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# The Legality of Armed Drone Strikes against U.S. Citizens within the United States

## I. INTRODUCTION

The passage of the National Defense Authorization Act for Fiscal Year 2012 drew heated criticism from both sides of the political spectrum<sup>1</sup> because it hinted that the U.S. military could, if necessary, detain a U.S. citizen on U.S. soil in accordance with the laws of armed conflict instead of through the criminal justice system.<sup>2</sup> A number of commentators and politicians assert that this would violate the fundamental constitutional rights that Americans enjoy.<sup>3</sup> The idea that the United States could use military force according to the laws of armed conflict within the United States, however, appears to be consistent with American history,<sup>4</sup> the text of the Constitution,<sup>5</sup> and Supreme Court precedent.<sup>6</sup> In a similar way, the U.S. military's targeted killing of Anwar al-Aulaqi, a U.S. citizen living in Yemen, in 2011 was highly controversial and raised questions about whether the United States could lawfully use

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1. See, e.g., NDAA, ACLU BLOG RTS. (Feb. 28, 2012), <http://www.aclu.org/blog/tag/ndaa>; Sunana Batra, *NDAA Passage Perfect Way to Sully Bill of Rights Anniversary with a Black Eye*, FREEREPUBLIC.COM (Dec. 16, 2011), <http://www.freerepublic.com/focus/f-bloggers/2827817/posts>.

2. S. 1867, 112th Cong. § 1032(a)–(b)(1) (2011). The text of the bill merely states that the requirement to detain al-Qaeda members does not extend to U.S. citizens. The implication is that military detention according to the law of armed conflict is an option that the President may exercise according to his or her discretion.

3. See Robert Gehrke, *Utah Lawmakers Sound Off Against Federal Detention Bill*, SALT LAKE TRIB. (Feb. 27, 2012), <http://www.sltrib.com/sltrib/politics/53598367-90/utah-federal-act-bill.html.csp>; Kurt Nimmo, *Ron Paul Introduces Legislation to Strike NDAA's Unconstitutional Section 1021*, INFOWARS.COM (Jan. 18, 2012), <http://www.infowars.com/ron-paul-introduces-legislation-to-strike-ndaas-unconstitutional-section-1021>.

4. See, e.g., Warren W. Hassler, Jr., *American Civil War*, BRITANNICA.COM, <http://www.britannica.com/EBchecked/topic/19407/American-Civil-War> (noting that the U.S. government used military force within the borders of the United States and against U.S. citizens).

5. See U.S. CONST. amend. III (foreseeing that the federal government may need to use military force within the United States and proscribing how troops might be quartered in civilian homes).

6. See *Hamdi v. Rumsfeld*, 542 U.S. 507 (2004); *Ex parte Quirin*, 317 U.S. 1 (1942).

military force against its own citizens.<sup>7</sup> As one commentator observed, however, “[n]o 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.”<sup>8</sup>

Despite the fact that the laws of armed conflict have applied to the use of military force within the borders of the United States and to U.S. citizens in the past, many Americans have argued that it is a gross violation of their rights.<sup>9</sup> It raises the question: What other aspects of military force would be permissible within the United States and against its citizens under the laws of armed conflict that run contrary to current popular assumptions? To explore this issue, this Comment poses the intentionally provocative question: Could the U.S. military conduct an armed drone strike against a U.S. citizen within the United States? The answer is most likely yes, but only under a narrow set of circumstances.

The use of unmanned armed aerial drones to target individuals during armed conflict is one of the most controversial U.S. practices in the War on Terror.<sup>10</sup> Recent years, however, have only seen an increase in the number of armed drone attacks overseas,<sup>11</sup> and the United States continues to defend its lawfulness.<sup>12</sup> If the use of armed drone strikes is acceptable under the laws of armed conflict, and the laws of armed conflict apply to the use of military force within the United States, then the U.S. military could conceivably target a U.S. citizen in the United States using an armed drone. The following is a hypothetical scenario that will be referred to throughout this Comment.

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7. See Glenn Greenwald, *The Due-Process-Free Assassination of U.S. Citizens Is Now Reality*, SALON.COM (Sep. 30, 2011), [http://www.salon.com/2011/09/30/awlaki\\_6/singleton](http://www.salon.com/2011/09/30/awlaki_6/singleton).

8. Mike Dreyfuss, *My Fellow Americans, We Are Going to Kill You: The Legality of Targeting and Killing U.S. Citizens Abroad*, 65 VAND. L. REV. 249, 291 (2012).

9. See Gehrke, *supra* note 3; Greenwald, *supra* note 7.

10. See Sikander Ahmed Shah, *War on Terrorism: Self Defense, Operation Enduring Freedom, and the Legality of U.S. Drone Attacks in Pakistan*, 9 WASH. U. GLOBAL STUD. L. REV. 77, 126 (2010); Akbar Nasir Khan, *Legality of Targeted Killings by Drone Attacks in Pakistan*, PAK. INST. PEACE STUD. (2011), available at <http://www.san-pips.com/download.php?f=76.pdf>.

11. *Predator Drones and Unmanned Aerial Vehicles (UAVs)*, N.Y. TIMES, [http://topics.nytimes.com/top/reference/timestopics/subjects/u/unmanned\\_aerial\\_vehicles/index.html](http://topics.nytimes.com/top/reference/timestopics/subjects/u/unmanned_aerial_vehicles/index.html) (last visited Sept. 25, 2012).

12. Kenneth Anderson, *Harold Koh Statements on Drone Warfare at ASIL Tonight*, VOLOKH CONSPIRACY (Mar. 25, 2010), <http://volokh.com/2010/03/25/harold-koh-state-ments-on-drone-warfare-at-asil-tonight>.

*A. Scenario for an Armed Drone Strike within the United States*

Consider the following hypothetical:

The U.S. military has recently captured al-Qaeda operatives in Afghanistan who, when interrogated, provided consistent accounts of a plan to remotely detonate chemical weapons in the Alamo and at least two more unknown locations in or around San Antonio, Texas. The attack is supposed to happen within the next few days, but no one knows exactly when. Initial estimates place the civilian death toll at about 1,000 people. According to the detainees, the al-Qaeda members planning the attack live in a suburban neighborhood just outside of San Antonio. Two al-Qaeda members along with their families live in the house, which acts as the operations center for the attack. All are U.S. citizens. In preparation for the attack, the al-Qaeda members have stockpiled small arms, ammunition, chemical weapons, and even some larger anti-tank weapons as well as remote detonating equipment. Within hours, law enforcement officials have identified the house in question and have observed individuals coming and going consistent with the human intelligence. Two persons have been identified as known al-Qaeda operatives. Civilian law enforcement agents have made no attempt to intercept or apprehend the persons out of fear that doing so would prompt them to remotely trigger the chemical weapons, which have yet to be located. Civilian law enforcement is also unequipped to deal with chemical weapons and anti-tank weapons. The President of the United States conducts a thorough review of the evidence and determines that the al-Qaeda members pose an imminent threat of violence and that capture is not possible. Invoking the Authorization for the Use of Military Force, the President orders a series of armed drone strikes on the house designed to kill the targets before they have a chance to remotely detonate the chemical weapons. Within hours the house has been completely destroyed and everyone inside has been killed. Later, an investigation finds that the strikes killed two known al-Qaeda operatives as well as seven family members and ten neighbors.

While admittedly disturbing, this scenario is likely legal under current domestic laws and lawful under the laws of armed conflict. This Comment deals primarily with *lex lata*, the law as it currently stands and does not define what the law should be. In Part II, this Comment examines why military force has been and continues to be justified and regulated under the laws of armed conflict within the territory of the United States. Part III deals with the lawfulness of

targeting U.S. citizens during armed conflict. Part IV ultimately concludes that it is currently legal to use armed drones within the United States to target U.S. citizens.

## II. THE LAWS OF ARMED CONFLICT APPLY WITHIN THE UNITED STATES

A quick review of the history of American armed conflict reveals a striking trend that may be influencing popular conceptions on the use of military force within the United States. The last major armed conflict against a foreign nation fought on U.S. soil was the War of 1812, in which the British sacked and burned the White House.<sup>13</sup> This was followed by the Civil War from 1861 to 1865, which was the last time a major war occurred on U.S. soil.<sup>14</sup> Various wars against American Indian tribes lasted until the late 1800s.<sup>15</sup> Since then, all armed conflicts in which the United States has been involved have occurred extraterritorially.<sup>16</sup> While two devastating attacks—Pearl Harbor in 1941 and the terrorist attacks on September 11, 2001—occurred within the territory of the United States, the ensuing armed conflicts occurred on foreign soil.<sup>17</sup> The result is the creation of an American tradition that armed conflict is something that happens overseas, not at home. The applicability of the laws of armed conflict within the United States, however, has not changed. Absent this century-old tradition of exclusively extraterritorial armed conflict, it might be completely uncontroversial for the government to use military force against enemy combatants within its own borders. For Americans today, however, this raises legitimate concerns about the balance between national security and constitutionally guaranteed rights. It is

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13. David S. Heidler & Jeanne T. Heidler, *War of 1812*, BRITANNICA.COM, <http://www.britannica.com/EBchecked/topic/181068/War-of-1812> (last visited Nov. 19, 2012).

14. Hassler, *supra* note 4.

15. See ELLIOT WEST, *THE LAST INDIAN WAR: THE NEZ PERCE STORY* XV (2009) (arguing that the last major American Indian war was against the Nez Perce and ended in 1877).

16. See *American History Timeline: American Involvement in Wars from Colonial Times to the Present*, AMERICANHISTORY.ABOUT.COM, <http://americanhistory.about.com/library/timelines/bltimelineuswars.htm> (last visited Nov. 19, 2012).

17. See *Pearl Harbor Attack*, BRITANNICA.COM, <http://www.britannica.com/EBchecked/topic/448010/Pearl-Harbor-attack> (last visited Nov. 19, 2012); Peter L. Bergen, *September 11 Attacks*, BRITANNICA.COM, <http://www.britannica.com/EBchecked/topic/762320/September-11-attacks> (last visited Nov. 19, 2012).

therefore worthwhile to review how the law of armed conflict applies under certain circumstances within the United States.

The text of the Constitution, American history, and Supreme Court precedent all indicate that, if necessary, the United States could fight an armed conflict on U.S. soil and even against U.S. citizens in accordance with the laws of armed conflict. This applies to the current Global War on Terror as authorized by Congress in the Authorization for the Use of Military Force (AUMF).<sup>18</sup>

#### *A. Historical View of the Law of Armed Conflict in the United States*

A review of the text of the Constitution shows that armed conflict within the United States was one of the major subjects that concerned the Framers. One of the stated purposes in the preamble of the Constitution is to “provide for the common defense.”<sup>19</sup> Article I, Section 8 grants Congress the power to declare war, raise an army, maintain a navy, and define and punish violations of the law of nations.<sup>20</sup> Article II, Section 2 sets up the executive as the commander and chief of the army and navy.<sup>21</sup> While not often recognized as a “war power,” Article III, Section 3 gives the Judiciary power to try U.S. citizens who are “levying War” against the United States for treason.<sup>22</sup> It also gives power to Congress to determine the punishment for treason.<sup>23</sup> Furthermore, the Bill of Rights contemplated the use of military force and the application of the laws of armed conflict within the United States. The Third Amendment specifically allows troops to be quartered in private homes in times of war in a manner prescribed by law.<sup>24</sup> While the case of al-Aulaqi, in which a U.S. citizen adheres to an enemy group like al-Qaeda, is relatively surprising and rare in modern times,<sup>25</sup> in

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

19. U.S. CONST. pmbl.

20. *Id.* at art. I, § 8, cls. 11–13.

21. *Id.* at art. II, § 2.

22. *Id.* at art. III, § 3.

23. *Id.*

24. *Id.* at amend. III.

25. See *Cramer v. United States*, 325 U.S. 1, 24 (1945) (discussing the rarity of U.S. citizens taking up arms against their country). But see Abu Mansur Al Amriki, *U.S. Jihadi in Somalia, Reportedly Claims Comrades Want to Kill Him*, HUFFINGTONPOST.COM (Mar. 17, 2012), [http://www.huffingtonpost.com/2012/03/17/abu-mansur-al-amriki-video\\_n\\_1355387.html](http://www.huffingtonpost.com/2012/03/17/abu-mansur-al-amriki-video_n_1355387.html) (showing that al-Aulaqi is not unique in being a U.S. citizen who has joined a terrorist group).

1789 the Framers were keenly aware of the possibility that U.S. citizens might engage in armed conflict with the federal government.<sup>26</sup> Dealing with a treason case in 1945, the Supreme Court observed the following about the Framers:

When our forefathers took up the task of forming an independent political organization for New World society, no one of them appears to have doubted that to bring into being a new government would originate a new allegiance for its citizens and inhabitants. Nor were they reluctant to punish as treason any genuine breach of allegiance, as every government time out of mind had done. The betrayal of Washington by Arnold was fresh in mind. They were far more awake to powerful enemies with designs on this continent than some of the intervening generations have been.<sup>27</sup>

A little less than four-score years later, the Civil War provided perhaps the most devastating example of the federal government's use of military force against U.S. citizens within U.S. territory. The Union Army killed about 75,000 U.S. citizens who were fighting for the Confederacy during that armed conflict.<sup>28</sup> In *Ex Parte Milligan*, a military detention case arising after the Civil War, both sides to the controversy recognized that the laws of armed conflict as applied during the Civil War were "accepted as part of the law of nations, and extended . . . to all belligerents."<sup>29</sup>

Even after the Civil War, when the U.S. transitioned into the current era of exclusively extraterritorial armed conflict, military force and military tribunals were used against U.S. citizens. During the Second World War, for example, a number of U.S. citizens chose to fight for Nazi Germany against the Allies and the United States.<sup>30</sup>

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26. *Cramer*, 325 U.S. at 8.

27. *Id.*

28. THE OXFORD COMPANION TO AMERICAN MILITARY HISTORY 849 (John W. Chambers II ed., Oxford University Press 1999).

29. *Ex Parte Milligan*, 71 U.S. 2, 36 (1866). The Court in *Milligan* eventually found that military tribunals after a conflict were not acceptable for U.S. citizens when federal courts were operational in that same jurisdiction. *Id.* at 127. While this has implications for the NDAA of 2012, it does not touch the question of whether the U.S. government could use an armed drone strike against a U.S. citizen within the United States.

30. Shaun Downey, *Americans in the SS*, POOR MOUTH BLOG (June 10, 2006), <http://thepoormouth.blogspot.com/2006/06/americans-in-ss.html>; Gary Warth, *Columnist Recounts Tale of German-Americans Fighting for Nazis*, JOURNALSTAR.COM (July 8, 2006, 7:00 PM) [http://journalstar.com/lifestyles/article\\_66492ff6-2d6c-5bf0-a1a4-4997e5b9d578.html](http://journalstar.com/lifestyles/article_66492ff6-2d6c-5bf0-a1a4-4997e5b9d578.html).

On the battlefields in Europe, the U.S. military treated these U.S. citizens according to the laws of armed conflict and not according to U.S. criminal law.<sup>31</sup> While no battles during the Second World War were fought on U.S. soil, the same rules applied to U.S. citizens who took up arms against the United States.<sup>32</sup>

The case of Herbert Hans Haupt is illustrative of this point. Haupt was a U.S. citizen who had lived in the United States since he was five years old, but left to fight for Germany during the Second World War.<sup>33</sup> Along with a handful of fluent English speakers in the German military, he clandestinely returned to the United States via submarine to sabotage U.S. military operations and to engage in what might now be referred to as terrorism.<sup>34</sup> The Federal Bureau of Investigation arrested Haupt and his fellow would-be saboteurs and turned them over to a military tribunal to be tried according to the laws of armed conflict, not U.S. domestic criminal law.<sup>35</sup> The military tribunal found Haupt guilty of violating the laws of war.<sup>36</sup> In *Ex parte Quirin*, the Supreme Court affirmed the military tribunal's jurisdiction.<sup>37</sup> It further held that the laws of armed conflict governed the way the U.S. military deals with an enemy belligerent regardless of his status as a U.S. citizen.<sup>38</sup> "Citizens who associate themselves with the military arm of the enemy government, and with its aid, guidance and direction enter this country bent on

31. See Oregonian Editorial Bd., *Sixty-five Years After Operation Overlord*, OREGONLIVE.COM (June 5, 2009), [http://www.oregonlive.com/opinion/index.ssf/2009/06/sixtyfive\\_years\\_after\\_operatio.html](http://www.oregonlive.com/opinion/index.ssf/2009/06/sixtyfive_years_after_operatio.html). Don Malarkey, a World War Two veteran, made famous in the book and television series *Band of Brothers*, recounts meeting a German prisoner of war who was originally from Portland, Oregon. The prisoner was treated the same way as the other prisoners of war.

32. See *infra* note 38.

33. *Ex parte Quirin*, 317 U.S. 1, 20 (1942), *modified*, *U.S. ex rel. Quirin v. Cox*, 63 S. Ct. 22 (1942).

34. See *id.* at 21.

35. *Id.* at 21, 23.

36. LOUIS FISHER, *PRESIDENTIAL WAR POWER* 206–07 (2d ed. 2004).

37. *Ex parte Quirin*, 317 U.S. at 48.

38. *Id.* at 37. President Roosevelt's decision to try Haupt in a military tribunal was controversial, and subsequent cases arising out of the same facts resulted in Art. III § 3 treason trials in civilian courts. FISHER, *supra* note 36, at 205–08; see also *Cramer v. United States*, 325 U.S. 1 (1945). However, the fact that President Roosevelt decided to change the way he prosecuted an armed conflict only shows that a president may exercise discretion in applying the laws of armed conflict instead of criminal law. The Supreme Court precedent in *Quirin* and *Cramer* show that either is acceptable as a matter of law.



hostile acts, are enemy belligerents within the meaning of . . . the law of war.”<sup>39</sup> Haupt was executed on August 8, 1942.<sup>40</sup>

*B. The Laws of Armed Conflict Applied During the War on Terror*

The question of how the laws of armed conflict apply to U.S. citizens during times of war has arisen most recently during the Global War on Terror.<sup>41</sup> With congressional authorization, the President may use military force against a U.S. citizen on U.S. soil when that person is taking active part in an armed conflict against the United States. This would apply generally to anyone actively participating in the Global War on Terror.

Before discussing how the laws of armed conflict apply in these instances, however, it is necessary to discuss whether the United States is currently in a state of armed conflict or war.<sup>42</sup> Following the attacks on September 11, 2001, Congress passed the Authorization for the Use of Military Force (AUMF), allowing the President to use all necessary means against those responsible for the attacks.<sup>43</sup> While there is no statutory formula for declaring that the United States is in a state of war, declarations of war have traditionally consisted of two parts: first, an official declaration that a state of war exists between two states; and second, an authorization for the President to use all necessary military force.<sup>44</sup>

39. *Ex parte Quirin*, 317 U.S. at 37, 38.

40. 8 August 1942 – Herbert Hans Haupt, EXECUTION DAY, <http://eotd.wordpress.com/2008/08/08/8-august-1942-herbert-hans-haupt/> (last visited Mar. 26, 2012).

41. See *supra* notes 1–3.

42. See Gabor Rona, *U.S. Targeted Killing Policy Unjustified*, JURIST.ORG (Feb. 24, 2012), <http://jurist.org/hotline/2012/02/gabor-rona-targeted-killing.php> (arguing that the War on Terror is substantively different than an international armed conflict like the Second World War).

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

44. See *An Act Declaring War Between the United Kingdom of Great Britain and Ireland and the Dependencies Thereof and the United States of America and Their Territories*, AVALON PROJECT YALE L. SCH., [http://avalon.law.yale.edu/19th\\_century/1812-01.asp](http://avalon.law.yale.edu/19th_century/1812-01.asp) (last visited on Nov. 19, 2012) (declaration for the War of 1812); *President McKinley and the Declaration of War*, SPANISH AMERICAN WAR CENTENNIAL WEBSITE, <http://www.spanamwar.com/McKinleywardec.htm> (last visited Nov. 19, 2012) (declaration for the Spanish American War); *Text of the Declaration of War Against Germany World War I*, NATIONALCENTER.ORG, <http://www.nationalcenter.org/DeclarationofWWI.html> (last visited Nov. 19, 2012) (declaration for World War I); *Declarations of a State of War with Japan, Germany, and Italy: Part 10*, AVALON PROJECT YALE L. SCH., <http://avalon.law.yale.edu/wwii/dec10.asp> (declaration for the Second World War) (last visited Nov. 19, 2012).

The AUMF is similar to a declaration of war in that it authorizes the President

to use all necessary and appropriate force against those nations, organizations, or persons he determines planned, authorized, committed, or aided the terrorist attacks that occurred on September 11, 2001, or harbored such organizations or persons, in order to prevent any future acts of international terrorism against the United States by such nations, organizations or persons.<sup>45</sup>

The AUMF also specifically invokes congressional war powers.<sup>46</sup>

The AUMF, however, is unlike past declarations of war in that it fails to explicitly describe a state of war. The magic words “declaration of war” are probably no longer necessary or appropriate, however, since a new regime of international law was ushered in after the Second World War.<sup>47</sup> The United Nations Charter generally outlawed war and triggered the demise of the word “war” as a “legal term of art.”<sup>48</sup>

Accordingly, the War Powers Resolution specifically allows the executive to invoke war powers without an overt declaration of war as long as there is specific statutory authorization from Congress.<sup>49</sup> Furthermore, the U.S. Army maintains that a formal declaration of war is not essential to trigger the laws of armed conflict.<sup>50</sup> The Korean War, for instance, was an international armed conflict authorized by the U.N. Security Council<sup>51</sup> without a declaration of war.<sup>52</sup> President Harry Truman agreed that the Korean War was a “police action under the United Nations.”<sup>53</sup> According to Article 51 of the U.N. Charter, states also have an inherent right to use force in

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

46. *Id.*

47. MARY ELLEN O’CONNELL, *INTERNATIONAL LAW AND THE USE OF FORCE* 7–8 (2nd ed. 2009).

48. *Id.*

49. 50 U.S.C. § 1541 (2012).

50. Department of the Army Field Manual 27–10, ch. 1, § 1 (1956).

51. S.C. Res. 83, U.N. Doc. S/1511 (June 27, 1950).

52. Allan R. Millett, *Korean War*, BRITANNICA.COM, <http://www.britannica.com/EBchecked/topic/322419/Korean-War> (last visited Sept. 27, 2012).

53. *The President’s News Conference of June 29, 1950*, TEACHINGAMERICANHISTORY.ORG, <http://teachingamericanhistory.org/library/index.asp?document=594> (last visited Sept. 27, 2012).

self-defense when they have been the object of an armed attack.<sup>54</sup> Under the new paradigm, it is no longer necessary or even appropriate to declare war when all that is required is to invoke the right of self-defense or U.N. Security Council authorization. The AUMF explicitly invoked the right of self-defense,<sup>55</sup> and the U.N. Security Council recognized the right of self-defense immediately following the September 11 attacks.<sup>56</sup>

The fact that the AUMF legally triggered the laws of armed conflict is reinforced by the Supreme Court's ruling in *Hamdan v. Rumsfeld* that Common Article Three of the Geneva Conventions applies to the Global War on Terror.<sup>57</sup> Common Article Three deals solely with armed conflicts.<sup>58</sup> Taking all this into consideration, the AUMF, while not without serious flaws, is a sufficient declaration of war or armed conflict to trigger the laws of armed conflict.

For the most part, the laws of armed conflict have applied today in the same way they did during the Second World War. While the War on Terror raises tough questions in international law,<sup>59</sup> the Supreme Court has made it clear from a domestic perspective that the War on Terror is an armed conflict governed by Common Article Three of the Geneva Conventions.<sup>60</sup> According to its text, Common Article Three applies to "armed conflict not of an international character occurring in the territory of one of the High Contracting Parties . . . ."<sup>61</sup> The hypothetical scenario Comment outlined in Section II of this Comment occurs within the territory of the United States, which is a high contracting party to the Geneva Conventions.<sup>62</sup> Viewed in its proper context, Common Article Three

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54. U.N. Charter art. 51.

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

56. S.C. Res. 1386, U.N. Doc. S/RES/1368 (Sept. 12, 2001).

57. *Hamdan v. Rumsfeld*, 548 U.S. 557, 629 (2006).

58. Geneva Convention Relative to the Treatment of Prisoners of War art. 3, Aug. 12, 1949, 6 U.S.T. 3316, 75 U.N.T.S. 135.

59. See Mary Ellen O'Connell, *Enhancing the Status of Non-State Actors Through a Global War on Terror?*, 43 COLUM. J. TRANSNAT'L L. 435 (2005) (describing the difficulties of claiming self-defense against a non-state actor like Al-Qaeda).

60. See *Hamdan*, 548 U.S. at 629.

61. Geneva Convention Relative to the Treatment of Prisoners of War art. 3, Aug. 12, 1949, 6 U.S.T. 3316, 75 U.N.T.S. 135.

62. See ICRC, *State Parties to the Following International Humanitarian Law and Other Related Treaties*, INT'L COMM. OF THE RED CROSS (Aug. 23, 2012), available at [http://www.icrc.org/IHL.nsf/%28SPF%29/party\\_main\\_treaties/\\$File/IHL\\_and\\_other\\_related\\_Treaties.pdf](http://www.icrc.org/IHL.nsf/%28SPF%29/party_main_treaties/$File/IHL_and_other_related_Treaties.pdf).

consists of two parts—one explicit and one implicit. The explicit part of Common Article Three describes a minimum amount of protections that must be afforded to “[p]ersons taking no active part in the hostilities, including members of armed forces who have laid down their arms and those placed *hors de combat* . . . .”<sup>63</sup> The implicit part of Common Article Three is that persons who are actively taking part in hostilities and are not *hors de combat* can be targeted and killed according to the customary laws of armed conflict. This clear authority to target U.S. citizens who are taking active part in hostilities against the United States must be balanced, however, with constitutional guarantees that proscribe what actions the government can take against an individual.<sup>64</sup>

The Supreme Court struggled to strike that balance in *Hamdi v. Rumsfeld* in 2004.<sup>65</sup> Most of the analysis in *Hamdi* deals with the question of detention, which, *inter alia*, does not affect the legality of the scenario presented in this Comment.<sup>66</sup> The plurality in *Hamdi* did, however, reaffirm the general principle in *Ex parte Quirin* that a person may be considered an enemy combatant according to the laws of armed conflict regardless of citizenship, holding: “There is no bar to this Nation’s holding one of its own citizens as an enemy combatant.”<sup>67</sup>

Based on the Constitution, U.S. history, and Supreme Court precedent, it is clear that the President, when authorized by Congress, may use military force against a U.S. citizen on U.S. soil when that person is taking active part in an armed conflict against the United States. Such a use of force is governed by the laws of armed conflict and not by domestic criminal law. Furthermore, the AUMF has triggered the laws of armed conflict and is an adequate grant of power to the executive branch to prosecute a war against terror anywhere in the world, including the United States. This

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63. Geneva Convention Relative to the Treatment of Prisoners of War, *supra* note 61, at 136.

64. See *Hamdi v. Rumsfeld*, 542 U.S. 507, 528 (2004).

65. See *id.*

66. See *id.*

67. *Id.* at 519.

authorization, however, is not unlimited.<sup>68</sup> Several checks exist on the use of military force within the United States.

### III. RESTRICTIONS ON THE USE OF FORCE WITHIN THE U.S. AND AGAINST U.S. CITIZENS

The major restrictions on the use of military force within the United States and against U.S. citizens are due process rights, the International Convention on Civil and Political Rights, Executive Order 12333, and the Posse Comitatus Act.

The plurality in *Hamdi* dealt primarily with the issue of due process rights as contained in the Fifth Amendment.<sup>69</sup> It held that even though U.S. citizens may lawfully be classified as enemy combatants, they are due some form of process before they are deprived of life or liberty.<sup>70</sup> “[W]ar is not a blank check for the President when it comes to the rights of the Nation’s citizens.”<sup>71</sup> It is only logical that if due process limitations apply to detention during armed conflict then similar limitations would also apply to targeting during armed conflict.<sup>72</sup> The *Hamdi* plurality used the balancing test from *Mathews v. Eldridge*, which requires the private interest of the individual be weighed against the government’s interest to determine if the risk of potential error stemming from reduced process outweighs the overall benefits to the government.<sup>73</sup>

Applied to the facts in *Hamdi*, the plurality found that *Hamdi* could not be accorded the full array of due process rights that a defendant in a criminal trial might receive, but the Constitution requires that he at least be able to challenge his status as an enemy

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68. Jeh Charles Johnson, Gen. Counsel Dept. of Def., *Dean’s Lecture at Yale Law School: National Security Law, Lawyers and Lawyering in the Obama Administration*, LAWFARE (Feb. 22, 2012), <http://www.lawfareblog.com/2012/02/jeh-johnson-speech-at-yale-law-school>.

69. See *Hamdi*, 542 U.S. at 529.

70. *Id.* at 535.

71. *Id.* at 536.

72. It is important to note, however, that in his dissent in *Hamdi*, Justice Souter argues that the AUMF does not allow for detention, but that it does allow for the use of military force against individuals. The AUMF “is fairly read to authorize the use of armies and weapons, whether against other armies or individual terrorists.” *Id.* at 547 (Souter, J., concurring in part, dissenting in part, and concurring in the judgment). If this is followed, targeting would actually be less scrutinized than detention.

73. *Mathews v. Eldridge*, 424 U.S. 319, 335 (1976).

combatant.<sup>74</sup> Specifically, Hamdi “must receive notice of the factual basis for his classification, and a fair opportunity to rebut the government’s factual assertions before a neutral decision maker.”<sup>75</sup> The executive and legislative branches, therefore, are restricted to some degree by the individual due process rights of accused enemy combatants, although it is not clear in the scenario in this Comment exactly what those would look like.

Next, the International Covenant on Civil and Political Rights (ICCPR) is a human rights treaty that could theoretically limit the U.S. government’s use of military force against its own citizens.<sup>76</sup> Among other things, the ICCPR requires that all signatories respect the human rights and freedoms of their citizens by not arbitrarily depriving them of life.<sup>77</sup> Furthermore, a state may take the life of one of its citizens only “pursuant to a final judgment rendered by a competent court.”<sup>78</sup> In many ways, the ICCPR overlaps with the due process rights contained in the Fifth Amendment to the U.S. Constitution, but the language of the treaty is much more explicit. So while the Supreme Court ruled in *Hamdi* that *some* form of process was required by the Constitution,<sup>79</sup> the ICCPR requires *specific* forms of process when dealing with the deprivation of life.<sup>80</sup>

While derogation from some parts of the ICCPR is allowed during “time[s] of public emergency [that threaten] the life of the nation and the existence of which is officially proclaimed,” Article Six, which deals with the right to life, is non-derogable.<sup>81</sup> Based solely on the text of the ICCPR, it would seem that a competent court would have to find a person guilty before the U.S. government

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

75. *Id.*

76. See Thomas Nachbar, *Is it Legal?: Can the U.S. Legally Kill Citizens Abroad?*, VA. L. REV. (Mar. 6, 2012), [http://www.law.virginia.edu/html/news/2012\\_spr/targeted\\_killing.htm](http://www.law.virginia.edu/html/news/2012_spr/targeted_killing.htm) (wondering if the ICCPR applies or whether the laws of armed conflict apply to the al-Awlaqi targeted killing).

77. International Covenant on Civil and Political Rights art. 6, Dec. 16, 1966, 1916 U.S.T. 521, 999 U.N.T.S. 171.

78. *Id.*

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

80. International Covenant on Civil and Political Rights art. 6, Dec. 16, 1966, 1916 U.S.T. 521, 999 U.N.T.S. 171.

81. *Id.* at art. 4.

could target them. In times of armed conflict, however, the ICCPR may often be “superseded by the laws of war.”<sup>82</sup>

In the end, the possibility that the ICCPR could limit the use of military force against U.S. citizens is mostly academic. The Supreme Court has held that “although the [ICCPR] does bind the United States as a matter of international law, the United States ratified the Covenant on the express understanding that it was not self-executing and so did not itself create obligations enforceable in the federal courts.”<sup>83</sup> In the Torture Victim Protection Act of 1991, Congress did enact some parts of the ICCPR prohibiting extrajudicial killings, but only as a civil liability after a killing has occurred and only against a foreign state official.<sup>84</sup> In addition, the U.S. is not a party to the International Criminal Court, which is the only currently constituted international court that could conceivably hear a controversy between a U.S. citizen and the U.S. government.<sup>85</sup> Therefore, until Congress implements legislation for the specific provisions contained in Article Six, or until the United States becomes a party to the International Criminal Court, the ICCPR creates no binding legal restriction on the President in a scenario like the one proposed in this Comment.

Some have wondered if Executive Order 12333, which prohibits assassination, should act as an effective bar against targeting an individual combatant.<sup>86</sup> The order states simply, “No person employed by or acting on behalf of the United States Government shall engage in, or conspire to engage in, assassination.”<sup>87</sup> The U.S. Army, however, defines assassination generally as a covert murder

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82. Q&A: *US Targeted Killings and International Law*, HUM. RTS. WATCH (Dec. 19, 2011), <http://www.hrw.org/news/2011/12/19/q-us-targeted-killings-and-international-law>.

83. *Sosa v. Alvarez-Machain*, 542 U.S. 692, 735 (2004).

84. Torture Victim Protection Act of 1991, Pub. L. No. 102-256, 106 Stat. 73 (1992).

85. Curtis A. Bradley, *ASIL Insights: U.S. Announces Intent Not to Ratify International Criminal Court Treaty*, AM. SOC'Y INT'L L. (May 2002), [http://www.asil.org/insigh87.cfm#\\_edn1](http://www.asil.org/insigh87.cfm#_edn1). It might be possible, however, for a third-party state to espouse the cause of a U.S. citizen whose rights under the ICCPR were violated and bring a case against the United States before the International Court of Justice, especially if that citizen had dual citizenship with the third-party state. It also might be possible to set up an ad hoc tribunal to try the U.S. government for a violation of the ICCPR. These scenarios, however, are highly improbable.

86. See Charlie Savage, *Secret U.S. Memo Made Legal Case to Kill a Citizen*, N.Y. TIMES, Oct. 8, 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?\\_r=1](http://www.nytimes.com/2011/10/09/world/middleeast/secret-us-memo-made-legal-case-to-kill-a-citizen.html?_r=1).

87. United States Intelligence Activities, 46 Fed. Reg. 59941, 59952 (Dec. 8, 1981).

for political reasons, and not as a targeted killing during a time of armed conflict or when an individual poses an immediate threat to the United States.<sup>88</sup> The executive branch, of course, is free to re-interpret or to rescind an executive order in the course of administering the U.S. government.<sup>89</sup> Therefore, Executive Order 12333 does not bar the targeted killings of U.S. citizens within the United States or elsewhere.

The final major limitation on the ability of the U.S. Government to use military force within the United States and against U.S. citizens is the Posse Comitatus Act, which was enacted after the Civil War to keep local civilian law enforcement from using military personnel and equipment.<sup>90</sup> It stands for the principle that the military should never be used to enforce civil laws in the United States.<sup>91</sup> Some courts have looked to see whether the military has assumed the role of civilian law enforcement in the way it arrests or detains individuals.<sup>92</sup> This, however, is not a concern in the hypothetical scenario since using military force is, by definition, not the role of civilian law enforcement within the United States. Furthermore, the text of the act seems to render it completely inapplicable to the War on Terror. It reads:

Whoever, except in cases and under circumstances expressly authorized by the Constitution or Act of Congress, willfully uses any part of the Army or the Air Force as a posse comitatus or otherwise to execute the laws shall be fined under this title or imprisoned not more than two years, or both.<sup>93</sup>

The AUMF is an act of Congress that authorizes the president to use military force without any restriction on geography.<sup>94</sup> The Posse Comitatus Act, therefore, would not bar the government from using military force within the borders of the United States. Because

88. W. Hays Parks, *Memorandum of Law: Executive Order 12333 and Assassination*, ARMY L., Dec. 1989, at 4.

89. See generally CHARLES H. KOCH, JR., ADMINISTRATIVE LAW AND PRACTICE § 7:31 (3d ed. 2010).

90. Tom A. Gizzo & Tama S. Monoson, *A Call to Arms: The Posse Comitatus Act and the Use of the Military in the Struggle Against International Terrorism*, 15 PACE INT'L L. REV. 149, 153–55 (2003).

91. *Id.*

92. *Id.* at 166–67.

93. 18 U.S.C. § 1385 (2012).

94. Authorization for Use of Military Force, Pub. L. No. 107–40, 115 Stat. 224 (2001).



neither the Posse Comitatus Act nor due process are total bars to the use of military force within the United States, and because the relevant portions of the ICCPR have yet to be executed in U.S. law, it is currently legal for the U.S. government to use military force within the United States. It is also probably legal to target U.S. citizens.

#### IV. TARGETED KILLINGS OF U.S. CITIZENS

It is unlikely that Anwar al-Aulaqi was surprised when the group he was traveling with in Yemen spotted a CIA-operated drone carrying a hellfire missile on September 30, 2011.<sup>95</sup> Al-Aulaqi, a U.S. citizen who was actively involved with an al-Qaeda affiliate in Yemen, had already escaped one U.S. drone attack earlier that year.<sup>96</sup> By the time the strike occurred, he had been a publicly known target of the U.S. military for over a year and a half.<sup>97</sup> His father had even attempted to intervene on his behalf through the U.S. court system, but was denied standing.<sup>98</sup> The hellfire missile deployed from the drone killed al-Aulaqi, another U.S. citizen who was traveling with him, and at least five other people.<sup>99</sup> Two weeks later, another U.S. drone strike targeted and killed al-Aulaqi's sixteen-year-old son, Abdulrhaman.<sup>100</sup> The series of armed drone strikes on al-Aulaqi and his family appears to be the first time that the United States has deliberately targeted and killed U.S. citizens in the War on Terror.<sup>101</sup>

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95. Anwar al-Awlaki, N.Y. TIMES, [http://topics.nytimes.com/top/reference/times-topics/people/a/anwar\\_al\\_awlaki/index.html?inline=nyt-per](http://topics.nytimes.com/top/reference/times-topics/people/a/anwar_al_awlaki/index.html?inline=nyt-per) (last updated July 18, 2012); Dominic Rushe et al., *Anwar al-Awlaki Death: US Keeps Role Under Wraps to Manage Yemen Fallout*, GUARDIAN (Sept. 30, 2011, 14:31 EDT), <http://www.guardian.co.uk/world/2011/sep/30/anwar-al-awlaki-yemen?newsfeed=true>.

96. David S. Cloud, *U.S.-born Cleric was Target of Yemen Drone Strike*, L.A. TIMES (May 7, 2011), <http://articles.latimes.com/2011/may/07/world/la-fg-yemen-drones-20110507>.

97. See *Al-Aulaqi v. Obama*, 727 F. Supp. 2d 1, 11 (D.C. Cir. 2010) (noting that the *Washington Post* had reported in January 2010 that al-Aulaqi was on a U.S. "kill list").

98. *Id.* at 1.

99. Rushe, *supra* note 95.

100. Glenn Greenwald, *The Killing of Awlaki's 16-Year-Old Son*, SALON.COM (Oct. 20, 2011), [http://www.salon.com/2011/10/20/the\\_killing\\_of\\_awlakis\\_16\\_year\\_old\\_son/single\\_ton](http://www.salon.com/2011/10/20/the_killing_of_awlakis_16_year_old_son/single_ton).

101. Anwar al-Awlaki, N.Y. TIMES (March 5, 2012), [http://topics.nytimes.com/top/reference/timestopics/people/a/anwar\\_al\\_awlaki/index.html?inline=nyt-per](http://topics.nytimes.com/top/reference/timestopics/people/a/anwar_al_awlaki/index.html?inline=nyt-per).

Initially, the reaction in the U.S. was highly critical.<sup>102</sup> President Obama's targeted killing of al-Aulaqi, however, found some support in unlikely places. Former Wisconsin Senator Russ Feingold, a Democrat known as a champion of civil liberties, said that he was "very pleased that [al-Aulaqi] was taken out."<sup>103</sup> Even Obama's one-time campaign rival, Senator John McCain praised the operation.<sup>104</sup> Since then, the Obama administration has tentatively attempted to publicly justify the targeted killing of U.S. citizens. An anonymous leaker gave parts of a memo from the Office of Legal Counsel that provided the legal justifications for targeting U.S. citizens to the New York Times in October 2011.<sup>105</sup> Then, in February, 2012, Jeh Johnson, general counsel for the Department of Defense, explained the policy during a speech at Yale University.<sup>106</sup> Johnson emphasized that the AUMF had no "geographical limitation" and defended targeted killings by pointing out that the U.S. lawfully targeted individuals during the Second World War as well.<sup>107</sup>

The most detail on the justification for targeting U.S. citizens came in March 2012 when Attorney General Eric Holder publicly addressed the issue at Northwestern University School of Law.<sup>108</sup> Like Johnson, he emphasized that the current war is not limited geographically to Afghanistan or any other state.<sup>109</sup> He then described three elements necessary for a targeted killing of a U.S.

102. See, e.g., Greenwald, *supra* note 7; Paul Craig Roberts, *The Day America Died*, LEWROCKWELL.COM (Oct. 3, 2011), <http://lewrockwell.com/roberts/roberts328.html>; Michael Martinez, *U.S. Drone Killing of American al-Awlaki Prompts Legal, Moral Debate*, CNN (Sept. 30, 2011), [http://articles.cnn.com/2011-09-30/politics/politics\\_targeting-us-citizens\\_1\\_al-awlaki-yemeni-embassy-drone-missile?\\_s=PM:POLITICS](http://articles.cnn.com/2011-09-30/politics/politics_targeting-us-citizens_1_al-awlaki-yemeni-embassy-drone-missile?_s=PM:POLITICS).

103. Andrea Stone, *Russ Feingold 'Pleased' Anwar Al-Awlaki Was Taken Out By Drone Strike*, HUFFINGTON POST (Feb. 22, 2012), [http://www.huffingtonpost.com/2012/02/22/russ-feingold-anwar-al-awlaki\\_n\\_1291593.html?ref=politics](http://www.huffingtonpost.com/2012/02/22/russ-feingold-anwar-al-awlaki_n_1291593.html?ref=politics).

104. Sara Sorcher, *McCaun: Obama Does Not Need to Apologize for Awlaki Killing*, NAT'L J. (Oct. 3, 2011), <http://www.nationaljournal.com/nationalsecurity/mccain-obama-does-not-need-to-apologize-for-awlaki-killing-20111003>.

105. Savage, *supra* note 86.

106. Johnson, *supra* note 68.

107. *Id.*

108. Josh Gerstein, *Eric Holder: Targeted Killings Legal, Constitutional*, POLITICO (Mar. 5, 2012), <http://www.politico.com/news/stories/0312/73634.html>.

109. Greg McNeal, *Attorney General Eric Holder's National Security Speech*, FORBES (Mar. 5, 2012), <http://www.forbes.com/sites/gregorymcneal/2012/03/05/holder-national-security-speech-targeted-killing/4>.

citizen in a foreign nation to be lawful: "First, the U.S. government has determined, after a thorough and careful review, that the individual poses an imminent threat of violent attack against the United States; second, capture is not feasible; and third, the operation would be conducted in a manner consistent with applicable law of war principles."<sup>110</sup>

According to Holder, this would be enough to satisfy the necessary balance between the government's interest in prosecuting the War on Terror and an individual U.S. citizen's due process rights under the Fifth Amendment.<sup>111</sup> While it is possible that the Supreme Court could review Holder's formulation, the Court would most likely grant the executive branch significant deference.<sup>112</sup> Furthermore, as *Al-Aulaqi v. Obama* shows, it is difficult to find a suitable plaintiff to challenge the executive's interpretation of the law on this subject.<sup>113</sup> It is therefore unlikely that a future president will face judicial review of his targeting policies, even if they are more aggressive than the policy described by Holder.

The administration has been silent as to the targeting of U.S. citizens within the United States.<sup>114</sup> However, a review of Holder's three points shows that they contain no bar against application within the United States. In interpreting Holder's statements, it is important to bear in mind the context. Since the Obama administration apparently used Holder's three elements in targeting Anwar al-Aulaqi and his son, then the facts of those targeted killings should give insight into how this targeting framework applies in the real world.<sup>115</sup> For the purposes of this analysis, Holder's three points are broken down into four elements: (1) thorough and careful review, (2) imminent violence, (3) capture is not feasible, and (4) in accordance with the law of armed conflict.

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110. *Id.*

111. *Id.*

112. See *Hamdi v. Rumsfeld*, 542 U.S. 507, 535 (2003).

113. See *Al-Aulaqi v. Obama*, 727 F. Supp. 2d 1, 8-9 (D.D.C. 2010) (pointing out that determining whether a person evading U.S. law enforcement can assert his own rights in federal court is problematic).

114. Catherine Herridge, *FBI director: Have to Check Whether Targeted Killing Rule is Outside US Only*, FOXNEWS.COM (Mar. 7, 2012), <http://www.foxnews.com/politics/2012/03/07/mueller-have-to-check-with-holder-whether-targeted-killing-rule-is-outside-us>.

115. See Savage, *supra* note 86.

*A. Thorough and Careful Review*

The first element for targeting a U.S. citizen has two main parts. The government must conduct a “thorough and careful review,” and that review must conclude that the targeted person poses an “imminent threat of violent attack against the United States.”<sup>116</sup> The review process is apparently where the Obama administration is attempting to satisfy the requirements of due process. The vague nature of Holder’s statement, however, raises questions about notice and independent judicial review. Al-Aulaqi had effective notice of his status as a targeted enemy combatant, but he did not have official notice.<sup>117</sup> Giving notice to a target would cause the U.S. military to lose a strategic advantage, but it may also encourage targeted individuals to disassociate themselves from al-Qaeda. These considerations, however, are not legal, but strategic and tactical and probably reside within an executive’s discretion as Commander-in-Chief.<sup>118</sup> However, the Supreme Court in *Hamdi* found that for detention, a person must at least “receive notice of the factual basis for his classification.”<sup>119</sup> This assumes, however, that the government already has custody of an enemy combatant.<sup>120</sup> Targeting assumes the opposite: that it is not feasible to detain the enemy combatant.<sup>121</sup>

Using the balancing test in *Matthews*,<sup>122</sup> failure to give notice to a potential target increases the chances of error, but may be outweighed by the government’s interest in an effective and workable strategy during armed conflict. One significant error that could be greatly reduced with notice is mistaken identity. This has been a problem in the prosecution of the War on Terror, most notably with Khaled al-Masri, a German citizen who claims to have been captured and held by the United States because he supposedly

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116. McNeal, *supra* note 109.

117. See *Al-Aulaqi*, 727 F. Supp. 2d at 11 (noting that the Washington Post had reported in January 2010 that al-Aulaqi was on a U.S. “kill list”).

118. See Johnson, *supra* note 68 (referring to these things as “core functions of the Executive Branch”).

119. *Hamdi v. Rumsfeld*, 542 U.S. 507, 533 (2003).

120. See *id.* (Hamdi was seeking post-detention habeas corpus relief).

121. See McNeal, *supra* note 109.

122. See *supra* note 73 and accompanying text.

had the same name as a targeted terrorist.<sup>123</sup> In the scenario described in this Comment, however, giving notice would be completely unworkable since it would give the targeted persons time to remotely detonate the chemical weapons. Therefore, while notice might be preferable under certain circumstances, it is probably not legally required.

The next question of the review process is whether the executive's decision to target would be subject to an independent review by the judiciary. Again in *Hamdi* the Supreme Court ruled that detention of an enemy combatant required review by a "neutral decision maker."<sup>124</sup> If this is the minimum amount of process required for a detainee, it seems that it would also be a minimum requirement for a targeted person. The Obama administration, however, has rejected any judicial review of targeting decisions as "not appropriate."<sup>125</sup>

Jeh Johnson, during his speech at Yale, argued that the "real-time" nature of the decisions would make judicial review unworkable<sup>126</sup> and made reference to the *Al-Aulaqi* case in which the federal district court ruled that courts could not possibly weigh these kinds of strategic decisions.<sup>127</sup> For years, however, special courts have been involved in national security decisions.<sup>128</sup> FISA courts, for instance, grant or deny warrants requested by the executive branch based on an ex parte showing that the target of the warrant is an agent of a foreign power and that the purpose of the surveillance is predominantly for foreign intelligence.<sup>129</sup> The judicial review process of FISA courts is generally secret in order to more appropriately deal with sensitive national security issues.<sup>130</sup> Using the *Matthews* balancing test, judicial review could significantly limit error in targeting decisions and would not appear to unduly burden the

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123. *US Rejects German's Case Against CIA*, SPIEGEL.DE (May 19, 2006), <http://www.spiegel.de/international/0,1518,417071,00.html>.

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

125. Johnson, *supra* note 68.

126. *Id.*

127. *Al-Aulaqi v. Obama*, 727 F. Supp. 2d. 1, 47 (2010).

128. See Ellen C. Yaroshesky, *The Slow Erosion of the Adversary System: Article III Courts, FISA, CIPA, and Ethical Dilemmas*, 5 CARDOZO PUB. L. POL'Y & ETHICS J. 203, 219 (2006).

129. *Id.* at 219–20.

130. *Id.* at 221.

executive in its decisions, especially since it is already going through a careful review. However, while some form of judicial review does seem to be workable and even preferable, it is clear that the executive branch currently rejects this approach.<sup>131</sup> The AUMF specifically allows for the targeting of persons according to congressional and presidential war powers without any requirements for judicial review.<sup>132</sup> Unless an independent review is statutorily required by Congress, the current state of the law is that the executive's decisions to target a person, even a U.S. citizen, will go unquestioned externally.

### *B. Imminent Violence*

Next, according to Holder, at the end of the thorough review, the government must conclude that the proposed targeted person poses an imminent threat of violence to the United States.<sup>133</sup> The concept of imminence is apparently quite broad here if it is supposed to apply to al-Aulaqi and his sixteen-year-old son. Al-Aulaqi had been targeted for over a year, showing that the Obama administration seems to interpret imminence as having a broad time frame.<sup>134</sup> Furthermore, it is hard to comprehend how a sixteen-year-old boy in Yemen, like Abdurrahman al-Aulaqi, could pose an imminent threat of violence to the United States, and yet he was targeted and killed just like his father.<sup>135</sup> Such a result raises serious questions about just how thorough and careful the review process is. One possible explanation for the targeted killing of Abdulrahman is that the threat of imminent violence that he posed was assessed in relation to the ability to capture him, which is the next element.

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131. Johnson, *supra* note 68.

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

133. McNeal, *supra* note 109.

134. See *Al-Aulaqi v. Obama*, 727 F. Supp. 2d 1, 11 (2010) (noting that the Washington Post had reported in January 2010 that al-Aulaqi was on a U.S. "kill list").

135. Greenwald, *supra* note 100. The killing of Abdulrahman al-Aulaqi is particularly disturbing in light of Article III, Section 3 of the U.S. Constitution. It declares the punishment for levying war against the United States is treason, but forbids a finding of treason to work "corruption of blood." U.S. CONST. art. III, § 3. In other words, the government is forbidden to punish the children of traitors for the treasonous acts of their parents.

*C. Capture is Not Feasible*

When Holder says that “capture is not feasible,”<sup>136</sup> he probably does not mean that capture is not possible, but only that capture is not a good option based on a risk-benefit analysis. It would be hard to argue that the U.S. military could not actually capture al-Aulaqi, even in Yemen. It was possible, but it was perhaps too difficult and dangerous. This makes more sense when one considers the feasibility of capture in relation to the imminent violence element. For instance, if a person is going to be very difficult to capture, then there might be a lower bar for the requisite threat of imminent violence. On the other hand, if a person would be relatively easy to capture, then there might be an extremely high bar—perhaps an impossibly high bar—for the threat of imminent violence that would justify a targeted killing. The reverse is also true. If a target poses a sufficiently high threat of imminent violence, it might never be feasible to capture him first. In the case of Anwar al-Aulaqi, perhaps his capture was considered to be so risky that the requirement of imminent violence was decreased. Perhaps this also explains the targeting of his son.

Capture on U.S. soil is certainly easier than it is in Yemen. So easy, in fact, that a potential target’s presence within the United States might nearly eliminate any justification for a targeted killing. The threat of imminent violence, however, is greatly increased as well. In the scenario in this Comment, the enemy combatants cannot feasibly be captured since they could remotely detonate explosives at the first sign of any attempt. Furthermore, their presence in the United States, instead of increasing the feasibility of capture, has only increased the threat of imminent violence. Therefore, the capture-is-not-feasible element of Holder’s formulation does not preclude a targeted killing within the United States.

*D. In Accordance with the Laws of Armed Conflict*

The last requirement for the targeted killing of a U.S. citizen is that it must be done in accordance with the laws of armed conflict.<sup>137</sup> In general, the laws of armed conflict require that the

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136. McNeal, *supra* note 109.

137. McNeal, *supra* note 109.

military necessity of any use of force be balanced with the principle of humanity, or the potential to cause unnecessary suffering.<sup>138</sup> If the target is a military necessity that will not result in unnecessary suffering, then the laws of armed conflict also require that the targeting be restricted in its implementation by (1) adhering to the principle of distinction,<sup>139</sup> (2) adhering to the principle of proportionality,<sup>140</sup> and (3) using only lawful weapons for their intended purpose.<sup>141</sup>

### *1. Distinction*

The principle of distinction demands that both parties to a conflict discriminate between civilians and combatants.<sup>142</sup> In general, military personnel of the opposing nation in an international armed conflict are considered combatants.<sup>143</sup> The question is more complicated, however, when dealing with a non-international armed conflict with a non-state actor, like the War on Terror against al-Qaeda.<sup>144</sup> Civilians, or persons who are not members of a state's military, can still be targeted, but only if they are directly participating in the hostilities or are part of an organized armed force.<sup>145</sup> Furthermore, members of organized armed forces, like al-Qaeda, who are not identified by a uniform with recognizable insignia, may be targeted only if they have a "continuous combat function."<sup>146</sup>

138. ICRC, Louise Doswald-Beck & Sylvain Vit , *International Humanitarian Law and Human Rights Law*, No. 293 (April 30, 1993), available at <http://www.icrc.org/eng/resources/documents/misc/57jmr.htm>.

139. ICRC, Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts (Protocol I), art. 48, (June 8, 1977, 1125 U.N.T.S. 3), available at <http://www.icrc.org/ihl.nsf/WebART/470-750061>.

140. Customary IHL: Rule 14. Proportionality in Attack, ICRC, available at [http://www.icrc.org/customary-ihl/eng/docs/v1\\_cha\\_chapter4\\_rule14](http://www.icrc.org/customary-ihl/eng/docs/v1_cha_chapter4_rule14).

141. Customary IHL: Rule 70. Weapons of a Nature to Cause Superfluous Injury or Unnecessary Suffering, ICRC, available at [http://www.icrc.org/customary-ihl/eng/docs/v1\\_rul\\_rule70](http://www.icrc.org/customary-ihl/eng/docs/v1_rul_rule70).

142. Protocol I, *supra* note 139.

143. Customary IHL: Rule 3. Definition of Combatants, ICRC, available at [http://www.icrc.org/customary-ihl/eng/docs/v1\\_rul\\_rule3](http://www.icrc.org/customary-ihl/eng/docs/v1_rul_rule3).

144. See *id.*

145. Protocol I, *supra* note 139, at art. 51.

146. ICRC, *Interpretive Guidance on the Notion of Direct Participation in Hostilities under International Humanitarian Law*, 90 INT'L REV. RED CROSS 991, No. 872 part 1, § II (Feb. 26, 2009) (prepared by Nils Melzer), available at <http://www.icrc.org/eng/assets/files/other/irrc-872->



Holder's criteria that a proposed target must pose an imminent threat of violence could be interpreted to mean that a proposed target is a member of an organized armed group of a non-state party to an armed conflict that has a continuous combat function.<sup>147</sup> Furthermore, Johnson argues that the AUMF is not open-ended, but is limited only to al-Qaeda and associated forces.<sup>148</sup> He defines "associated forces" as having two necessary characteristics: "(1) an organized, armed group that has entered the fight alongside al Qaeda, and (2) is a co-belligerent with al Qaeda in hostilities against the United States or its coalition partners."<sup>149</sup> Generally applied, these considerations seem to adhere to the principle of distinction.

## 2. Proportionality

Next, the principle of proportionality demands that parties to an armed conflict limit their targeting to actions where the loss of civilian life and damage to property is not excessive in relation to the concrete military advantage that would be gained.<sup>150</sup> Here, the commander on the ground making the targeting decision has to quickly assess whether the collateral damage caused by an attack is proportionate in relation to the military value of the target. The higher value the target, the more collateral damage will be tolerated.<sup>151</sup> There is no hard and fast rule about proportionality, and any judgment on proportionality must take into account all the circumstances.<sup>152</sup> In the case of Anwar al-Awlaki, six non-targeted people died during the attack, at least one of whom was also an American citizen.<sup>153</sup> Since no one has officially raised the issue of proportionality in this attack, it is impossible to say definitively

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reports-documents.pdf.

147. See McNeal, *supra* note 109.

148. Johnson, *supra* note 68.

149. *Id.*

150. See *Customary IHL: Rule 70*, *supra* note 140.

151. See *id.*

152. See *id.*

153. Anwar al-Awlaki, N.Y. TIMES, [http://topics.nytimes.com/top/reference/times/topics/people/a/anwar\\_al\\_awlaki/index.html?inline=nyt-per](http://topics.nytimes.com/top/reference/times/topics/people/a/anwar_al_awlaki/index.html?inline=nyt-per) (last updated July 18, 2012); Dominic Rushe et al., *Anwar al-Awlaki Death: US 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?newsfeed=true>.

whether it violated the principle of proportionality or not. However, based on other drone attacks, this does not appear to be an excessive amount of casualties by U.S. military standards.<sup>154</sup> Therefore, it is possible that targeting a U.S. citizen with an armed drone attack may be done according to the law of proportionality.

### 3. *Lawful weapon*

Finally, it is necessary to consider if armed drones are lawful weapons. Armed drones seem to have become the weapons of choice in the War on Terror.<sup>155</sup> It is also important to note that while the scenario of armed drones in the United States may seem a long way off, the use of unarmed drones in the U.S. is rapidly increasing. The U.S. has already designated domestic drone bases, and the Federal Aviation Agency is working with testing standards and waivers for unarmed drones operating within the U.S.<sup>156</sup>

Despite the fact that there is no specific treaty outlawing the use of armed drones,<sup>157</sup> some have questioned their lawfulness and effectiveness.<sup>158</sup> Critics have highlighted state sovereignty issues as well as insufficient self-defense justifications for the U.S. drone operations overseas.<sup>159</sup> These legitimate criticisms, however, do not apply when considering the use of armed drones within U.S. territory and do not make the weapon itself unlawful. Harold Koh and Jeh Johnson have both argued that the relative advanced nature of any given weapons system is irrelevant as long as the decision to target the individual is lawful.<sup>160</sup> Some have even noted that, strangely, armed drones seem less controversial than older methods of targeted killing. For example, a former CIA lawyer, Vicki Divoll, told the New Yorker, "People are a lot more comfortable with a

154. See *infra* notes 162–63 and accompanying text.

155. John Yoo, *Dead Terrorists Answer No Questions*, NAT'L REVIEW ONLINE (Apr. 26, 2011, 2:25 PM), <http://www.nationalreview.com/corner/265648/dead-terrorists-answer-no-questions-john-yoo>.

156. Kashmir Hill, *Ten Fun Facts About Drones*, FORBES (Feb. 9, 2012, 12:25 PM), <http://www.forbes.com/sites/kashmirhill/2012/02/09/10-fun-facts-about-drones/2/>.

157. See *Customary IHL: Rule 70. Weapons of a Nature to Cause Superfluous Injury or Unnecessary Suffering*, INT'L COMM. OF THE RED CROSS, [http://www.icrc.org/customary-ihl/eng/docs/v2\\_rul\\_rule70](http://www.icrc.org/customary-ihl/eng/docs/v2_rul_rule70).

158. See, e.g., Shah, *supra* note 10, at 125–26.

159. *Id.* at 115–19.

160. Anderson, *supra* note 12; Johnson, *supra* note 68.

[drone] strike that kills many people than with a throat-slitting that kills one.”<sup>161</sup> Beyond being an advanced weapons system, however, armed drones raise legitimate questions of proportionality.

By 2009, the Brookings Institute determined that American use of armed drones had resulted in about 600 civilian deaths worldwide—a ratio of about ten civilian deaths for every lawfully targeted person.<sup>162</sup> A more recent study focusing only on Pakistan found that U.S. drone strikes over a three-year period killed fourteen al-Qaeda leaders and 687 Pakistani civilians.<sup>163</sup> American analysts may argue that a ten-to-one ratio or even a fifty-to-one ratio is acceptable according to the principle of proportionality if the concrete military advantage is important enough. It is hard to imagine, however, that the same amount of civilian casualties would be acceptable within the United States. Is it acceptable to have one standard for proportionality overseas and a different standard for proportionality at home? Whatever the answer, it does not make the armed drone an unlawful weapon according to the laws of armed conflict, although it may provide some practical limitations on how armed drones are used.

Considering distinction, proportionality, and the use of a lawful weapon, targeting a U.S. citizen within the United States could be done according to the laws of armed conflict. When the U.S. military targets a person, the commander on the ground goes through a standard methodology to ensure that the targeting complies with the laws of armed conflict principles discussed here.<sup>164</sup> Figure 1, below, is an example of what the targeting analysis for a U.S. citizen might look like. “DPH” indicates a civilian who is directly participating in the hostilities and “CCF” indicates a civilian who is part of an organized armed group and has a continuous combat function.

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161. Jane Mayer, *The Predator War*, NEW YORKER (Oct. 26, 2009), [http://www.newyorker.com/reporting/2009/10/26/091026fa\\_fact\\_mayer#ixzz1oVo07Kk4](http://www.newyorker.com/reporting/2009/10/26/091026fa_fact_mayer#ixzz1oVo07Kk4).

162. Daniel L. Byman, *Do Targeted Killings Work?*, BROOKINGS INSTITUTION (July 14, 2009), [http://www.brookings.edu/opinions/2009/0714\\_targeted\\_killings\\_byman.aspx](http://www.brookings.edu/opinions/2009/0714_targeted_killings_byman.aspx).

163. Shah, *supra* note 10, at 126.

164. See U.S. Army Field Manual 3–60, p. 1–4 (Nov. 26, 2010).

## V. CONCLUSION

Applying this analysis to the scenario of this Comment, it appears that it would be legal to target a U.S. citizen on U.S. soil under a narrow set of circumstances. The President, with proper congressional authorization, can use military force according to the laws of armed conflict to target U.S. citizens who are actively engaged in hostilities against the United States, even if that use of military force occurs within the territory of the United States. Targeting a U.S. citizen, however, requires the President to balance national security concerns with an individual's right to due process under the Fifth Amendment.<sup>165</sup> Taking all this into account and using an analysis similar to that demonstrated in Figure 1, the scenario in this Comment is probably lawful.

The first consideration is whether the potential targeted persons in the scenario are combatants or civilians. In this scenario, the targets are not members of a state's armed forces, so they are not combatants.<sup>166</sup> However, they are not simply civilians, either. No matter how narrowly one defines the terms, the targets are either directly participating in the hostilities or are members of an organized armed force with a continuous combat function because they are in the middle of a plot to attack the United States by remotely detonating chemical weapons around San Antonio.<sup>167</sup>

Next, there must be a thorough review that takes into account all the evidence against the targets and balances the threat they pose against the possibility of error caused by reduced process.<sup>168</sup> In this scenario, the President has done such a review. The review must further find that the targets pose an imminent threat of violence and that their capture is not feasible.<sup>169</sup> In the scenario, the targets undoubtedly pose an imminent threat of violence. Furthermore, it would be completely infeasible to capture them without running the

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165. See *Hamdi v. Rumsfeld*, 542 U.S. 507, 532–34 (2004).

166. See *Customary IHL: Rule 3. Definition of Combatants*, INT'L COMM. OF THE RED CROSS (2012), [http://www.icrc.org/customary-ihl/eng/docs/v1\\_rul\\_rule3](http://www.icrc.org/customary-ihl/eng/docs/v1_rul_rule3).

167. See ICRC, *Interpretive Guidance on the Notion of Direct Participation in Hostilities under International Humanitarian Law* Part 1.II (Feb. 26, 2009) (prepared by Nils Melzer), <http://www.icrc.org/eng/assets/files/other/irrc-872-reports-documents.pdf>.

168. McNeal, *supra* note 109; cf. *Mathews v. Eldridge*, 424 U.S. 319, 335 (1976).

169. See McNeal, *supra* note 109.

risk that they will have enough time to remotely detonate the chemical weapons.

An armed drone, the weapon proposed for the targeting of U.S. citizens in the scenario, is a lawful weapon, but one that tends to result in non-targeted civilian casualties.<sup>170</sup> Since there is a definite risk to civilians, it is necessary to consider if all feasible measures have been taken to reduce collateral damage.<sup>171</sup> In this scenario, it is difficult to imagine what kind of steps the U.S. military could take to mitigate the civilian casualties. Any attempt to evacuate the neighbors or cordon off the area where the targets live would give them enough warning to detonate their weapons. A conservative approach to the armed drone attack might result in a survivor who could then detonate the chemical weapons.

Once the commander of the operation determines that he has taken all feasible measures for the attack, he must still consider the proportionality of the attack. In the scenario, the armed drone attack kills two targets and seventeen non-targeted civilians. Based on the seriousness of the threat of chemical weapons detonated in a highly populated area, the amount of civilian casualties in this scenario is probably proportional. If it is not, then it raises serious questions about the lawfulness of U.S. armed drone attacks overseas. Nothing in the laws of armed conflict indicates that proportionality should be calculated differently based on the civilians' nationalities.<sup>172</sup>

Based on this analysis, it would be legal for the U.S. military to use an armed drone to target and kill a U.S. citizen within the United States based on the laws of armed conflict and the authority granted under the AUMF. This conclusion runs contrary to the century-old American tradition of extraterritorial armed conflict, but it is in harmony with U.S. domestic law and international law. This also explains much of the controversy surrounding the 2012 NDAA. The NDAA hinted that war is something that could happen in the U.S. even though that directly conflicts with the popular American idea that war is something that happens overseas and to other people.

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170. See Byman, *supra* note 162.

171. Customary IHL: Rule 22. *Principle of Precautions against the Effects of Attacks*, ICRC (2012), available at [http://www.icrc.org/customary-ihl/eng/docs/v1\\_rul\\_rule22](http://www.icrc.org/customary-ihl/eng/docs/v1_rul_rule22).

172. See Customary IHL: Rule 14. *Proportionality in Attack*, ICRC (2012), available at [http://www.icrc.org/customary-ihl/eng/docs/v1\\_cha\\_chapter4\\_rule14](http://www.icrc.org/customary-ihl/eng/docs/v1_cha_chapter4_rule14).

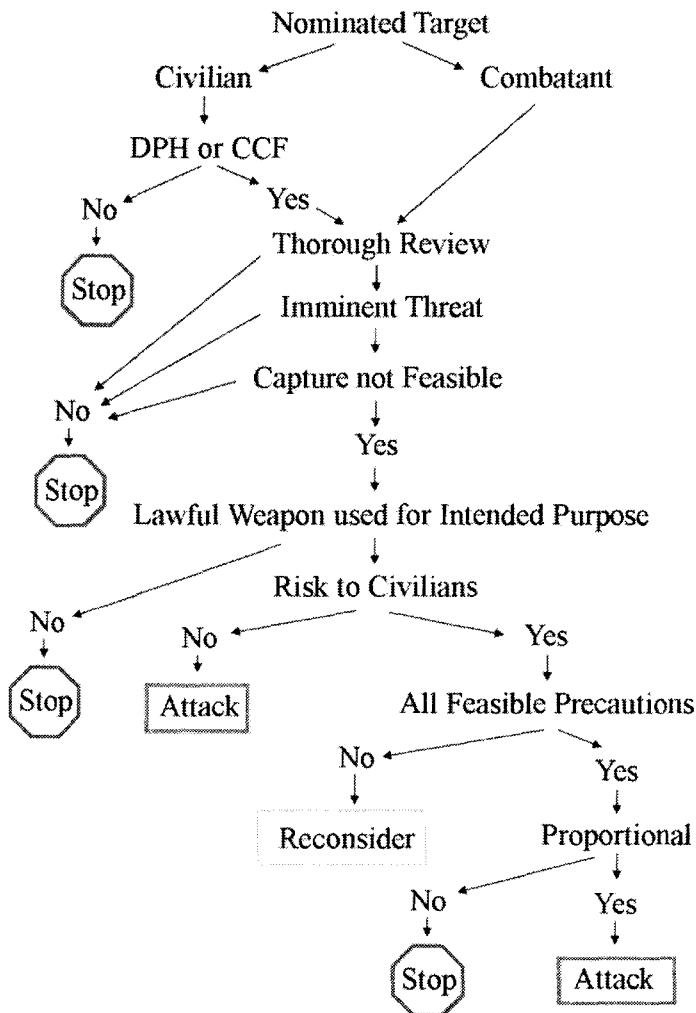
The conclusion that under certain circumstances the U.S. could use armed drones to kill U.S. citizens within the United States is a statement of *lex lata*, or the law as it currently stands. It is emphatically not an opinion about what the law should be. While the conclusion of this Comment is admittedly disturbing, hopefully it will be a starting point for a renewed discussion about the inherent value of human life and the responsibility of a state to provide security for its citizens.

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## Targeting Analysis for a U.S. Citizen



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† This chart is based off a chart created by Professor Eric Talbot Jensen, Associate Professor of Law at Brigham Young University J. Reuben Clark Law School, for a forthcoming textbook.