* note 1.

117. *Id.*

118. I am a citizen of Rome.

everywhere they go.[119] The Bill of Rights applies extraterritorially.[120] The United States cannot strip its citizens of constitutional protection merely because they are not present in the country.[121] It is an extraordinary measure for the U.S. government to kill a U.S. citizen. When the United States decides to kill one of its citizens far from an area in which U.S. combat forces are active, the protections assured to all citizens by the Constitution and the Bill of Rights must weigh heavily, even if the target is actively participating in hostilities against the United States. Americans must receive greater process than non-Americans.[122]

A. The Crime of Treason

When U.S. citizens take up arms against the United States, the government traditionally prosecutes them for treason.[123] The expectation that the United States will have to deal with traitors has a long history. It is one of only a very few substantive crimes mentioned in the Constitution.[124] It has a well-established jurisprudence stretching back to the Revolutionary War.[125]

The crime of treason is defined in Article III, section 3 of the U.S. Constitution. It reads:

> Treason against the United States, shall consist only in levying War against them, or in adhering to their Enemies, giving them Aid and Comfort. No Person shall be convicted of Treason unless on the Testimony of two Witnesses to the same overt Act, or on

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119. *See The West Wing: A Proportional Response* (NBC television broadcast Oct. 6, 1999) (Bartlet: "[A] Roman citizen could walk across the face of the known world . . . unharmed, cloaked only in the protection of the words '*civis Romanus*'—I am a Roman citizen. So great was the retribution of Rome, universally understood as certain, should any harm befall even one of its citizens . . . . [W]here is the warning to the rest of the world that Americans shall walk this Earth unharmed, lest the clenched fist of the most mighty military force in the history of mankind comes crashing down on your house?").

120. *See* United States v. Verdugo-Urquidez, 494 U.S. 259, 270 (1990) ("[Reid v. Covert, 354 U.S. 1 (1957),] decided that United States citizens stationed abroad could invoke the protection of the Fifth and Sixth Amendments."); *In re* 9 Terrorist Bombings of U.S. Embassies in E. Afr., 552 F.3d 157, 167 (2d Cir. 2008) (discussing the applicability of the Fourth Amendment to citizens abroad).

121. Reid v. Covert, 354 U.S. 1, 5 (1957) ("At the beginning we reject the idea that when the United States acts against citizens abroad it can do so free of the Bill of Rights.").

122. Savage, *supra* note 1.

123. Hamdi v. Rumsfeld, 542 U.S. 507, 554 (2004) (Scalia, J., dissenting) ("Where the Government accuses a citizen of waging war against it, our constitutional tradition has been to prosecute him in federal court for treason or some other crime.").

124. U.S. CONST. art. III, § 3.

125. *See, e.g.*, Respublica v. Carlisle, 1 U.S. 35 (1778) (affirming the indictment of a citizen of the Pennsylvania for assisting Great Britain in waging war against the Commonwealth).

> Confession in open Court. The Congress shall have Power to declare the Punishment of Treason . . . .[126]

The Constitution also provides that treason will not "work Corruption of Blood" and provides additional security from the government for the descendants and relatives of the traitor.[127]

Because targeted individuals are engaged in a war against the United States, any U.S. citizen on the targeted killing list, were he to return to the United States, could stand accused of treason. Even the nebulous criteria available for being added to the kill list—i.e., being actively involved in operations against the United States—would likely qualify as "levying War . . . or in adhering to [the] Enemies [of the United States], giving them Aid and Comfort."[128] Applied to the facts of the Anwar Al-Aulaqi case, Al-Aulaqi was, by his own words and as demonstrated through his actions, levying war against the United States. Al-Aulaqi advocated for, participated in, and recruited others to participate in war. Because Al-Aulaqi was a citizen of the United States, by participating in a war against the United States, Al-Aulaqi was a traitor. Under the other qualification for treason, he was not only an adherent to an enemy but also a leader within an enemy organization, al-Qaeda.[129] In terms of giving the organization aid and comfort, he had been one of its principal recruiters and scholars. He was therefore a prime candidate for conviction of the crime of treason if he had come back to the United States for trial. However, because capture and trial were not feasible, President Barack Obama secretly ordered U.S. forces to kill Al-Aulaqi in a drone strike.[130]

B. U.S. Citizens Have the Right to a Trial When Accused of a Crime

Inescapable in the Constitution's definition of treason are the stringent evidentiary requirements for conviction. The Constitution requires that the accused traitor stand trial and be convicted by competent evidence from at least two witnesses or a confession "in open Court."[131] Overwhelming anecdotal evidence of traitorous conduct is insufficient. Part IV.A indicated the seriousness with which the framers treated an accusation of treason. The second evidentiary

126. U.S. CONST. art. III, § 3.
127. *Id.*
128. *Id.*
129. Rushe et al., *supra* note 1.
130. *See* Savage, *supra* note 1.
131. U.S. CONST. art. III, § 3.

requirement of an in-court confession is important in the context of vocal supporters of enemy regimes, because it means that their out-of-court statements cannot be used as confessions sufficient for conviction. Finally, relevant to the use of the "treason" framework to justify targeted killing, the Constitution vests power in Congress to designate the punishment for treason.[132] It does not vest the executive with any power with regard to traitors save the power to execute laws, which is already contained in the executive function.[133]

If individuals on the targeted killing list peaceably surrendered themselves to the United States to stand trial for treason, they would be entitled to these protections.[134] The law protects citizens' rights and safety if they choose to surrender.[135] If the government plans to treat a citizen as a traitor, then the government must give the citizen notice that he is wanted for the crime of treason. Without notice, the accused lacks the opportunity to avail himself of his constitutional right to stand trial before a jury of his peers. A targeted citizen's choice to avail himself of the judicial system says nothing of his guilt or innocence or his status as a suspected terrorist.[136] Forcing the accused to face trial does not deprive him of his rights: "*All* U.S. citizens may avail themselves of the U.S. judicial system if they present themselves peacefully, and *no* U.S. citizen may simultaneously avail himself of the U.S. judicial system and evade U.S. law enforcement authorities."[137] Targeted killing is not punishment for treason. U.S. citizens who serve as soldiers for the enemy can be shot without trial during military operations but must be afforded a trial as traitors if they can be captured. So too U.S. citizens who are leaders at the strategic level for the enemy can be targeted and killed without trial

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132. *Id.*

133. *See id.*

134. Hamdi v. Rumsfeld, 542 U.S. 507, 554 (2004) (Scalia, J., dissenting).

135. *See* U.S. CONST. amends. VIII, XIV (guaranteeing freedom from excessive bail, fines, and cruel and unusual punishment by both federal and state governments); Farmer v. Brennan, 511 U.S. 825, 828 (1994) ("A prison official's 'deliberate indifference' to a substantial risk of serious harm to an inmate violates the Eighth Amendment." (citing Helling v. McKinney, 509 U.S. 25 (1993); Estelle v. Gamble, 429 U.S. 97 (1976))); *McKinney*, 509 U.S. at 32 ("[c]ontemporary standards" require that prison conditions receive scrutiny under the Eighth Amendment (citing *Gamble*, 429 U.S. at 103–104)); *Gamble*, 429 U.S. at 104 ("[D]eliberate indifference to serious medical needs of prisoners constitutes the 'unnecessary and wanton infliction of pain' proscribed by the Eighth Amendment." (quoting Gregg v. Georgia, 428 U.S. 153, 173 (1976)); Cottone v. Jenne, 326 F.3d 1352, 1358 (11th Cir. 2003) (plaintiff stated a cause of action under the Fourteenth Amendment by alleging that prison guards had knowingly allowed him to be placed in a cell with a violent, mentally unstable inmate).

136. Al-Aulaqi v. United States, 727 F. Supp. 2d 1, 17–18 (D.D.C. 2010).

137. *Id.* at 18.

during military operations but must be afforded a trial as traitors if they can be captured. Targeted killing is not a punishment for a crime but a military operation. The difference between killing a U.S. citizen soldier in enemy ranks during battle and killing a leader of the enemy in a targeted strike is one of personal specificity. In the context of killing a soldier of the enemy, the individual U.S. soldier does not know that he is firing at a U.S. citizen traitor in the ranks of the enemy; the U.S. citizen traitor is killed in the heat of battle, as are so many other enemy soldiers. For this manner of killing a traitor, prior notice is not a requirement. If the U.S. armed forces conducts a military operation in an area that will kill enemy soldiers, no special precautions must be taken to ensure that the U.S. citizen traitor is not killed alongside his adopted countrymen. But in the case of a targeted killing, senior executive branch officials explicitly designate one U.S. citizen as a target and attempt to kill him specifically outside of a standard battle. The result is that the U.S. citizen needs to be on notice that he stands suspected of being a traitor or of committing some other crime. If he is given this information, he can make the choice either to surrender himself to the United States, stand trial, and possibly clear his name or to continue to fight and die with the enemies of the United States.

For example, before the United States killed him, Al-Aulaqi should have been given notice that he was wanted for treason, or another crime, and that if he refused to return and stand trial, then he would be considered a military target. Functionally, Al-Aulaqi had notice that he was on a kill list. The media had been abuzz about killing him, and his father even filed an unsuccessful lawsuit on his behalf.[138] Nonetheless, he did not return to the United States for trial.

All citizens have the constitutional right to a jury trial in criminal cases.[139] For traitors who stand accused of committing crimes

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138. *See, e.g.*, *Al-Aulaqi*, 727 F. Supp. 2d 1; *Times Topics: Anwar al-Awlaki*, N.Y. TIMES, Oct. 11, 2011, http://topics.nytimes.com/topics/reference/timestopics/people/a/anwar_al_awlaki/index.html (providing a biography of and listing eighty articles on Al-Aulaqi); Spencer S. Hsu, *U.S. Officials Defend 'State Secrets' Claim in al-Aulaqi Suit*, WASH. POST, Sept. 26, 2010, *available at* http://www.washingtonpost.com/wp-dyn/content/article/2010/09/25/AR2010092503089.html; Kenneth Anderson, *Judge Dismisses Al-Aulaqi Targeted Killing Case*, THE VOLOKH CONSPIRACY (Dec. 7, 2010, 11:13 AM), http://volokh.com/2010/12/07/judge-dismisses-al-aulaqi-targeted-killing-case/; Chez Pazienza, *Killing an Arab-American: The Debate over Anwar al-Aulaqi*, THE HUFFINGTON POST (Sept. 28, 2010, 1:10 PM), http://www.huffingtonpost.com/chez-pazienza/anwar-al-aulaqi-debate_b_741830.html.

139. U.S. CONST. art. III § 2, cl. 3 ("The Trial of all Crimes . . . shall be held in the State where the said Crimes shall have been committed; but when not committed within any State, the Trial shall be at such Place or Places as the Congress may by Law have directed.").

that physically touched the United States, their trials will be held where they committed their crimes.[140] But in the case of terrorists who are still in the planning stages of launching a strike, or who commit a crime against the United States outside of the territorial bounds of the United States, Congress can direct where the trial ought to take place.[141] The guarantee of a jury trial is a protection available if the designated individual decides to avail himself of it. With regard to targeted killings, the Constitution, however, does not demand that a person who is a military threat to the United States remain at large because he is good at avoiding arrest.

C. Notice

An underlying element of all law is the principle of *nullem crimen sine lege*, or "no crime without law." One purpose of law is to make people aware of what conduct is permissible and what is not. U.S. citizens have a right to know what conduct will get them killed by their government. Currently, the United States does not publish the criteria it uses to decide who will be killed by targeted killing, beyond statements like that of then Director of the National Counterterrorism Center, Michael Leiter, who stated, "Individuals aren't targeted because they have bad ideas. Individuals aren't targeted because they inspire others to do things. Individuals are targeted because they are involved in operations targeting the United States and our homeland."[142] Nor, for that matter, does the United States publish the list of U.S. citizens who it intends to kill.[143] The result is that the United States can use secret criteria to secretly designate U.S. citizens, secretly kill them, and officially deny any involvement in the action.[144]

These unpublished "kill lists" or other means of designating individuals for targeted killing should not be confused with the U.S. Treasury Department's published lists of Specially Designated Global

140. *Id.*

141. *Id.*

142. Michael Leiter, Dir., Nat'l Counterterrorism Ctr., Address to the Aspen Institute: The Terror Threat and Picture and Counterterrorism Strategy (June 30, 2010) (transcript available at http://www.nctc.gov/press_room/speeches/leiter_transcript_aspen_institute_063010.pdf); *see also* Savage, *supra* note 1.

143. *See* Savage, *supra* note 1.

144. *Id.*

Terrorist ("SDGT") individuals, which are available to the public.[145] While Al-Aulaqi was on both an SDGT list[146] and a kill list, the two lists are not necessarily the same. It is not known, for example, whether Aqeel Abdulaziz al-Aqil or Chiheb Ben Mohamed Ben Moktar al-Ayari, the SDGT individuals listed immediately before and after Al-Aulaqi, are also subject to targeted killing.[147] Even after the United States killed Al-Aulaqi, it did not publicly acknowledge his presence on a kill list.[148]

Military expedience and security arguments support the practice of nonpublication of the lists. If the targets know that they have been designated, then they will make it more difficult, more expensive, and more dangerous for our armed forces to kill them. Notifying the targets will also make continued intelligence gathering more difficult.

Fundamental justice arguments support publication. All people have rights to life and liberty unless their government deprives them of those rights through the due process of law. Because the U.S. government can freeze the assets of SDGT individuals, they already have serious financial incentives to challenge their designations or otherwise exercise their rights in U.S. courts. Many have opted not to do so. But regardless of whether any individuals on kill lists decide to exercise their rights in court, it is still important to provide notice because it is a fundamental principle of our justice system.[149]

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145. *Specially Designated Nationals and Blocked Persons*, U.S. DEP'T OF THE TREASURY, OFFICE OF FOREIGN ASSETS CONTROL, http://www.treasury.gov/ofac/downloads/t11sdn.pdf (last visited Oct. 30, 2011) ("AL-AULAQI, Anwar (a.k.a. AL-AWLAKI, Anwar; a.k.a. AL-AWLAQI, Anwar; a.k.a. AULAQI, Anwar Nasser; a.k.a. AULAQI, Anwar Nasser Abdulla; a.k.a. AULAQI, Anwar Nasswer); DOB 21 Apr 1971; alt. DOB 22 Apr 1971; POB Las Cruces, New Mexico; citizen United States; alt. citizen Yemen (individual) [SDGT] 7-16-10").

146. *Id.* ("AL-AULAQI, Anwar (a.k.a. AL-AWLAKI, Anwar; a.k.a. AL-AWLAQI, Anwar; a.k.a. AULAQI, Anwar Nasser; a.k.a. AULAQI, Anwar Nasser Abdulla; a.k.a. AULAQI, Anwar Nasswer); DOB 21 Apr 1971; alt. DOB 22 Apr 1971; POB Las Cruces, New Mexico; citizen United States; alt. citizen Yemen (individual) [SDGT] 7-16-10").

147. *Id.* Neither Al-Aqil nor Al-Ayari is a U.S. citizen.

148. *See* Savage, *supra* note 1.

149. *See* Mullane v. Cent. Hanover Bank & Trust Co., 339 U.S. 306, 313 (1950) ("Many controversies have raged about the cryptic and abstract words of the Due Process Clause but there can be no doubt that at a minimum they require that deprivation of life, liberty, or property by adjudication be preceded by notice and opportunity for hearing appropriate to the nature of the case.").

D. Constitutional Concerns

The U.S. Constitution protects all American citizens from abuses by the U.S. government. These constitutional protections take the form of explicitly guaranteed rights, limits to the power of the federal government, and checks on government power through the structure of the government. American citizens carry these rights with them regardless of where they go or of what they stand suspected or accused.[150]

1. Due Process

Due process comes in two varieties—substantive and procedural. Of concern here is procedural due process; that is, the procedures that the government must follow before depriving a citizen of his right to life. In the context of targeted killing, the decision to kill an individual American citizen will ultimately fall on an agency, such as the Central Intelligence Agency ("CIA").[151] When an agency makes a binding decision on the rights of a particular party by reference to historical facts,[152] it is conducting an adjudication.[153]

The U.S. Supreme Court articulated the standard for evaluating agency compliance with procedural due process in *Mathews v. Eldridge*.[154] The Court has not formally applied *Eldridge* to targeted killing—it has not yet heard a case concerning targeted killing—but its reasoning in *Hamdi v. Rumsfeld* suggests that the *Eldridge* test would also apply to a targeted killing case.[155] *Eldridge* concerned the

150. Reid v. Covert, 354 U.S. 1, 5 (1957) ("At the beginning we reject the idea that when the United States acts against citizens abroad it can do so free of the Bill of Rights.").

151. *See* Hamdi v. Rumsfeld, 542 U.S. 507, 597 (2004) (Thomas, J., dissenting) (describing a 2002 killing, by the CIA, of a U.S. citizen who was an al-Qaeda leader).

152. Historical here means the same as "adjudicative," as opposed to "legislative." It should not be taken to imply the type of facts found in dusty volumes on library shelves, but rather, those of the type used at trial.

153. *Compare* Londoner v. City & Cnty. of Denver, 210 U.S. 373, 385–86 (1908) (providing the rationale for agency adjudications in requiring a due process hearing when assessing a new road-paving tax that would be levied on just a few landholders), *with* Bi-Metallic Inv. Co. v. State Bd. of Equalization, 239 U.S. 441 (1915) (making the pragmatic distinction between adjudication and rulemaking and distinguishing from *Londoner* on the grounds that a new tax would be levied across all citizens equally, making a hearing unnecessary).

154. Mathews v. Eldridge, 424 U.S. 319, 355 (1976).

155. *Hamdi*, 542 U.S. at 528–29 ("The ordinary mechanism that we use for balancing such serious competing interests, and for determining the procedures that are necessary to ensure that a citizen is not 'deprived of life, liberty, or property, without due process of law,' U.S. Const., Amdt. 5, is the test that we articulated in *Mathews v. Eldridge*."). Justice Thomas, in his dissent,

termination of Social Security disability benefits.[156] While some members of the Court have maligned expanding a test created for adjudicating disability payments to cases adjudicating the most basic rights of terrorists engaged in combat against the United States, the Court has nonetheless specifically named *Eldridge* as the standard.[157] The famous *Eldridge* standard is a three-part balancing test.[158] First, a court will consider the private interest that will be affected by the official action.[159] Second, it will consider the risk of an erroneous deprivation of such interest through the procedures used and the probable value, if any, of additional or substitute procedural safeguards.[160] Third, it will consider the government's interests, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirements would entail.[161]

Applying the *Eldridge* standard to the presumable[162] procedures the government uses for selecting targets, this Note concludes that those procedures fall short. The private interest at stake here is the life of an American citizen. The risk of erroneous deprivation of that right is difficult to determine because the procedures the government uses are secret. The political ramifications of engaging in a targeted killing are such that the killings should not be undertaken haphazardly or without consideration of the available evidence. Similarly, the targets are such that the association of a target with a terrorist organization should be abundantly clear. The difficulty lies in the determination of whether killing the target would prevent future attacks against the United States. Intelligence data, even the best, upon which the President and top advisors rely to make

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worried that the plurality's decision "would seem to require notice and opportunity to respond [in a case of targeted killing] as well." *Id.* at 597 (Thomas, J., dissenting).

156. *Eldridge*, 424 U.S. 319, 335 (1976).

157. *Hamdi*, 542 U.S. at 528–29; *see also id.* at 575 (2004) (Scalia, J., dissenting) ("[The Court] claims authority to engage in this sort of 'judicious balancing' from *Mathews v. Eldridge*, . . . a case involving . . . *the withdrawal of disability benefits!*").

158. *Eldridge*, 424 U.S. at 335.

159. *Id.*

160. *Id.*

161. *Id. Eldridge* is not the appropriate test for evaluating the validity of state procedural rules that are part of a criminal process. Medina v. California, 505 U.S. 437, 442–43 (1992). Targeted killing is not part of a criminal process. *See supra* Part II.D (differentiating targeted killing from assassinations and execution).

162. The actual procedures being used have not been disclosed in detail, but it is possible to make educated guesses based on the facts disclosed in Savage, *supra* note 1.

the most critical decisions of U.S. defense policy, is still a dicey business.[163]

With the risk of making an error being what it is, we must now consider whether there are additional or substitute procedures that would produce more reliable evidence.[164] Trial by jury is no doubt the best protection that the government can provide to avoid erroneous deprivation of a right, but not all deprivations require trial-like procedures.[165] In a trial-like procedure, the suspected terrorist would be able to present written and oral arguments, have access to the evidence the state plans to use against him, be able to cross-examine the witnesses against him, and be able to prevent the inclusion of much hearsay evidence. The government is amicable to this sort of procedure.[166] The suspect need only turn himself in.[167]

A trial in absentia would be incredibly costly, in terms of the expenditure of state resources and in terms of the opportunity cost of not attacking the target when expedient. Likewise, a trial in absentia would provide little additional benefit to the target as the witnesses and information at his disposal would remain with him. Even providing evidence with which to conduct a trial or a trial-like proceeding presents grave issues implicating the state secrets doctrine. The *Totten* bar bans adjudication in court of any matter where the subject matter of the case is itself a state secret.[168] Here, as evidenced by the government's refusal to disclose whether these programs in fact exist, the programs are a state secret. Even if the state's targeted killing program were fully disclosed, the *Reynolds* bar prevents any evidence that is itself a state secret from being admitted in court.[169] Thus, an Article III-style trial will have greatly limited access to evidence as compared with an agency's initial determination,

163. *See, e.g.*, Wilson v. Libby, 498 F. Supp. 2d 74, 79 (D.D.C. 2007) (describing the intelligence failures that led the George W. Bush White House to believe erroneously that Iraq possessed weapons of mass destruction), *aff'd*, 535 F.3d 697 (D.C. Cir. 2008). It is unlikely the government would do a more thorough intelligence analysis to launch a single strike than it did to launch a war.

164. *See, e.g.*, Zinermon v. Burch, 494 U.S. 113, 132 (1990) (examining the value of predeprivation hearings).

165. *See, e.g.*, Tull v. United States, 481 U.S. 412, 417 (1987) (discussing how statutory actions similar to 18th century actions in English courts before the merger of the courts of equity and law may not require jury trials).

166. Al-Aulaqi v. Obama, 727 F. Supp. 2d 1, 32 (D.D.C. 2010).

167. *Id.*

168. Mohamed v. Jeppesen Dataplan, Inc., 614 F.3d 1070, 1077 (9th Cir. 2010) (en banc) (citing Totten v. United States, 92 U.S. 105, 107 (1876)).

169. United States v. Reynolds, 345 U.S. 1, 7–8 (1953).

making an erroneous conclusion at trial more likely than one at the agency level.

Finally, the government interest at stake is the defense of the country. Weighing against the definite deprivation of life of one U.S. citizen is the potential deprivation of life of many U.S. citizens. The cost of providing many of the additional procedures would be high. The time required to conduct a proper trial on the merits in absentia or even to give judicial review to judges prior to taking action would impose impracticable time costs. The cost-benefit analysis of providing additional procedures thus likely fails.

While the Court has not formally applied the *Eldridge* standard to a case of targeted killing, Justice Thomas, in his dissent in *Hamdi,* does so in dicta.[170] Justice Thomas and this Note reach the same conclusion regarding the current state of the law under the plurality's standard: the United States must give individuals notice before killing them.[171] Justice Thomas reads the plurality decision in *Hamdi* to apply to other military operations central to war making.[172] He says, "Because a decision to bomb a particular target might extinguish *life* interests, the plurality's analysis seems to require notice to potential targets."[173] Justice Thomas goes on to describe the situation that this Note uses as its introduction. The CIA targeted a U.S. citizen who was an al-Qaeda leader and four others driving down a road in Yemen. The CIA launched a Predator drone, and the Predator drone launched a Hellfire missile. Justice Thomas states, "[T]he plurality's due process would seem to require notice and opportunity to respond here as well."[174] While Justice Thomas dislikes the current state of the law, he correctly recognizes that this is the current state of the law. Should the case come before the Court, he could dissent again.

170. Hamdi v. Rumsfeld, 542 U.S. 507, 597 (2004) (Thomas, J., dissenting).

171. *Id.* It is worth noting that Justice Thomas considers giving targets notice a bad idea. His reading of the plurality's application of *Eldridge* in *Hamdi* is one of the reasons for his dissent.

172. *Id.*

173. *Id.*

174. *Id.* Thomas does not think that the plurality desires this result or that they would require notice and opportunity to respond in this situation. *Id.* However, it is fair to assume that the plurality was aware of Justice Thomas's concerns and decided against him.

2. Amendment IV: Seizure of the Target's Life

Targeted killing implicates the Seizure Clause of the Fourth Amendment because "apprehension by the use of deadly force is a seizure subject to the reasonableness requirement of the Fourth Amendment."[175] In its analysis of the *Tennessee v. Garner* case, the Supreme Court determined that the reasonableness inquiry must balance the threat the suspect posed to the public with the suspect's interest in his life.[176] *Garner* involved a domestic arrest by police forces and is distinguishable from targeted killing on those grounds.[177] However, targeted killing is susceptible to review under this domestic standard, and it is not yet clear what standard the Court will choose in the final analysis of targeted killing. The rules imposed upon domestic law enforcement when apprehending dangerous criminals at home have implicit appeal because we can view terrorists as dangerous criminals abroad that the United States wishes to apprehend. While in Part III.H this Note cites reasons why the domestic law enforcement model is not particularly well suited to the targeted killing context, the Court may still adopt a domestic law enforcement model, so its implications deserve examination. The domestic law enforcement regime has additional relevance because it is a comprehensive and thoroughly reviewed system dealing with criminal U.S. citizens. By contrast, procedures for determining the permissibility of strictly military strikes are designed not with a view toward attacking criminals or U.S. citizens but rather with a view toward attacking the lawful combatants of other states.

Should the Court adopt a domestic law enforcement framework for analysis of the seizure component of targeted killing, the practice will be permissible in some circumstances but not as a carte blanche policy of extrajudicial killing. In *Garner*, the Court rejected a Tennessee law making it permissible for police officers to use lethal force to apprehend any suspected felon whom the police have notified that they intend to arrest and who subsequently flees.[178]

Cases arising out of the famed Ruby Ridge standoff between FBI agents and anti-U.S. government U.S. citizens in Idaho and the siege of the Branch Davidian compound in Waco, Texas, help bring the current jurisprudence on lethal apprehension of U.S. citizens into

175. Tennessee v. Garner, 471 U.S. 1, 7 (1985).

176. *Id.*

177. *Id.* at 3.

178. TENN. CODE ANN. § 40-7-108 (1982); *Garner*, 471 U.S. at 4, 11.

focus. The U.S. Court of Appeals for the Ninth Circuit ruled unconstitutional the rules of engagement at Ruby Ridge that permitted the FBI to shoot armed adult males in the area.[179] Specifically, the court took issue with the blanket attack, the ability of federal agents to kill without warning, and the absence of a requirement that the suspect pose an immediate threat to the agents or to the public.[180] The Ninth Circuit considered the permitted killings of suspects who did not pose an immediate threat to be "wartime rules" and held that they were "patently unconstitutional in a police action."[181]

Read together, these rulings stand for a peacetime ban on carte blanche killing of members of any class of suspects determined exclusively by reference to external characteristics. The hallmark of the courts' analyses of domestic use of lethal force against U.S. citizens is the "reasonableness" balancing test espoused in *Garner*.[182] Determining whether the force used to effect a seizure is reasonable balances the nature and quality of the intrusion, the person's Fourth Amendment rights, and the government interests at stake.[183] The inquiry embraces the "totality of the circumstances."[184]

Targeted killings, by and large, should pass this inquiry. Targeted killings are executive-branch decisions to seize a particular suspect through lethal force. Whereas the *Garner* and *Horiuchi* lines of cases ban directives authorizing the killings of whole classes of suspects, targeted killings examine the totality of the circumstances with respect to a particular individual suspect.[185] Targeted killing keeps the decision in the hands of senior members of the executive branch and out of the hands of lower-level law enforcement agents. In a targeted killing, senior members of the executive branch choose to strike a specific individual and then junior members carry out the operation.

A separate string of cases guarantees certain minimum conditions precedent for the seizure of suspected terrorists under the Fourth Amendment. In *Hamdi v. Rumsfeld*, the Court held that a U.S. citizen captured in combat in Afghanistan, where the United States is

179. Harris v. Roderick, 126 F.3d 1189, 1201–02 (9th Cir. 1997).

180. *Id.* at 1201–04.

181. Idaho v. Horiuchi, 253 F.3d 359, 377 (9th Cir. 2001) (en banc) (Kozinski, J.), *vacated as moot*, 266 F.3d 979 (9th Cir. 2001).

182. *Garner*, 471 U.S. at 7–8.

183. Graham v. Connor, 490 U.S. 386, 396 (1989) (citing *Garner*, 471 U.S. at 8).

184. *Garner*, 471 U.S. at 9.

185. *Id.* at 11; *Horiuchi*, 253 F.3d at 377.

currently fighting a war, still possessed basic constitutional rights.[186] The facts of *Hamdi* present the ideal alternative situation to targeted killing. There, the U.S. citizen was not targeted for killing but rather was captured in the field.[187] That the capture occurred during combat in a territory in which the United States was actively engaged in hostilities also allows *Hamdi* to skirt some of the thornier issues surrounding the targeted killing of people like Al-Aulaqi, who are not engaged in combat and who reside outside of the geographic regions of active hostility.[188] Under *Eldridge*, Hamdi's interest in his liberty was less important than Al-Aulaqi's interest in his life.[189] The government's interest in "eliminating" a terrorist remains the same because, whether killed or captured, the target is no longer a threat. Therefore, any protections guaranteed to Hamdi will likely also extend to citizens like Al-Aulaqi that the government intends to kill.

Hamdi guaranteed suspects the right to be put on notice and an opportunity to be heard by a neutral decisionmaker regarding the reasons for the government's decision for apprehension.[190] Hamdi and others like him could exercise these rights after their arrests. In the context of targeted killing, however, the accused must be afforded the opportunity to exercise these rights prior to the state action.[191] This is a relatively low hurdle for the government to overcome, given the severity of the deprivation of rights that it seeks to impose. The hurdle reflects a deliberate balancing of the rights of the individual and the interests of the government.[192] All that would be required is that the government make reasonable efforts to put the accused on notice that he is wanted for trial and afford him a neutral decisionmaker should

186. *See* Hamdi v. Rumsfeld, 542 U.S. 507, 533 (2004) (plurality opinion) (holding that due process requires a citizen-detainee to receive notice of the factual basis for his classification as an enemy combatant and a fair opportunity to rebut that factual basis before a neutral decisionmaker).

187. *Id.* at 510.

188. *See id.* at 514 (explaining that the Fourth Circuit stressed that, because Hamdi was captured in a zone of active combat, "no factual inquiry or evidentiary hearing allowing Hamdi to be heard or to rebut the Government's assertions was necessary or proper").

189. *See supra* Part IV.D.1.

190. *Hamdi*, 542 U.S. at 533.

191. *See id.* at 597 (Thomas, J., dissenting) (noting that the potential for extinguishing life interests would require notice to a bombing target).

192. *Cf.* Mathews v. Eldridge, 424 U.S. 319, 335 (1976) (establishing the standard for compliance with procedural due process, which balances the private interest against the government interest).

he come forward.[193] *Hamdi* speaks of notice and an *opportunity* to be heard by a neutral decisionmaker, not an actual hearing.[194] The suspect therefore needs notice but does not necessarily need a prior review by a neutral decisionmaker under the *Hamdi* guidelines.[195] All targets should receive notice. If a suspect surrenders himself or is otherwise captured, then he receives a hearing. All targets should receive the opportunity for a hearing. Once they have received both, it is up to the individual target whether to avail himself of that opportunity.

3. Amendment V: Right Not to Be Deprived of Life Without Due Process

The U.S. government cannot simply kill an American citizen out of hand. The Fifth Amendment to the U.S. Constitution contains within it a due process requirement that requires the government to follow adequate procedures before depriving a citizen of a weighty right.[196] That requirement is applied to the states through the Fourteenth Amendment.[197] The Fifth Amendment states that "[n]o person shall . . . be deprived of life, liberty, or property, without due process of law."[198] The Due Process Clause extends outside of the boundaries of criminal trials.[199] Due process is required whenever an individual will be deprived of life, liberty, or property.[200] For targeted killing then, a targeted U.S. citizen must be afforded some process before the government kills him. This process is not spelled out in the text of the Constitution, but it does not necessarily include a trial before an Article III court.[201]

The precedents from the War on Terror cases are instructive as to the kinds of process due to those targeted for killing. In *Hamdi*, the Court held that the Due Process Clause protects U.S. citizens

193. *See Hamdi*, 542 U.S. at 597 (Thomas, J., dissenting) (arguing that the plurality's requirements of notice and the opportunity to be heard by a neutral decisionmaker for citizen-detainees would apply to other military operations such as bombing a target).

194. *Id.* at 533 (plurality opinion).

195. *See id.*

196. U.S. CONST. amend. V; *Eldridge*, 424 U.S. at 335.

197. U.S. CONST. amend. XIV, § 1.

198. U.S. CONST. amend. V.

199. *See, e.g.*, *Eldridge*, 424 U.S. at 323 (applying the due process in the context of government deprivation of an individual's social security disability benefits).

200. U.S. CONST. amend. V.

201. *See Eldridge*, 424 U.S. at 335 (describing the factors that determine how much process the Fifth Amendment requires).

captured on the battlefield in open and violent opposition to the United States.[202] The swaying political opinions of the executive branch, and the foreign policy decisions of the commander-in-chief, cannot justly dictate whether a U.S. citizen will live or die.[203] Certain rights, such as the right to life, are set apart from other state processes and subject to infringement only after the state observes formal processes.[204] The U.S. government cannot infringe on a fundamental liberty interest at all "unless the infringement is narrowly tailored to serve a compelling state interest."[205]

In the situation of a targeted killing, the government's infringement on the target's interest is narrowly tailored to serve a compelling state interest. The government defines the target and takes action to protect the rest of the citizens of the United States from an attack by one particular citizen. The government still needs to disclose a process for determining who it will kill and why it can kill them that can survive strict scrutiny.

4. Amendment VI: Beyond a Trial

One right that seems especially cogent in the targeted killing context is the right of the accused "to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defense."[206] Though these rights are constitutionally guaranteed only "in all criminal prosecutions,"[207] they would certainly provide additional safeguards for the rights of targeted U.S. citizens from overzealous military commanders. The adversarial process employed in law enforcement has the same merit with regard to making accurate determinations when applied to decisions by agencies and military commanders to target and kill an individual. And, unlike in the more traditional battlefield context where the commander cannot afford to waste time with such "micromanaging" by judicial process, a targeted killing is subject to a more deliberative process.

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202. 542 U.S. 507, 532–33 (2004) (plurality opinion).

203. *See* W. Va. State Bd. of Educ. v. Barnette, 319 U.S. 624, 638 (1943) (explaining that the purpose of the Bill of Rights was to remove certain subjects from the reach of majorities, officials, and political controversies).

204. *Id.* ("One's right to life . . . may not be submitted to vote; [it] depend[s] on the outcome of no elections.").

205. Reno v. Flores, 507 U.S. 292, 302 (1993); *see also* Johnson v. California, 543 U.S. 499, 508–09 (2005) (applying strict scrutiny to prison determinations of cell selection based on race).

206. U.S. CONST. amend. VI.

207. *Id.*

The closest analogy to targeted killing is targeted bombings of structures and enemy facilities. Strikes of this nature raise issues of humanitarian law and domestic law.[208] The Judge Advocate Generals ("JAGs") of the various military branches advise commanders on the legality of a strike. JAGs are already in place in the military command structure, and they could equally advise commanders on the legality of ordering a particular targeted killing. With regard to the targeted killing of non-U.S. citizens, it would seem that the structure in place for advising commanders of the legality of targeting an enemy facility (which often contains many people) is sufficient for the targeting and killing of a single individual.

However, the United States should provide more protection to American citizens than to foreign citizens. The JAG Corps could still provide this function, but the Sixth Amendment guarantees of access to counsel and compulsory process for obtaining witnesses (or at least evidence) in favor of the target seem especially important here. Once JAG officers make their cases before a neutral decisionmaker for the legality or illegality of killing the target, the commander would then have the authority to decide, with the advice of the JAG Corps, whether the military objective served justified conducting the targeted killing.

5. Amendment VIII: Cruel and Unusual Punishment

The Eighth Amendment protects citizens from cruel and unusual punishment.[209] To date, the Court has not concluded that death is a cruel and unusual punishment.[210] Although Part II.D cites reasons targeted killing should not be considered a "punishment," the protection against cruel and unusual punishment still applies to these killings. The jurisprudence of the Court has found that the protection against cruel and unusual punishment extends to practices that are arbitrary and capricious and that deprive the individual in question of his life.[211] The Court's finding that capital punishment was imposed in

208. *See, e.g.*, Convention Respecting the Laws and Customs of War on Land and Its Annex, *supra* note 38, § II, arts. 22, 25 (stipulating that belligerents do not have an unlimited right to adopt measures to injure the enemy and prohibiting the attack or bombardment of undefended towns, villages, dwellings, or buildings).

209. U.S. CONST. amend. VIII.

210. Gregg v. Georgia, 428 U.S. 153, 169 (1976) (plurality opinion); *see also* Baze v. Rees, 553 U.S. 35, 41 (2008) (plurality opinion) (affirming that death is not itself a cruel and unusual punishment).

211. *See* Furman v. Georgia, 408 U.S. 238, 242 (1972) (Douglas, J., concurring) (banning the death penalty where it was applied in an arbitrary and capricious manner); Rachel E. Barkow,

a manner that was arbitrary and capricious led it to put a moratorium on executions in 1972.[212] Under such reasoning, the Court would likely take a similar view of the targeted killing program if it is found to be arbitrary and capricious in its application. This is another argument in favor of a steady and known process of determining and reviewing targets. If targeted killing is to continue as a process, then the government must ensure that the agencies making these decisions follow procedures that can sustain judicial scrutiny under the "arbitrary and capricious" standard.

6. Judicial Review of Executive Decisions and Separation of Powers

Finally, there are additional protections for the citizens of the United States coming out of the very structure of the U.S. government. The executive is at its most powerful when working in the sphere of foreign relations, particularly when working in military operations.[213] The district court opinion in the *Al-Aulaqi* case raises the question of whether Al-Aulaqi would have the right to sue for an injunction preventing him from being targeted and killed.[214] The United States cannot be sued without its consent because of sovereign immunity.[215] The United States must waive sovereign immunity explicitly to give rise to a private action, as all purported waivers of sovereign immunity are strictly construed.[216] The Administrative Procedure Act ("APA") provides a waiver of sovereign immunity in actions against federal government agencies for nonmonetary relief.[217] Nonetheless, the judiciary maintains the power to review executive

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The Court of Life and Death: The Two Tracks of Constitutional Sentencing Law and the Case for Uniformity, 107 MICH. L. REV. 1145, 1151 (2009) ("When the Supreme Court struck down capital punishment as it then existed in 1972 in *Furman v. Georgia*, its central concern was avoiding arbitrary and capricious death sentences.").

212. *Furman*, 408 U.S. at 293 (Brennan, J., concurring).

213. *See* Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579, 691–92 (1952) (Vinson, C.J., dissenting) (arguing that the constitutional provisions designating the President as representative in foreign relations and commander of the military authorize him to act for the national protection, even absent specific constitutional provisions or enactments of Congress allowing that action).

214. *See* Al-Aulaqi v. Obama, 727 F. Supp. 2d 1, 35 (D.D.C. 2010) (dismissing Al-Aulaqi's father's request for an injunction due to lack of standing).

215. United States v. Sherwood, 312 U.S. 584, 586 (1941) ("The United States, as sovereign, is immune from suit save as it consents to be sued."); *see* United States v. King, 395 U.S. 1, 4 (1969) (finding that the Court of Claims' jurisdiction to grant relief depends on whether the United States has waived its sovereign immunity, and that the waiver must be unequivocally expressed and not implied).

216. *King*, 395 U.S. at 3.

217. 5 U.S.C. § 702 (2006).

branch decisions made in the exercise of its war powers if the decisions infringe constitutionally protected rights.[218]

This Section also presents, as noted by the district court, an issue of justiciability that may preclude any ex post review by Article III courts. The district court considered the military matter of targeted killing to be a political question, beyond the scope of its review powers.[219] Military action is textually committed by the Constitution to the political branches of the U.S. government.[220] This textual commitment is likely sufficient for a court to find that the targeted killing program is a nonjusticiable political question.[221]

Review of targeted killing decisions does not necessarily have to come from an Article III court. The legislature, with some exceptions,[222] can decide what cases will or will not be heard and by whom the cases will be heard.[223] In his opinion dismissing the *Al-Aulaqi* case for lack of standing, Judge Bates stated his concern about making targeted killing decisions effectively unreviewable by the judiciary, stating, "How is it that judicial approval is required when the United States decides to target a U.S. citizen overseas for electronic surveillance, but that . . . judicial scrutiny is prohibited when the United States decides to target a U.S. citizen overseas for death?"[224] The reason for this is that search and seizure is

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218. Kovach v. Middendorf, 424 F. Supp. 72, 77 (D. Del. 1976) (citing Kennedy v. Mendoza-Martinez, 372 U.S. 144, 164–165 (1963)); *cf.* Marbury v. Madison, 5 U.S. (1 Cranch) 137, 166, 177 (1803) (stating that when the law assigns a duty to an executive official, unlike when they are exercising executive discretion, a person who considers themselves injured has the right to resort to the laws of the country for a remedy and "[i]t is emphatically the province and duty of the judicial department to say what the law is").

219. *Al-Aulaqi*, 727 F. Supp. 2d at 52.

220. *Id.* at 48 (citing Schneider v. Kissinger, 412 F.3d 190, 194–95 (D.C. Cir. 2005)).

221. *See id.* at 44–45 (stating that for a case to be nonjusticiable a court need only conclude that one *Baker* factor is present, not all).

222. *See* Boumediene v. Bush, 553 U.S. 723, 728 (2008).

223. Hamdan v. Rumsfeld, 548 U.S. 557, 577 (2006) (citing Hallowell v. Commons, 239 U.S. 506, 508 (1916)) (stating that jurisdiction stripping does not take away a substantive right, instead it simply changes the tribunal that hears the case), *partially superseded by statute*, Military Commissions Act of 2006, Pub. L. No. 109–366, 120 Stat. 2600, 2636.

224. *Al-Aulaqi*, 727 F. Supp. 2d at 8. Some commentators have argued Judge Bates could and should have ruled on targeted killing as a matter of law in the *Al-Aulaqi* case. *See, e.g.*, John C. Dehn & Kevin Jon Heller, Debate, *Targeted Killing: The Case of Anwar al-Aulaqi*, 159 U. PA. L. REV. PENNUMBRA 175, 177–78 (2011), http://www.pennumbra.com/debates/debate.php?did=40 (Dehn, Opening Statement); Benjamin McKelvey, Note, *Due Process Rights and the Targeted Killing of Suspected Terrorists: The Unconstitutional Scope of Executive Killing Power*, 44 VAND. J. TRANSNAT'L L. 1353 (2011).

distinguishable from military strikes.[225] Judges hold sway in law enforcement decisions because that is where the judiciary has expertise. Judges are not military commanders and are far removed from the factors that go into making military decisions. For that reason, the JAG Corps is a better choice for providing safeguards for the rights of U.S. citizens than judges, sitting far away in courthouses.[226]

V. SOLUTION

U.S. citizens whom the U.S. government targets for killing have greater rights than non-U.S. citizens whom the U.S. government wishes to kill.[227] Judge Bates, in his opinion dismissing the *Al-Aulaqi* case, hit strongly on this point. The Judge explained that if the U.S. citizen chooses not to avail himself of his constitutional rights, and the U.S. government is unable to capture and bring him to trial, the United States is not obliged to tolerate continued attacks.[228]

The citizen makes the choice to exercise his rights and decides not to come before a U.S. court but instead decides to try to evade a military strike.[229] For the citizen to make this choice, he must be put on notice.[230] This notice protects his rights to life and liberty by giving the citizen access to the judicial process guaranteed by the Constitution to all citizens.[231] At a minimum, the U.S. government needs to provide certain information to satisfy the notice requirement. First, the government should formally disclose the existence of kill

225. Editorial, *A Federal Judge Made the Right Decision on Targeted Killings*, WASH. POST, Dec. 21, 2010, http://www.washingtonpost.com/wp-dyn/content/article/2010/12/21/AR2010122105210.html.

226. *Id.*

227. *Cf. Al-Aulaqi*, 727 F. Supp. 2d at 51 (stating that the political question doctrine wanes where the constitutional rights of a U.S. citizen are at stake, but does not make the doctrine inapposite).

228. *Id.* at 17–18 (noting that nothing was preventing Al-Aulaqi from "peacefully presenting himself at the U.S. Embassy in Yemen and expressing a desire to vindicate his constitutional rights in U.S. courts" and that "[a]ll U.S. citizens may avail themselves of the U.S. judicial system if they present themselves peacefully, and no U.S. citizen may simultaneously avail himself of the U.S. judicial system and evade U.S. law enforcement authorities").

229. *Id.* (denying Al-Aulaqi's father standing for various reasons including that Al-Aulaqi did have access to the courts, were he to avail himself).

230. *Cf.* Mathews v. Eldridge 424 U.S. 319, 348 (1976) (citing Joint Anti-Fascist Comm. v. McGrath, 341 U.S. 123, 171–172 (1951) (Frankfurter, J., concurring)) ("The essence of due process is the requirement that 'a person in jeopardy of serious loss (be given) notice of the case against him and opportunity to meet it.' ").

231. *Id.*

lists and the names of those U.S. citizens who are on them. Second, the government should provide information detailing the specific criteria that make citizens eligible for placement on a kill list. Then, once the government establishes uniform standards, it should disclose them.

With notice, the due process requirements of the Constitution begin to take hold. If choice is at the core of the determination of whether to strike the person as a military target or to try him as a criminal, then there must be some determination that the person has made that choice. If the person has been put on notice using the *Mullane* standard[232] that he is wanted for trial in the United States, then the government can infer whether he wishes to exercise his trial rights by whether he turns himself in or otherwise avails himself of the judicial system. However, due to the importance of the interest at stake and the possibility that the target was erroneously added to a kill list, there needs to be additional protection.[233] This Note suggests assigning each targeted individual a JAG officer, who can raise defenses on behalf of the individual.

A. Military Necessity

As targeted killing is a military operation, the decisions must first be justified by reference to military necessity.[234] Courts lack competence to assess the particular disposition of military forces.[235] This Note believes that the JAG Corps and military commanders are in the best position to determine the feasibility of a military operation. The decisions can therefore be left to commanders' discretion, checked by the adversarial process of the JAG Corps, to decide whether a military strike against the person is necessary and proportionate.

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232. *See* Mullane v. Cent. Hanover Bank & Trust Co., 339 U.S. 306, 314 (1950) ("An elementary and fundamental requirement of due process in any proceeding which is to be accorded finality is notice reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections.").

233. *Cf. Eldridge*, 424 U.S. at 335 (1976) (stating that due process generally requires the consideration of the risk of erroneous deprivation of the private interest and whether additional or substitute procedural safeguards are needed).

234. *See* Report of the Special Rapporteur, *supra* note 13, at ¶¶ 47–51 (stating that international humanitarian law ("IHL") has a strict requirement that lethal force be necessary).

235. *Cf.* El-Shifa Pharm. Indus. Co. v. United States, 607 F.3d 836, 844 (D.C. Cir. 2010) (citing Gilligan v. Morgan, 413 U.S. 1, 10 (1973)) (stating that courts lack the competence to assess the strategic decision to deploy force or create standards to determine whether it was justified because the control of military forces are essentially professional military judgments, subjected to civilian control by the legislative and executive branches).

Second, for the targeted killing to be justified, it must further a genuine military objective. This is true for all targeted killings, not just those against U.S. citizens. Third, the attacks by the person targeted and his organization must be likely to occur. The targeted killing cannot be used as a reprisal for an earlier strike or merely to settle a political score;[236] it must be a genuine attack that is against a military threat and that will damage the enemy's war-making capabilities.

B. Process Due

The crux of the matter is what process is due to a U.S. citizen before he can be killed in military strikes by his own government in response to his role in planning and conducting military operations against the United States. First and foremost, the U.S. citizen is entitled to a neutral decisionmaking process.[237] This need not take the form of a trial in an Article III court.[238] Rather, the executive can create a neutral decisionmaking body within an agency for purposes of determining whether a U.S. citizen will be killed.[239] This function could be served admirably by the JAG Corps or a similar organization within the executive branch.

The first determination this neutral body will have to make in all instances is the proposed target's combatant status and his level of participation in the operations against the United States. The decisionmaker will have to determine whether the person targeted for killing is a lawful or unlawful combatant, a civilian (which automatically bars the targeting of that individual for killing), or one

236. *Cf., e.g.*, Bell v. Wolfish, 441 U.S. 520, 535–36 (1979) (stating that the Due Process Clause prohibits the punishment of detainees prior to an adjudication of guilt).

237. Hamdi v. Rumsfeld, 542 U.S. 507, 533 (2004) (holding that a citizen-detainee seeking to challenge his classification as an enemy combatant must receive a fair opportunity to rebut the Government's factual assertions before a neutral decisionmaker); *cf. Eldridge*, 424 U.S. at 333 (citing Armstrong v. Manzo, 380 U.S. 545, 552 (1965)) (stating that the fundamental requirement of due process is the opportunity to be heard "at a meaningful time and in a meaningful manner").

238. *See Hamdi*, 542 U.S. at 538 (plurality opinion) (noting a possibility that a military tribunal could meet the due process standards required but, lacking such process, an Article III court that receives a habeas petition must ensure that the minimum requirements of due process are achieved).

239. *Cf. Eldridge*, 424 U.S. at 349 (holding that the Social Security Administration's administrative review procedures provided effective process for the termination of disability benefits).

of the many proposed hybrids.[240] If the decisionmaker finds that the proposed target is actively participating in military operations against the United States, then it can move on to the next stage of its decisionmaking. Otherwise, the target would not be lawful.[241]

Once the decisionmaker determines that the target is lawful, U.S. citizen targets must be put on notice that their lives will be forfeited if they fail to turn themselves over to the authorities.[242] Once the government provides notice, the decisionmaker can decide the sufficiency of this notice, which should embrace the totality of the circumstances. If notice is sufficient, then the process can continue. If there has not been sufficient notice, then the government must provide additional notice.[243]

Having determined that the U.S. citizen is a lawful target with sufficient notice, the decisionmaker then will evaluate the citizen's ability to choose to exercise his rights to avail himself of the court system. If the decisionmaker finds that the target has the ability to choose what he will do and has decided not to exercise his rights, then the process can continue.

Next, it falls on the decisionmaker to evaluate whether or not it is possible to capture the individual.[244] This part of the inquiry is necessary to satisfy the humanitarian law of proportionality.[245] If less

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240. This Note discusses the relevant categories above. For greater detail see generally Geneva Convention III, *supra* note 60, art. 4(A)(2) (stating who should be considered a prisoner of war if captured); NILS MELZER, INTERNATIONAL COMMITTEE OF THE RED CROSS, INTERPRETIVE GUIDANCE ON THE NOTION OF DIRECT PARTICIPATION IN HOSTILITIES UNDER INTERNATIONAL HUMANITARIAN LAW (2009), *available at* http://www.icrc.org/eng/assets/files/other/icrc-002-0990.pdf (detailing different classifications of civilians and armed forces in conflicts). Recruiters and trainers in addition to proper fighters can also be targeted but they may be targeted only during their participation, not after they have relinquished that function. Report of the Special Rapporteur, *supra* note 13, ¶¶ 66–70.

241. *See generally* Geneva Conventions III, *supra* note 60, art. 4(A)(2) (stating who should be considered a prisoner of war if captured).

242. *See Hamdi*, 542 U.S. at 597 (Thomas, J., dissenting) (stating that the plurality's opinion "seems to require notice to potential targets"); *Eldridge*, 424 U.S. at 335 (citing Joint Anti-Fascist Comm. v. McGrath, 341 U.S. 123, 171–172 (1951) (Frankfurter, J., concurring)) ("The essence of due process is the requirement that 'a person in jeopardy of serious loss (be given) notice of the case against him and opportunity to meet it.' ").

243. *See* Mullane v. Cent. Hanover Bank & Trust Co., 339 U.S. 306, 319 (1950) (holding that although a trustee followed the statutory requirements to provide constructive notice, with regard to known beneficiaries, due process required additional service in those circumstances).

244. *See* Savage, *supra* note 1 (describing the secret Obama Administration policy not to kill individuals it can capture).

245. *See* Rome Statute, *supra* note 64, art. 8(2)(b)(i) (stating that it is a war crime to intentionally launch an attack that would cause incidental loss of civilian life if it was clearly excessive to the concrete and direct military advantage anticipated); Protocol I, *supra* note 12 (prohibiting an "attack which may be expected to cause incidental loss of civilian life, injury to

harmful means for depriving the enemy of the war-making capability provided by this U.S. citizen exist, then those means must be used. The decisionmaker need not find that the military has tried and failed to capture the individual, just that military leaders reasonably decided that capture was not feasible.[246]

Finally, the decisionmaker must review the military objective that targeting and killing this U.S. citizen will serve. Only true military targets are subject to military action. If all of the above conditions are satisfied, then the targeted killing can proceed.

VI. CONCLUSION: THE BALANCE OF LIFE AND DEATH

The practice of targeted killing can be used in a manner that is consistent with U.S. and international laws. Permissible targets will be of a military nature, and killing them will serve a military objective. No laws, international or domestic, prohibit the practice if it is carried out by a state against an enemy of that state actively engaged in an armed conflict against that state. When the target is a U.S. citizen, the U.S. Constitution demands certain additional procedures before the U.S. government may kill the target. The Fifth Amendment's Due Process Clause dictates these procedures. The procedures ensure a just determination of the target's permissibility as a military matter and the subjective intent of the target not to avail himself of the further protections to which he is entitled as an American citizen. A neutral decisionmaker should balance the targeted citizen's life against the risk he poses. If the decision comes out against him, then the military may launch a strike.

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civilians, damage to civilian objects, or a combination thereof, which would be excessive in relation to the concrete and direct military advantage anticipated").

246. *See* Savage, *supra* note 1 (describing the secret Obama Administration policy not to kill individuals it can capture).

This Note has shown that a program of targeted killing of U.S. citizens could be lawful under certain circumstances. Specifically, I propose a system where the targeted citizen receives notice and an opportunity for a hearing followed by a JAG determination of his decision not to avail himself of further process and of his permissibility as a military target. This would balance the target's interest in his life against the threat he poses to the lives of his fellow Americans. When we must, we will kill our fellow American before he can kill us.

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