

MEMORANDUM

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Subject: Legal Issues Related to the Lethal Targeting of U.S. Citizens Suspected of Terrorist Activities

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This memorandum was prepared to enable distribution to more than one congressional office.

The killing of Anwar Al-Awlaki and another U.S. citizen by airstrike in Yemen, although never officially attributed to U.S. military action,¹ has fueled the ongoing debate about the legal propriety of targeted killings, in particular where a U.S. citizen is targeted or killed.² While the Obama Administration has not released a detailed description of the legal rationale undergirding the targeting policy,³ some insight into the Administration's thinking can be gleaned from speeches given by high-ranking Administration officials and government filings in a legal case brought by Awlaki's father in an effort to enjoin military operations against his son. This memorandum is an effort to clarify the debate by providing legal background, setting forth what is known about the Administration's position and identifying possible points of contention among legal experts and other observers, including the view from abroad.

Just over a decade ago Congress responded to the September 11 terrorist attacks by authorizing the President to use all necessary and appropriate military force to subdue those responsible as well as those who harbored the perpetrators.⁴ U.S. military operations began in Afghanistan the following month to drive the Taliban from power and eliminate the Al Qaeda safe haven from the territory under Taliban control. The use of armed but unmanned aerial vehicles – UAVs – also known as drones, became a new

¹ President Obama stated that the operation was a tribute to the U.S. intelligence community. David Jackson, *Obama: Terrorists will find 'no safe haven anywhere'*, USA TODAY, Sep. 30, 2011, <http://content.usatoday.com/communities/theoval/post/2011/09/obama-terrorists-will-find-no-safe-haven-anywhere/1>.

² For the purpose of this memorandum, "targeted killing" refers to a state sponsored premeditated use of lethal force directed at an individual or group of individuals specifically identified in advance of commencement of the operation.

³ The Administration has thus far refused to confirm or deny the existence of a written opinion from the Office of Legal Counsel (OLC) explaining the legality of targeted killing of U.S. citizens, although some Members of Congress have urged its release. See Charlie Savage, *A Not-Quite Confirmation of a Memo Approving Killing*, NY TIMES, March 9, 2012, at A13.

⁴ Authorization for Use of Military Force ("AUMF"), P.L. 107-40, authorized 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.

feature of warfare in the resulting conflict. As the use of UAVs has increased, so apparently has the debate about the legal propriety of their use. There seems to be wide agreement that UAVs are permissible to the same extent as any other weapon of war used in accordance with the principles of the laws of armed conflict (also known as international humanitarian law), but their remote operation from territory where no combat is taking place and the fact that they may be operated by non-military personnel raise questions about the scope of the armed conflict and who qualifies as a participant in it.

Legal Frameworks

Perspectives differ with respect to the legal framework that governs targeted killings, both as a matter of international law and domestic law. One possible framework is the law of armed conflict. It is widely accepted that anyone who participates directly in an armed conflict is subject to being captured or killed in accordance with the laws of armed conflict. However, there is some disagreement as to the scope of armed conflict, or at least the scope of the armed conflict against Al Qaeda and associated forces. Some believe that armed conflicts are necessarily constrained to certain territory, while others believe that the conflict exists wherever members of a warring party are conducting operations. In the view of the former, the killing of a belligerent away from a battlefield is not governed by the law of armed conflict at all. Those who believe that the law of armed conflict does not apply to targeted killings in places like Yemen argue that another legal framework comes into play there. Some believe that lethal actions in such areas are justifiable under the international right of self defense, but some assert that the activities, if lawful at all, must follow a law-enforcement model. Some have argued that no legal framework is currently adequate and propose that the United States should adopt a new strategy to incorporate elements of various models.⁵ In addition, there is some debate about whether or to what extent international human rights law applies in connection with these frameworks, and whether or not the U.S. Constitution, federal statutes, and treaties have any application under the circumstances.

The following sections provide a brief summary of the elements believed to be applicable to each of the possible frameworks, noting some areas of possible disagreement as well as overlap, followed by an analysis of the interaction of the frameworks in the event more than one applies.

Law of Armed Conflict

During an armed conflict, the law regulating the conduct of military operations during war applies. This law is variously called the “law of war,” the “law of armed conflict” (LOAC), or by its Latin term *jus in bello*. Where the law of war applies, targeted killing is lawful when the target is a “combatant” or “fighter,” which, during a non-international armed conflict, includes civilians who are at the time of attack directly participating in hostilities or who perform a continuous combat function as part of an armed group that is a party to the armed conflict.⁶ The rules governing targeting in this context are

⁵ See, e.g., PHILIP B. HEYMANN AND JULIETTE N. KAYYEM, LONG-TERM LEGAL STRATEGY PROJECT FOR PRESERVING SECURITY AND DEMOCRATIC FREEDOMS IN THE WAR ON TERRORISM 59-61 (JFKSG/Harvard Law School, Feb. 2005) (funded by National Memorial Institute for the Prevention of Terrorism and the Office of Domestic Preparedness, Department of Homeland Security (hereinafter “Long-Term Strategy”) (proposing new rules for targeted killings outside zones of active combat).

⁶ A “combatant” is generally understood to be a member of the “armed forces of a party to a conflict,” which is an organized armed group that is subject to an internal disciplinary system that functions to enforce compliance with the law of war, such that its members are entitled to combatant immunity for lawful hostile acts. See, e.g., Michael W. Lewis, *Potential Pitfalls of “Strategic Litigation”*: How the Al-Aulaqi Lawsuit Threatened to Undermine International Humanitarian Law, 9 LOY. U. CHI. INT’L L. REV. 177, 181-82 (2011). By contrast, “fighter” is used here to describe a person who is not entitled to participate in hostilities but nonetheless does so. Some authorities view such persons as civilians while others use terms such as “unlawful combatant” or “unprivileged belligerent,” but there appears to be broad agreement that there is a category of persons in armed (continued...)

seemingly more permissive than in the others; any legitimate military target may be attacked based on the status of the targeted individual without regard to the immediate risk the target may pose, so long as the attack is not conducted in a “treacherous” manner.⁷ Additionally, the law of war requires that any armed attack must be militarily necessary for the pursuit of a legitimate end and be proportionate to achieving it.⁸ No more force than reasonably necessary may be employed, and measures must be taken to minimize harm to civilians. While there is no requirement that a targeted individual be offered an opportunity to surrender, an effort to surrender must be accepted.⁹

There appears to be little disagreement about these rules regarding targeting during armed conflict; however, the scope of application of the law of armed conflict itself has been subject to much debate. Additionally, there is debate regarding the difference in rules that apply in an international armed conflict as distinguished from a conflict “not of an international nature.”¹⁰ Because states traditionally regarded any internal conflict that did not rise to the level of intensity that would compel the recognition of belligerency¹¹ as matters to be dealt with under domestic law, customary international law for non-international armed conflicts is much less developed than the law applicable to wars between states. While some interpret the paucity of international law regarding internal conflicts to mean that a state may assert at least the same belligerent rights against a non-state actor as would be permissible against an

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conflict who are not entitled to civilian immunity from attack. See, e.g., Philip Alston, *The CIA and Targeted Killings Beyond Borders*, 2 HARV. NAT’L SEC. J. 283, 301 (2011); INTERNATIONAL INSTITUTE OF HUMANITARIAN LAW, THE MANUAL ON THE LAW OF NON-INTERNATIONAL ARMED CONFLICT, Rule 1.1.3 (Yoram Dinstein, *et al.*, eds. 2006) [hereinafter “SAN REMO NIAC MANUAL”] (defining “fighter” to include civilians who directly participate in hostilities).

⁷ See GARY D. SOLIS, THE LAW OF ARMED CONFLICT 421-22 (2010); DEP’T OF THE ARMY, FM 27-10, THE LAW OF LAND WARFARE para. 31 (1956) [hereinafter FM 27-10] (explaining provision of Hague Regulations prohibiting treachery is “construed as prohibiting assassination, proscription, or outlawry of an enemy, or putting a price upon an enemy’s head, as well as offering a reward for an enemy ‘dead or alive.’ It does not, however, preclude attacks on individual soldiers or officers of the enemy whether in the zone of hostilities, occupied territory, or elsewhere.”).

⁸ NILS MELZER, TARGETED KILLING IN INTERNATIONAL LAW 283-86 (2008) (concluding that the principle of military necessity requires that the kind and degree of force used must be actually necessary for the achievement of a legitimate military end and must be lawful under international humanitarian law).

⁹ SAN REMO NIAC MANUAL, *supra* footnote 6, Rule 2.3.2; FM 27-10, *supra* footnote 7, at para 29 (explaining that it is considered “especially forbidden to kill or wound an enemy who, having laid down his arms, or having no longer means of defense, has surrendered at discretion”).

¹⁰ Common Article 3 of the Geneva Conventions applies to “armed conflicts not of an international nature,” that is, that are not armed conflicts between two states, which take place “on the territory of a High Contracting Party” to the Geneva Conventions, but does not define “armed conflict.” 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 [hereinafter GPW]. Some interpret this definition as excluding conflicts that take place in the territory of more than one High Contracting Party, see SAN REMO NIAC MANUAL, *supra* footnote 6, Rule 1.1.1 (defining non-international armed conflict as one that is confined “within the territory of a single State and in which the armed forces of no other State are engaged against the central government”), but there is considerable state practice indicating the possibility of cross-border spillover effects into neighboring countries, see YORAM DINSTEIN, THE CONDUCT OF HOSTILITIES UNDER THE LAW OF INTERNATIONAL ARMED CONFLICT 27 (2d ed. 2010); MELZER, *supra* footnote 8, at 257-61 (interpreting GPW art. 3 as emphasizing that its application would be restricted to territory belonging to a party to the Geneva Conventions, inasmuch as the obligations of the treaty could not extend onto the territory of a state that had not accepted them; noting subsequent state practice). At any rate, the U.S. Supreme Court in *Hamdan v. Rumsfeld*, 548 U.S. 557, 628-29 (2006), rejected the Bush Administration contention that the armed conflict with Al Qaeda was neither international nor non-international in character within the meaning of the Geneva Conventions, finding that, at least to the extent that it was occurring in Afghanistan, was a conflict not of an international nature.

¹¹ A state’s recognition as a belligerency with respect to an armed contention between itself (or another state) and a non-state armed group serves as an indication that the non-state party to the conflict has sufficient international personality to carry out international responsibilities under the law of war, in which case both parties to the conflict are entitled to exercise belligerent rights. See SOLIS, *supra* footnote 7, at 152. Formal recognition of belligerency has fallen into disuse. *Id.* at 153.

opposing sovereign state,¹² this reasoning arguably ignores the principles of sovereignty that provide the basis both for states' exclusive control within their own territories (territorial jurisdiction) and the need to substitute international law for domestic law when dealing with an equal sovereign (sovereign equality).¹³ The principle that a sovereign has an absolute right to exclusive territorial control has also given way in recent decades to international human rights law. Accordingly, although the United States' position is that human rights law and humanitarian law are exclusive,¹⁴ it is often argued that human rights law fills in some of the gaps of humanitarian law especially in the context of non-international armed conflict.¹⁵

While there is little doubt that military operations launched against Afghanistan in 2001 and ensuing hostilities there amount to an armed conflict within the meaning of international law, many U.S. allies have expressed doubt that hostilities between the United States and Al Qaeda meet the threshold for an armed conflict separate from the conflict in Afghanistan. One widely accepted definition separating a non-international armed conflict from lesser forms of violence¹⁶ was articulated by the International Criminal Tribunal for the former Yugoslavia:

The test . . . to the existence of an armed conflict for the purposes of the rules contained in Common Article 3 focuses on two aspects of a conflict; the intensity of the conflict and the organization of the parties to the conflict. In an armed conflict of an internal character, these closely related criteria are used solely for the purpose, as a minimum, of distinguishing an armed conflict from banditry, unorganized and short-lived insurrections, or terrorist activities, which are not subject to international humanitarian law. . . .¹⁷

Under this definition, it has been argued, Al Qaeda and associated forces are not organized under a sufficiently cohesive command and control structure to form an identifiable party to an armed conflict and have not, at least outside of Afghanistan and perhaps parts of Pakistan, been able to carry out protracted military operations that rise to the level of an armed conflict.¹⁸ While some observers have theorized that there is (or ought to be recognized) a new form of "transnational armed conflict" to bridge the difference between internal armed conflict and international armed conflict,¹⁹ others doubt that the concept has

¹² See, e.g., Ryan Goodman, *The Detention of Civilians in Armed Conflict*, 103 AM. J. INT'L L. 48, 50 (2009) (reasoning that because international humanitarian law is "uniformly less restrictive in internal armed conflict" that states "a fortiori possess the authority to undertake those practices in non-international conflict").

¹³ See Gabor Rona, *An Appraisal of US Practice Relating to 'Enemy Combatants'*, 2007 Y.B. INT'L HUMANITARIAN L. 232, 240-41 (explaining the view that international humanitarian law does not displace domestic law with respect to detention during a non-international armed conflict). Under this view, the failure of the relevant conventions to prescribe rules for detention in internal armed conflicts is more a recognition that sovereign states have sufficient authority to regulate the conduct of persons within their territory than an indication that fewer rules are meant to apply. Even in what some view as a "transnational armed conflict," there is no clash of sovereign authority that would necessitate a displacement of domestic law by detailed agreement between states. See *id.*

¹⁴ See SOLIS, *supra* footnote 7, at 23-23; *id.* at 503-04.

¹⁵ See, e.g., MELZER, *supra* footnote 8, at 79-81.

¹⁶ See SAN REMO NIAC MANUAL, *supra* footnote 6, Rule 1.1.1(b) ("Internal disturbances and tensions (such as riots, isolated and sporadic acts of violence, or other acts of a similar nature) do not amount to a non-international armed conflict.");

¹⁷ Prosecutor v. Tadic, IT-94-1-T, Judgment (7 May 1997), para. 562.

¹⁸ See, e.g., Mary Ellen O'Connell, *The Legal Case Against the War on Terror*, 36 CASE WESTERN RESERVE J. INT'L L. 349, 352-57 (2004) (denying possibility of a "global war on terror" because hostilities do not necessarily meet traditional Geneva threshold for armed conflict); Jordan J. Paust, *War and Enemy Status After 9/11: Attacks on the Laws of War*, 28 YALE J. INT'L L. 325, 326 (2003).

¹⁹ 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, 201 (2005) (proposing a "mixed model" where law enforcement and armed conflict models are inappropriate); Geoffrey S. Corn, *Transnational Armed Conflict: A 'Principled' Approach to the Regulation of Counter-Terror Combat Operations*, 42 ISRAEL L. REV. 45 (2009).

achieved wide enough acceptance by governments outside the United States to have developed into international law.²⁰

Assuming that Al Qaeda and associated forces meet the requirements to be a party to a non-international armed conflict, it remains to be considered whether the armed conflict is constrained within geographical bounds. Under customary international law, wars between states and “belligerencies”—internal conflicts like the U.S. Civil War in which a rebel government capable of holding territory and fielding an armed force such that ordinary law enforcement measures were inadequate to the task of maintaining law and order—were typically regarded as extending to the entire territory held by any one of the parties to the conflict.²¹ Wartime measures could be undertaken in areas not subject to the control of a neutral party, for example, on the high seas, but not on the territory of a neutral sovereign state, unless extenuating circumstances existed.²²

The idea that armed conflict might exist in a transnational setting divorced from the territory of parties coupled with the use of remotely piloted aircraft in warfare has given rise to a debate as to whether there exists a “legal geography of war” that restricts U.S. lethal operations to a defined “zone of hostilities” or “battlefield.”²³ On the one hand, it has been argued that the application of the law of war at a given place and time depends on the existence of hostilities.²⁴ In the absence of ongoing hostilities, it is presumed that ordinary peacetime rules apply, including international human rights law. Assuming that a targeted killing is authorized under the law of war only by those who have combatant privileges and in places where hostilities are ongoing, targeted killing wherever the law of war is not in operation would be unlawful. Accordingly, under this view, targeted killings that take place outside of a zone of hostilities would amount to an unlawful “extrajudicial killing” or “assassination” unless justified under peacetime rules. On the other hand, some argue from the premise that the law of war follows the armed forces of the parties to it, and that therefore, the targeted killing of combatants is permitted anywhere and at any time under wartime rules of engagement. Under this view, international boundaries are relevant only insofar as sovereignty conflicts may arise. These, it is argued, may be resolved by applying the international law regarding the resort to force, known as *jus ad bellum* or the law of self defense.

²⁰ See MELZER, *supra* footnote 8, at 269 (“In the final analysis, the current state of international law . . . leaves no room for a ‘third kind’ of armed conflict.”); DINSTEIN, *supra* footnote 10, at 56 (“Strangely enough, the US Supreme Court, in the *Hamdan* case of 2006, seems to have subscribed to the fiction that the cross-border worldwide ‘war on terrorism’ is a non-international armed conflict. This judicial decision must be seen as strictly limited to the confines of American domestic law, inasmuch as – from the vantage point of international law– a non-international armed conflict cannot possibly assume global dimensions.”) (citations omitted); Gabor Rona, *Interesting Times for International Humanitarian Law: Challenges from the “War on Terror,”* 27 FLETCHER F. OF WORLD AFF. 55, 63-64 (2003), available online at http://www.icrc.org/eng/assets/files/other/rona_terror.pdf.

²¹ L. OPPENHEIM, 2 INTERNATIONAL LAW §§ 70-71 (7th ed. 1952) (describing the “region of war,” where belligerents are permitted to prepare and execute hostilities, as distinct from the “theater of war,” where hostilities take place). This does not appear to mean that a state may necessarily exercise all forms of belligerent power on its own territory, at least with respect to its own citizens, where ordinary governance is not impaired. See, e.g., *Ex parte Milligan*, 4 Wall. (71 U.S.) 2 (1866).

²² See *id.* § 71 (“[The] territories and territorial waters of both belligerents, together with the open sea, fall within the region of war, [but] neutral territories do not, [although] exceptions occur.”).

²³ See Kenneth Anderson, *Targeted Killing and Drone Warfare: How We Came to Debate Whether There Is a ‘Legal Geography of War’*, Koret-Taube Task Force on National Security and Law, available at www.futurechallengesessays.com.

²⁴ See, e.g., Mary Ellen O’Connell, *The Choice of Law Against Terrorism*, 4 J. NAT’L SECURITY L. & POL’Y 343 (2010).

Self Defense under International Law

Even outside the context of an armed conflict, sovereign states retain the right to self defense in the event of an armed attack.²⁵ The law governing the resort to force, frequently known by its Latin term *jus ad bellum*, is related to but separate from the law governing the use of force, *jus in bello*. Prior to World War II, states were recognized as having a sovereign right to use military force against other states to vindicate any number of wrongs. In drafting the U.N. Charter, member states sought to reduce the incidence of war by curtailing the rights of states to use force against one another.

Although Article 2(4) of the U.N. Charter generally prohibits member states from using or threatening to use force “against the territorial integrity or political independence of any state,”²⁶ Article 51 preserves the “inherent right of individual or collective self-defence if an armed attack occurs against a Member of the United Nations, until the Security Council has taken measures necessary to maintain international peace and security.”²⁷ Read literally, Article 51’s articulation of the right seems to preclude a state’s use of force until *after* an armed attack has already commenced and not merely on the threat of any use of force,²⁸ but some authorities regard the right as encompassing the previously existing inherent right of self-defense under customary international law,²⁹ which many likewise regard as including a right to preemptive (or “anticipatory”) self-defense in the event of an imminent attack.³⁰

The classic formulation of the right to use force in self-defense on the territory of a foreign state was set forth by Secretary of State Daniel Webster in connection with the famous *Caroline* incident. In 1837 British troops attacked a private American ship, the *Caroline*, while it was moored for the night on the New York side of the Niagara River, asserting that the ship was being used to provide supplies to insurrectionists against British rule in Canada who were based on an island on the Canadian side of the river. The United States protested this “extraordinary outrage” and demanded an apology and reparations.

²⁵ “Armed attack” is not defined. The International Court of Justice has suggested that “armed attack” is limited to attacks of sufficient intensity launched by or under the direction of a state. *See e.g.*, *Military and Paramilitary Activities in and against Nicaragua (Nicar. v. U.S.)*, 1986 I.C.J. 14 (June 27); *Oil Platforms (Iran v. U.S.)*, 42 I.L.M. 1334 (November 6, 2003); *Armed Activities on the Territory of the Congo (Dem. Rep. Congo v. Uganda)*, 2005 I.C.J. 116, ¶ 147 (Dec. 19); *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, Advisory Opinion*, 2004 I.C.J. 136, 215 (July 9). However, the UN Security Council recognized that the 9/11 attacks gave rise to a right to self defense. UN Sec. Council Res. 1368, S/RES/1368 (12 September 2001). Recent state practice seems to confirm that attacks by non-state actors can amount to an armed attack and may give rise to a right of self defense. *See* Michael Schmitt, *Responding to Transnational Terrorism Under the Jus Ad Bellum*, 56 NAVAL L. REV. 1, 8 (2008) (positing that the international response to 9/11 demonstrates the acceptability of military force in response to violent acts by non-state actors with no connection to any state, which until that time remained the province of law enforcement).

²⁶ United Nations Charter art. 2(3). The use of force is further precluded “in any other manner inconsistent with the Purposes of the United Nations.” *Id.*

²⁷ *Id.* art. 51.

²⁸ YORAM DINSTEIN, *WAR, AGGRESSION AND SELF-DEFENCE* 166-68 (3d ed. 2001).

²⁹ THE CHARTER OF THE UNITED NATIONS: A COMMENTARY 666-67 (Bruno Simma, ed., 1994) (hereinafter “UN COMMENTARY”) (describing the “prevailing view” as holding that article 51 is a limitation on the customary right of self-defense, while noting that an opposing view considers that article 51 preserves a customary right of self-defense that is not limited to cases of armed attack, but may be invoked against lesser threats); DINSTEIN, *supra* footnote 28, at 167-68 (noting, but disagreeing with a “strong school of thought maintain[ing] that Article 51 only highlights one form of self-defence...[but] does not negate other patterns of legitimate action in self-defence”).

³⁰ UN COMMENTARY, *supra* footnote 29, at 675 (describing lack of consensus in international legal doctrine with respect to the point at which self-defense measures may be taken); DINSTEIN, *supra* footnote 28, at 165-66 (assessing that the majority of commentators regard self-defense under customary international law as encompassing a right to anticipatory self-defense, but arguing that the right of self-defense under the UN Charter is more restricted); ANTONIO CASSESE, *INTERNATIONAL LAW* 307-11 (2001) (describing U.S. position on self-defense as broader than that which appears to be generally accepted among states).

In the course of the ensuing diplomatic exchanges with the British Government, Secretary of State Daniel Webster asserted that an intrusion into the territory of another state can be justified as an act of self-defense only in those “cases in which the necessity of that self-defence is instant, overwhelming, and leaving no choice of means and no moment for deliberation.”³¹ Moreover, he wrote that even if justified, the use of defensive force must be proportional to the threat, “since the act, justified by the necessity of self-defence, must be limited by that necessity, and kept clearly within it.”³² The three conditions of necessity, proportionality, and immediacy (or imminence) are widely regarded as establishing the grounds for invoking the right to resort to force extraterritorially.³³

The United States has used force in self-defense to respond to terrorist attacks in the past,³⁴ and also has asserted the right to use force in anticipation of an imminent attack. The right to use force in self-defense, and even the actual use of force justified under the circumstances, do not necessarily indicate the existence of an armed conflict. For example, the United States in 1986 used force against Libya in response to a terrorist attack against American personnel in Berlin, but neither Libya nor the United States seems to have regarded the circumstances as amounting to an armed conflict.³⁵ Likewise, the use of force against suspected terrorist targets in Afghanistan and Sudan in response to the bombing of U.S. embassies in Africa does not appear to have been regarded at the time as giving rise to a situation of armed conflict so as to bring the law of war into operation in those places.

If the state on whose territory force is to be used gives its consent, there is no violation of article 2(4) of the UN Charter and therefore no need to invoke a theory of self-defense. Another possibility for resolving a conflict of sovereignty in order to justify the use of force without consent on the territory of another state which did not itself initiate an armed attack is to justify intervention on the basis that the invaded or injured state is “unable or unwilling” to remove the threat emanating from its territory.³⁶ It has been suggested that the right to intervene militarily in such cases stems from the obligation of neutrality during wars between states,³⁷ but for peacetime purposes, where an incursion or threat does not amount to an “armed attack” within the meaning of the UN Charter, the right may be an extension of the concept of “self-help” in international law, which in theory did not survive the adoption of the UN Charter insofar as it involves the use of force.³⁸ In present-day application, it is not clear whether the “unable or unwilling” test is understood to be a separate test from the *Caroline* test,³⁹ an additional consideration (for example,

³¹ Letter from Secretary of State Daniel Webster to Lord Ashburton of August 6, 1842, set forth in JOHN BASSETT MOORE, 2 A DIGEST OF INTERNATIONAL LAW 412 (1906).

³² Letter from Mr. Webster to Mr. Fox of April 24, 1841, 29 British and Foreign State Papers 1129, 1138 (1857), quoted in Lori Damrosch, *International Law: Cases and Materials* 923 (2001).

³³ DINSTEIN, *supra* footnote 28, at 219 (noting that the Webster correspondence has come to be “looked upon as transcending the specific legal contours of extra-territorial law enforcement” to influence the entire field of self defense).

³⁴ See Michael Schmitt, *Responding to Transnational Terrorism Under the Jus Ad Bellum*, 56 NAVAL L. REV. 8 (2008) (discussing U.S. response to Libya in 1986 and missile strikes against targets in Sudan and Afghanistan in 1998).

³⁵ Cf. DINSTEIN, *supra* footnote 28, at 11 (noting that the classification of a use of force between states as war or incident short of war depends on how the antagonists choose to treat the situation).

³⁶ Ashley Deeks, *'Unwilling or Unable': Toward a Normative Framework for Extra-Territorial Self-Defense*, 52 VA. J. INT'L 483 LAW (2012).

³⁷ Deeks, *supra* footnote 36, at 497-98.

³⁸ DINSTEIN, *supra* footnote 28, at 159-61.

³⁹ In fact, the dispute over the *Caroline* did include as part of the British justification an allegation that the United States was unable to prevent insurgents from using its territory to launch attacks against British Canada. Deeks, *supra* footnote 36, at 502; Abraham D. Sofaer, *On the Necessity of Pre-emption*, 14 EUR. J. INT'L L. 209, 218-19 (2003).

an element of necessity⁴⁰), or a substitute for one of the factors, perhaps immediacy in the case of a continuing threat.

If an armed attack on the part of a non-state armed group gives rise to a state's right of self-defense, it remains to be considered what rules govern the resulting use of force on the part of the state. Some argue that the necessity, proportionality, and immediacy requirements to justify the resort to force also provide an adequate framework to govern its use.⁴¹ Others, however, believe that the legal framework applicable under the law of war applies in the event hostilities meet the threshold to be considered an armed conflict, or that the legal framework applicable to peacetime law enforcement operations applies in the event they do not.

Lethal Force during the Course of Extraterritorial Law Enforcement Operations

Counterterrorism operations conducted prior to 2001 were largely considered to be the province of law enforcement,⁴² along with other military operations against non-state actors such as pirates. Such operations conducted extraterritorially were frequently conducted by the armed forces, and although an intrusion into the territory of another state for such purposes requires consent or a *jus ad bellum* justification, the resulting operations were not typically regarded as part of an armed conflict. Other terms were typically employed, for example, military operation other than war ("MOOTW" or "OOTW"), to describe the activities.⁴³ The rules regarding the use of deadly force during such operations are typically less permissive than the rules of engagement applicable during armed conflict.⁴⁴ The United States has adopted a policy of conducting all operations involving the use of force in accordance with the law of armed conflict, regardless of how the conflict or operations have been characterized.⁴⁵ Those detained in connection with such operations have been treated as if they were entitled to prisoner of war status,

⁴⁰ See Deeks, *supra* footnote 36, at 12-13. Deeks writes:

The necessity inquiry . . . has two prongs in the non-state actor context: a victim state must consider not just whether the attack was of a type that would require it to use force in response to that non-state actor, but it also must evaluate the conditions in the state from which the non-state actor launched the attacks. This latter evaluation is where, absent consent, states currently employ the "unwilling or unable" test to assess whether the territorial state is prepared to suppress the threat. If the territorial state is neither willing nor able, the victim state may appropriately consider its own use of force in the territorial state to be necessary and, if the force is proportional and timely, lawful. If the territorial state is both willing and able, it will not be necessary for the victim state to use force and the victim state's force would be unlawful.

Id. at 13.

⁴¹ See Jordan J. Paust, *Self-Defense Targetings of Non-State Actors and Permissibility of U.S. Use of Drones in Pakistan*, 19 J. TRANSNAT'L L. & POL'Y 237 (2010); Anderson, *supra* footnote 23.

⁴² See SOLIS, *supra* footnote 7, at 164-167.

⁴³ *Id.* at 498. The term and acronym "MOOTW" was discontinued by JP 3-0, Joint Operations (17 September 2006). See INT'L & OPERATIONAL LAW DEP'T, THE JUDGE ADVOCATE GENERAL'S SCHOOL, U.S. ARMY, OPERATIONAL LAW HANDBOOK 50 (MAJ Marie Anderson & Emily Zukauskas, eds., 2008).

⁴⁴ See, e.g., OPERATIONAL LAW HANDBOOK, *supra* footnote 43, at 60 (in the context of a peace-keeping mission, "the use of deadly force is justified only under situations of extreme necessity (typically in self-defense), and as a last resort when all lesser means have failed to curtail the use of violence by the parties involved").

⁴⁵ See, e.g., U.S. DEP'T OF DEF., DEPARTMENT OF DEFENSE DIRECTIVE NO. 2311.01E, DOD LAW OF WAR PROGRAM para. 4.1 (2006), available at <http://www.dtic.mil/whs/directives/corres/pdf/231101p.pdf> (mandating that "[m]embers of the DoD Components comply with the law of war during all armed conflicts, however such conflicts are characterized, and in all other military operations"); See SOLIS, *supra* footnote 7, at 167 (interpreting U.S. policy to mean only that the "basic protections and the humanitarian spirit of [the law of armed conflict] apply in every conflict, no matter how it is characterized," not that the need to distinguish between types of conflicts is negated altogether); Geoffrey S. Corn and Eric Talbot Jensen, *Untying the Gordian Knot: A Proposal for Determining Applicability of the Laws of War to the War on Terror*, 81 Temple L. Rev. 787 (2008).

although not legally classified as such. Consequently, it is difficult to determine in many cases whether the law of armed conflict was applied as a matter of law or as a matter of policy.

Interplay of Legal Frameworks

The right of self defense may be asserted to justify an otherwise wrongful use of force in the territory of another state, whether or not an armed conflict results or there is an ongoing armed conflict. Self-defense in this context refers to the concept of *jus ad bellum*, which addresses the justification for the use of interstate force. It is questionable whether self-defense can be said to provide a legal “framework” governing the use of force separate from the law of armed conflict or the generally applicable rule of law that applies in peacetime, which is generally understood to encompass international human rights law as implemented through the domestic laws governing law enforcement operations. In other words, under this view, establishing that a targeted killing on the territory of another state was conducted with the consent of the host state or that it was justified under the rubric of self-defense within the meaning of Article 51 of the UN Charter resolves only whether the use of force violates the sovereignty of the host state as protected by Article 2(4) of the UN Charter. It remains to be considered whether the targeting of a particular group or individual violates any individual’s rights.

A state of armed conflict could plausibly justify the use of force on the territory of a state that is not a party to the armed conflict if it gives its consent, although some argue that a state which consents to the use of armed force on its territory in this way makes itself in essence a party to the armed conflict. Under these circumstances, the law of armed conflict would provide the framework within which to evaluate the legality of the operation. Otherwise, it would seem that human rights law and generally applicable domestic law would provide the applicable framework,⁴⁶ in which case it might be questioned whether a state’s consent to military operations on its territory under circumstances in which its own use of military force would not be justified could violate its obligation to protect the inhabitants of its territory.⁴⁷

Necessity and proportionality are both elements associated with *jus in bello* and *jus ad bellum*, but the meaning of the terms varies according to context. While in the *jus ad bellum* context, “necessity” consists of imminence and seriousness of the threat, along with the lack of peaceful alternative means, “military necessity” in the *jus in bello* context requires that the kind and degree of force used must be actually necessary for the achievement of a legitimate military end and must be lawful under international humanitarian law. Proportionality for *jus ad bellum* purposes measures the extent of the use of force against the overall goals legitimately sought, while proportionality for *jus in bello* purposes weighs the amount of collateral damage expected to result from a military operation against the gains hoped to be achieved.

The Assassination Ban and Extrajudicial Killings

Another area of contention surrounding the use of lethal strikes against specifically targeted individuals is whether the practice violates the U.S. executive ban on assassinations or amounts to an extrajudicial

⁴⁶ See MELZER, *supra* footnote 8, at 52.

⁴⁷ In the event that law enforcement principles apply, the use of deadly force is restricted to cases of necessity and only as a last resort. See, e.g., Principle 9, U.N. Basic Principles on the Use of Force and Firearms by Law Enforcement Officials, G.A. Res. 45/166 (Dec. 18, 1999) (stating that force can only be used “in self-defence or defence of others against the imminent threat of death or serious injury, to prevent the perpetration of a particularly serious crime involving grave threat to life, to arrest a person presenting such a danger and resisting their authority, or to prevent his or her escape, and only when the less extreme means are insufficient to achieve these objectives”).

killing under international law. The U.S. prohibition on assassinations conducted by U.S. officials or persons employed by the United States is set forth most prominently in an executive order originally issued in 1981 by President Ronald Reagan. Executive Order 12333 on “United States Intelligence Activities,” provides that “[n]o person employed by or acting on behalf of the United States Government shall engage in, or conspire to engage in, assassination.”⁴⁸

The term “assassination” is not defined in E.O. 12333 or in any of the predecessor orders. While some construe assassination as a general matter to refer to the murder of a political leader or some other (usually famous) person for political reasons, others regard the term as encompassing a broader category of unlawful killings. In a 1989 memorandum of law written to provide guidance for a revision of the U.S. Army’s law of war manual, W. Hays Parks, Special Assistant for Law of War Matters to The Judge Advocate General of the Army, explored the meaning of “assassination” as prohibited by E.O. 12333 to conclude that what constitutes assassination differs during time of war from time of peace, and that wartime targeting of valid military objectives (including specific enemy military leaders) is not prohibited.⁴⁹ According to his analysis, peacetime assassination would encompass any murder for political purposes of public figures, or of private persons, if conducted by covert means.⁵⁰ During war, however, where legalized killing is part of the role of the Armed Forces, combatants are subject to attack at any time or place, regardless of their activity when attacked.⁵¹ Moreover, according to the memorandum:

An individual combatant’s vulnerability to lawful targeting (as opposed to assassination) is not dependent upon his or her military duties, or proximity to combat as such. Nor does the prohibition on assassination limit means that otherwise are lawful; no distinction is made between an attack accomplished by aircraft, missile, naval gunfire, artillery, mortar, infantry assault, ambush, landmine or booby trap, a single shot by a sniper, a commando attack, or other, similar means. All are lawful means for attacking the enemy and the choice of one vis-à-vis another has no bearing on the legality of the attack. If the person attacked is a combatant, the use of a particular lawful means for attack (as opposed to another) cannot make an otherwise lawful attack either unlawful or assassination.⁵²

Under this view, wartime assassination is set apart from lawful killing by the element of treachery, which is not generally regarded as prohibiting operations that depend upon the element of surprise.⁵³ The 1989 memorandum noted the unresolved questions of whether killing by non-uniformed conventional forces or partisan surrogates constitutes assassination as well as the degree of participation in hostilities necessary

⁴⁸ 46 Fed. Reg. 59954 (1981). E.O. 12333 is the latest in a series of three executive orders which included assassination bans. The first assassination ban was part of an executive order issued by President Ford in response to concerns raised in the 1970’s with respect to alleged abuses by the U.S. intelligence community. Executive Order 11905, Sec. 5(g), 41 Fed. Reg. 7703, 7733 (President Gerald Ford, 2/19/76) (banning “political assassination”). The order was issued after a select committee chaired by Senator Frank Church (the Church Committee), released a report addressing allegations of possible U.S. involvement in assassination plots against certain foreign leaders and proposing a legislative ban on assassinations. See *Alleged Assassination Plots Involving Foreign Leaders, An Interim Report of the Select Committee to Study Governmental Operations with respect to Intelligence Activities*, United States Senate, S. Rept. 94-465, 94th Cong., 1st Sess. 1-84 (Nov. 20, 1975) (Church Committee). The assassination ban in E.O. 11905 was superseded by E.O. 12036, §§ 2-305 & 2-309 43 Fed. Reg. 3674, 3688, 3689 (President Jimmy Carter, 1/26/78) (banning assassinations without using the modifier “political”). For a discussion of these orders, see William C. Banks and Peter Raven-Hansen, *Targeted Killing and Assassination: The U.S. Legal Framework*, 37 U. RICH. L. REV. 667 717-26 (2003).

⁴⁹ See W. Hays Parks, *Memorandum of Law: Executive Order 12333 and Assassination*, Dep’t of the Army Pamphlet 27-50-204, from ARMY LAW., Dec 1989.

⁵⁰ *Id.* at 2.

⁵¹ *Id.* at 3.

⁵² *Id.*

⁵³ *Id.* at 4; see *supra* footnote 7; see also MELZER, *supra* footnote 8, at 47 (criticizing “American view” of wartime assassination as extremely narrow.)

to make a civilian a combatant who is subject to attack.⁵⁴ The unintentional killing of a civilian ancillary to a lawful attack on a military objective, according to the memorandum, would not constitute assassination.⁵⁵

Finally, the memorandum of law asserted that there is “historical precedent for the use of military force to capture or kill individuals whose peacetime actions constitute a direct threat to U.S. citizens or national security,” and identified three forms of self defense in which the United States has asserted the right to use force: (1) against an actual use of force or “hostile act”; (2) pre-emptive self defense against an imminent use of force; and (3) self defense against a “continuing threat.”⁵⁶ The memorandum did not distinguish between legal constraints on the use of force in self defense and the use of force during war.

This view of the lawfulness of targeted killing during peace or war is not universally held,⁵⁷ which has led to characterizations of U.S. attacks in Yemen and other places as acts of “extrajudicial killing” in violation of international law. After the United States conducted a drone strike in Yemen in 2002 against suspected Al Qaeda militants alleged to have been involved in the 2000 strike against the USS *Cole*, the special rapporteur on extrajudicial, summary, or arbitrary executions of the United Nations Commission on Human Rights issued a report calling the strike “a clear case of extrajudicial killing.”⁵⁸ The United States responded that the special rapporteur had no mandate to inquire into “operations conducted during the course of an armed conflict with Al Qaida.”⁵⁹

U.S. law defines “extrajudicial killing” for purposes of the Torture Victims Protection Act⁶⁰ as:

For the purposes of this Act, the term ‘extrajudicial killing’ means 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. Such term, however, does not include any such killing that, under international law, is lawfully carried out under the authority of a foreign nation.⁶¹

Courts have found that deaths due to state-sponsored terrorist attacks constitute extrajudicial killings under this definition in lawsuits brought under the terrorism exception to the Foreign Sovereign Immunities Act,⁶² which permits U.S. citizens and certain others to bring civil suits against Iran and other states designated as sponsors of terror. Among acts found to have constituted extrajudicial killings are the assassinations of Iranian dissidents during the 1980s who were leaders of the deposed Shah’s regime, some of whom were alleged to have been conspiring to launch a military attack against the new

⁵⁴ Parks, *supra* footnote 49, at 5.

⁵⁵ *Id.* at 3.

⁵⁶ *Id.* at 7-8.

⁵⁷ MELZER, *supra* footnote 8, at 45-51 (discussing and listing sources for what the author calls the “American discussion on assassination”).

⁵⁸ *Report of the Special Rapporteur on Extrajudicial, summary or arbitrary executions, Asma Jahangir*, UN Doc. E/CN.4/003/3, paras. 37 – 39 (Jan. 13, 2003), available at <http://www2.ohchr.org/english/issues/executions/annual.htm>.

⁵⁹ Response of the Government of the United States of America to the letter from Special Rapporteur on Extrajudicial, Summary or Arbitrary Executions Asma Jahangir’s letter to the Secretary of State dated November 15, 2002 and to the findings of the Special Rapporteur contained in her report to the Commission on Human Rights (E/CN.4/2003/3).

⁶⁰ P.L. 102-256, 106 Stat. 73 (1992).

⁶¹ 28 U.S.C. § 1350 Note.

⁶² 28 U.S.C. § 1605A (previously § 1605(a)(7)). For information about such lawsuits, see CRS Report RL31258, *Suits Against Terrorist States by Victims of Terrorism*, by Jennifer K. Elsea.

government.⁶³ Because these cases have been default judgments in which Iran has never mounted a defense, there is no discussion in any of the opinions of whether the acts could be construed as lawful acts of war or self defense under any set of facts. However, in cases involving the 1983 bombing of the Marine Corps barracks in Beirut, the judge found it significant that the Marines were operating under peacetime rules of engagement, suggesting that the barracks attack might have been lawful if the Marines were participating in an armed conflict as opposed to engaging in a peace-keeping mission.⁶⁴ These cases may be read to support a state practice demonstrating that states may be held responsible under international law for extrajudicial killings taking place outside their borders and that there is an individual right of redress.

Administration Remarks

The Obama Administration has declined to release an Office of Legal Counsel (OLC) opinion explaining the legal basis supporting the targeted killing program, but the *New York Times* reported on the contents of such a memorandum reportedly prepared in 2010 to justify the killing of Anwar al-Awlaki.⁶⁵ The legal analysis reportedly concluded that Alawki would be a lawful target authorized by the AUMF so long as his capture was not feasible and Yemeni authorities were unable or unwilling to prevent his participation in activities that posed a threat to the United States, on the basis that intelligence agencies assessed that he posed such a threat and was taking part in hostilities between the United States and Al Qaeda (or one of its “co-belligerents”).⁶⁶ The memorandum reportedly considered whether his killing would amount to an assassination or murder under U.S. law, whether it would violate the law of war if the killing were conducted by CIA personnel, and whether the constitutional guarantees against unreasonable seizure and deprivation of life without due process would be violated.⁶⁷ No legal obstacles to the killing were apparently identified. It is not possible to tell from the article whether these factors were all deemed to be applicable under any legal theory or whether they were considered as relevant under alternative “law-of-war” and “self-defense” paradigms.

While the Administration has declined requests to make available a written analysis of the legal regime governing lethal actions against terrorist suspects, including those who are U.S. citizens, senior Administration officials have shed some light on these issues in a series of speeches addressing national security issues beginning in early 2010.

⁶³ See, e.g., *Oveissi v. Islamic Republic of Iran*, 768 F. Supp. 2d 16 (D.D.C. 2011) (damages awarded for killing of plaintiff’s grandfather, Gholam Oveissi, a general in pre-revolutionary Iran who “remained active in the movement to retake Iran and re-install the Shah as the secular leader of that country,” by agents of Iran in Paris in 1984); *Bahktiar v. Islamic Republic of Iran*, 571 F. Supp. 2d 27 (D.D.C. 2008) (murder of former prime minister of Iran, Shapour Bakhtiar, by agents of Iran in 1991 constitutes extrajudicial killing). For information about coup attempts against the Iranian government, in which the two men whose killings were at issue in these cases were allegedly involved, see STEVEN R. WARD, *IMMORTAL: A MILITARY HISTORY OF IRAN AND ITS ARMED FORCES* 238-39 (2009). The length of time between the allegedly sizable Nuzhah coup attempt, which took place in 1979-1980, and the killings suggests that a self-defense justification would not have been available in any event.

⁶⁴ *Peterson v. Islamic Republic of Iran*, 264 F. Supp. 2d 46, 49 (D.D.C. 2007) (finding that under peace-keeping rules of engagement, Marines were non-combatants); *id.* at 61 (concluding that the “act undertaken by agents of Hezbollah—the development and detonation of an explosive charge in the barracks of the 24th MAU on October 23, 1983, which resulted in the deaths of over 241 peacekeeping American servicemen—satisfies the FSIA’s definition of an ‘extrajudicial killing’”);

⁶⁵ Charlie Savage, *Secret U.S. Memo Made Legal Case to Kill a Citizen*, NY TIMES, Oct. 9, 2011, at 1.

⁶⁶ *Id.*

⁶⁷ *Id.*

Harold Koh

In a speech delivered to the American Society of International Law in March 2010, the U.S. State Department Legal Adviser, Harold Hongju Koh, described U.S. targeting practices, including lethal operations conducted by means of UAVs, as complying with all applicable law, including the laws of war.

He explained the Administration's view that:

as a matter of international law, the United States is in an armed conflict with al-Qaeda, as well as the Taliban and associated forces, in response to the horrific 9/11 attacks, and may use force consistent with its inherent right to self-defense under international law. As a matter of domestic law, Congress authorized the use of all necessary and appropriate force through the 2001 Authorization for Use of Military Force (AUMF).⁶⁸

This comment suggests two possible rationales for targeted killings: that such a killing may be conducted either as part of an armed conflict or that it may be justified as an exercise in self-defense, or possibly as both. The Legal Adviser described two principles that form a part of the relevant legal framework, apparently without regard to which justification is asserted:

- First, the principle of distinction, which requires that attacks be limited to military objectives and that civilians or civilian objects shall not be the object of the attack; and
- Second, the principle of proportionality, which prohibits attacks that may be expected to cause incidental loss of civilian life, injury to civilians, damage to civilian objects, or a combination thereof, that would be excessive in relation to the concrete and direct military advantage anticipated.

He further stated that “great care is taken to adhere to these principles in both planning and execution, to ensure that only legitimate objectives are targeted and that collateral damage is kept to a minimum.”

The remainder of the remarks describing the legality of unmanned drone attacks addressed four possible objections to the use of UAVs. He disputed the notion that targeting a leader of an enemy force violates the law of war, citing as positive precedent the World War II targeting of an aircraft carrying Admiral Yamamoto. Second, he disputed the argument that the use of UAVs for lethal operations violates the law of armed conflict, stating that “the rules that govern targeting do not turn on the type of weapon system used, and there is no prohibition under the laws of war on the use of technologically advanced weapons systems in armed conflict... so long as they are employed in conformity with applicable laws of war.” He rejected the contention that drone operations amount to unlawful extrajudicial killing, arguing that “a state that is engaged in an armed conflict or in legitimate self-defense is not required to provide targets with legal process before the state may use lethal force.” Finally, he rejected any contention that UAV operations violate the domestic ban on assassinations for essentially the same reason, stating that the term “assassination” only applies to unlawful killings.

These explanations did not quell all of the criticism, although there seems to be broad agreement as to the general propositions regarding the law of armed conflict. The main points of contention with respect to targeted killings seem to stem from a rejection of the premise that the United States is engaged in an armed conflict against Al Qaeda, or a belief that drone attacks that take place outside Afghanistan are not

⁶⁸ Harold Hongju Koh, Legal Adviser, U.S. Department of State, Speech before the Annual Meeting of the American Society of International Law, Washington, DC., March 25, 2010, prepared text *available at* <http://www.state.gov/s/l/releases/remarks/139119.htm>.

within the legitimate scope of that conflict. The Legal Adviser did not clarify in his remarks what circumstances would determine whether the law of armed conflict or the sovereign right of self-defense would justify a given targeted killing, or whether a combination of factors may apply.

John O. Brennan

John O. Brennan, Assistant to the President for Homeland Security and Counterterrorism, shed additional light on the topic in a speech at a Harvard conference on national security law in September 2011. In noting the disagreement regarding the geographic scope of the armed conflict, he stated that

The United States does not view our authority to use military force against al-Qa'ida as being restricted solely to "hot" battlefields like Afghanistan. Because we are engaged in an armed conflict with al-Qa'ida, the United States takes the legal position that—in accordance with international law—we have the authority to take action against al-Qa'ida and its associated forces without doing a separate self-defense analysis each time. And as President Obama has stated on numerous occasions, we reserve the right to take unilateral action if or when other governments are unwilling or unable to take the necessary actions themselves.⁶⁹

Mr. Brennan's remarks suggest that the Administration viewed the scope of the conflict as global rather than confined to Afghanistan and possibly parts of Pakistan, and that therefore, attacks outside of a traditional theater of military operations need not be justified as self-defense against an armed attack within the meaning of the U.N. Charter. However, he continued,

International legal principles, including respect for a state's sovereignty and the laws of war, impose important constraints on our ability to act unilaterally—and on the way in which we can use force—in foreign territories.⁷⁰

Accordingly, although the Administration takes the position that targeted killings of foreign militants are not restricted to situations in which the target is planning, engaging in, or threatening an imminent armed attack against the United States, the sovereignty of the foreign nation on whose territory the targeted killing is to take place is taken into consideration. As a practical matter, then, drone strikes against terrorist targets in places like London or Hamburg are unlikely, although the legal rationale could plausibly support an attack in such places. Mr. Brennan went on to suggest that although the U.S. view of the legal framework differs from that of other countries, there is a convergence of views that would nonetheless accept as lawful a targeted killing operation based on a broadening of the understanding of "imminence."⁷¹

In another speech delivered at the Wilson Center April 30, 2012, Mr. Brennan further elaborated on the success of military operations against Al Qaeda and how adherence to the law and authorities "[permitting the pursuit of Al Qaeda members]—including U.S. citizens—with the use of

⁶⁹ Remarks of John O. Brennan, Assistant to the President for Homeland Security and Counterterrorism, "Strengthening Our Security By Adhering To Our Values And Laws," Program on Law and Security, Harvard Law School, Cambridge, Massachusetts, September 16, 2011 (hereinafter "Brennan Remarks at Harvard"), prepared text *available at* <http://www.whitehouse.gov/the-press-office/2011/09/16/remarks-john-o-brennan-strengthening-our-security-adhering-our-values-an>.

⁷⁰ *Id.*

⁷¹ *Id.* "Over time, an increasing number of our international counterterrorism partners have begun to recognize that the traditional conception of what constitutes an 'imminent' attack should be broadened in light of the modern-day capabilities, techniques, and technological innovations of terrorist organizations."

‘technologically advanced weapons’” strengthens counterterrorism efforts.⁷² For legal authority, he cited the President’s constitutional power “to protect the nation from any imminent threat of attack” as well as the AUMF, which he noted does not restrict the use of military force against Al Qaida to Afghanistan. He also repeated the assertion that the United States is in an armed conflict and may use force “consistent with our inherent right of national self-defense.” Nothing in international law, he stated, “bans the use of remotely piloted aircraft for this purpose or ... prohibits us from using lethal force against our enemies outside of an active battlefield, at least when the country involved consents or is unable or unwilling to take action against the threat.” He further affirmed that targeted strikes are undertaken under the rubric of the law of armed conflict.

Mr. Brennan devoted the last portion of his remarks to discussing the “rigorous standards and process of review” to which the Administration holds itself when considering and authorizing strikes against a specific member of Al Qaeda outside of Afghanistan, which includes not only legal considerations but also the wisdom of a proposed particular strike. He described the process and standards, as they continue to evolve, as follows:

If our counterterrorism professionals assess, for example, that a suspected member of al-Qa’ida poses such a threat to the United States as to warrant lethal action, they may raise that individual’s name for consideration. The proposal will go through a careful review and, as appropriate, will be evaluated by the very most senior officials in our government for decision.

First and foremost, the individual must be a legitimate target under the law. Earlier, I described how the use of force against members of al-Qa’ida is authorized under both international and U.S. law, including both the inherent right of national self-defense and the 2001 Authorization for Use of Military Force, which courts have held extends to those who are part of al-Qa’ida, the Taliban, and associated forces. If, after a legal review, we determine that the individual is not a lawful target, end of discussion. We are a nation of laws, and we will always act within the bounds of the law.⁷³

If the assessment reveals that an individual may be lawfully targeted, there is additional consideration of whether the individual’s activities “rise to a certain threshold for action, and whether taking action will, in fact, enhance our security.” Lethal action is not undertaken to seek vengeance for past crimes, but are conducted only to mitigate an actual ongoing, significant threat. He did not mention whether the threat must be imminent, but described a significant threat as one that might be posed by:

an individual who is an operational leader of al-Qa’ida or one of its associated forces. Or perhaps the individual is himself an operative—in the midst of actually training for or planning to carry out attacks against U.S. interests. Or perhaps the individual possesses unique operational skills that are being leveraged in a planned attack. The purpose of a strike against a particular individual is to stop him before he can carry out his attack and kill innocents. The purpose is to disrupt his plots and plans before they come to fruition.⁷⁴

Mr. Brennan also expressed the Administration’s “unqualified preference” to capture when feasible, but noted that such captures have been rare outside of a “hot battlefield” because U.S. counterterrorism partners “have been able to capture or kill dangerous individuals themselves.” Particular lethal operations

⁷² Remarks of John O. Brennan, Assistant to the President for Homeland Security and Counterterrorism, “The Ethics and Efficacy of the President’s Counterterrorism Strategy,” Woodrow Wilson International Center for Scholars, April 30, 2012 (hereinafter “Brennan Remarks at Wilson Center”), prepared text *available at* <http://www.wilsoncenter.org/event/the-ethics-and-ethics-us-counterterrorism-strategy>.

⁷³ *Id.*

⁷⁴ *Id.*

are authorized, he stated, only if intelligence provides a “high degree of confidence” that the individual being targeted has been correctly identified and that innocent civilians will not be injured or killed, an assessment enhanced by advanced technology and which he claimed “exceed what is required as a matter of international law on a typical battlefield.”⁷⁵ Mr. Brennan conceded that, in rare circumstances and despite extraordinary precautions taken to avoid them, civilians have been accidentally injured or killed in these strikes. An after-action review is undertaken to improve practices and provide information to appropriate Members of Congress and committees with oversight.

Jeh Johnson

In remarks to an audience at Yale Law School in February 2012, DoD General Counsel Jeh Johnson reiterated the Administration’s view that, while the AUMF contains no geographical limitations, the Administration does not regard the hostilities as a “Global War on Terror” because of the non-geographic limitations imposed by international legal principles.⁷⁶ He also explained that the AUMF is not an open-ended authority to target any person deemed to be a terrorist, but is limited to Al Qaeda and associated forces, a term to be construed consistently with the “concept of co-belligerency in the law of war.” Such a force, he explained, must be

- (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.⁷⁷

He stated that conventional legal principles apply, notwithstanding the unconventional nature of the enemy, remarking that “we must guard against aggressive interpretations of our authorities that will discredit our efforts, provoke controversy and invite challenge.” Moreover, he addressed the possible danger of extending the reach of military operations onto U.S. territory, which he predicted would meet with resistance in the courts and as well as clash with core American values limiting military action, as reflected in the Posse Comitatus Act⁷⁸ and other sources. Still, he stated, “belligerents who also happen to be U.S. citizens do not enjoy immunity where non-citizen belligerents are valid military objectives.” Lethal force against any valid military target would not, he averred, constitute an “assassination” under “well-settled legal principles.” Finally, he stated his view that targeting decisions are core functions of the Executive Branch and are not amenable to judicial review.⁷⁹

Eric Holder

Attorney General Eric Holder defended the legality of the lethal targeting program in a speech delivered March 5, 2012 at Northwestern University School of Law. He asserted that the AUMF provides domestic authority and that the existence of an armed conflict provides international legal authority to target enemy belligerents.⁸⁰ He further stated that the Constitution “empowers the President to protect the nation from

⁷⁵ *Id.*

⁷⁶ See Jeh Charles Johnson, “National security law, lawyers and lawyering in the Obama Administration,” Dean’s Lecture at Yale Law School, Feb. 22, 2012, prepared text available at <http://www.lawfareblog.com/2012/02/jeh-johnson-speech-at-yale-law-school/>.

⁷⁷ *Id.*

⁷⁸ 18 U.S.C. § 1385, punishes those who, “except in cases and under circumstances expressly authorized by the Constitution or Act of Congress, willfully use[] any part of the Army or the Air Force as a posse comitatus or otherwise to execute the laws....”

⁷⁹ *Id.* (citing *Al-Aulaqi v. Obama*, 727 F. Supp. 2d 1 (D.D.C. 2010)).

⁸⁰ See Attorney General Eric Holder, Speech at Northwestern University School of Law, March 5, 2012, prepared text available (continued...)

any imminent threat of violent attack” and noted that “international law recognizes the inherent right of national self-defense.” He repeated the point that such authority is not limited to Afghanistan, citing the AUMF and domestic court decisions, but stated that international legal principles constrain operations abroad. Lethal operations would be legal in other countries, he maintained, if the host nation provided its consent or a determination had been made that the nation “is unable or unwilling to deal effectively with a threat to the United States.”

In the case of U.S. citizens who “have decided to commit violent attacks against their own country from abroad,” Mr. Holder argued that the Supreme Court has made clear that citizenship does not provide immunity from attack, but that the Fifth Amendment’s Due Process Clause operates to prevent a citizen’s deprivation of life without due process of law:

The Supreme Court has made clear that the Due Process Clause does not impose one-size-fits-all requirements, but instead mandates procedural safeguards that depend on specific circumstances. In cases arising under the Due Process Clause – including in a case involving a U.S. citizen captured in the conflict against al Qaeda – the Court has applied a balancing approach, weighing the private interest that will be affected against the interest the government is trying to protect, and the burdens the government would face in providing additional process. Where national security operations are at stake, due process takes into account the realities of combat.⁸¹

Without describing what legal process is considered to be due under the circumstances, Mr. Holder went on to describe some circumstances under which lethal force would be lawful against a U.S. citizen, from which the following elements may be derived.

- If the citizen is:
 - a senior operational leader of al Qaeda or an associated force with which the United States is engaged in an armed conflict,
 - who is actively engaged in planning to kill Americans
 - abroad (with the consent of the foreign government or where that government is unwilling or unable to take action);
- lethal action is lawful if:
 - the government determines through a “thorough and careful review” that “the individual poses an imminent threat of violent attack against the United States,”
 - capture is not feasible,
 - and the operation is consistent with “applicable law of war principles” of necessity,⁸² distinction,⁸³ proportionality,⁸⁴ and humanity.⁸⁵

(...continued)

at <http://www.lawfareblog.com/2012/03/text-of-the-attorney-generals-national-security-speech/#more-6236>.

⁸¹ *Id.* The Supreme Court cast appears to be *Hamdi v. Rumsfeld*, 542 U.S. 507 (2004), in which a plurality held that a U.S. citizen could be detained pursuant to the AUMF but was entitled to due process to contest his designation as an “enemy combatant.” For more information about the authority to treat U.S. citizens as enemy belligerents, see CRS Report R42337, *Detention of U.S. Persons as Enemy Belligerents*, by Jennifer K. Elsea.

⁸² *Id.* Holder described the necessity principle as requiring that the target have “definite military value.”

The first three elements paraphrased above describe the situation to which the Attorney General's remarks were limited, while the remaining describe the Administration's position on the minimum circumstances necessary to make a targeted killing lawful. Consequently, it appears that the apparent due process element consists of a "thorough and careful review" that applies only to the determination that the individual poses an "imminent threat," without describing how the threshold determination is made that the individual is a senior operational leader of a relevant organization engaged in planning attacks. The "imminence" determination entails, according to the speech, "considerations of the relevant window of opportunity to act, the possible harm that missing the window would cause to civilians, and the likelihood of heading off future disastrous attacks against the United States." Feasibility of capture is also presented as a time-sensitive question, requiring an assessment of the "window of time available to prevent an attack," as well as the risk to civilians or to U.S. personnel that a capture operation might pose.

Presumably the law of war principles apply to all targeted killings and not just lethal operations targeting U.S. citizens in senior operational leadership roles. It appears that the killing of U.S. citizens who are not the primary targets of lethal operations may be justified under these principles with no element of due process necessary. For example, Samir Khan, a U.S. citizen who was a propagandist for Al Qaeda was reportedly killed while riding in the same vehicle as Awlaki,⁸⁶ but it has not been suggested that his name appeared on a list of approved targets. This raises the question whether his death is considered to be collateral to Awlaki's targeting and whether the Administration considers it legally necessary to provide additional safeguards for U.S. citizens if it is known that they may be in close proximity to an individual who is targeted for lethal action.

The Attorney General's speech seems to confirm that the Administration's legal rationale supporting the targeted killing of U.S. citizens borrows elements from the frameworks applicable to "law of war" targeting as well as "self-defense" under international law, although the need to establish a self defense rationale for each lethal operation has been explicitly rejected.⁸⁷ Perhaps the Administration has concluded that due process requirements introduce elements of self-defense in the law enforcement sense rather than as a necessary element to justify the use of force abroad consistent with international law. Such a conclusion could explain why there appears to be an "imminence" requirement with respect to targeted citizens but not to targeted foreigners or to any individuals who are killed collateral to a targeted lethal operation.

Stephen W. Preston

Finally, Stephen W. Preston, General Counsel of the Central Intelligence Agency, delivered some remarks addressing the "CIA and the Rule of Law" at Harvard Law School on April 10, 2012.⁸⁸ He stated that CIA

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⁸³ *Id.* According to the Attorney General, the principle of distinction requires that "only lawful targets – such as combatants, civilians directly participating in hostilities, and military objectives – may be targeted intentionally."

⁸⁴ *Id.* The principle of proportionality is described as requiring that "the anticipated collateral damage must not be excessive in relation to the anticipated military advantage."

⁸⁵ *Id.* Humanity is described as the use of weapons "that will not inflict unnecessary suffering."

⁸⁶ See Robbie Brown and Kim Severson, *Drone Victim Went From American Middle Class to Waging a Media War for Al Qaeda*, NY Times, Oct. 1, 2011, at A8.

⁸⁷ See text accompanying footnote 69, *supra*.

⁸⁸ Stephen W. Preston, General Counsel, Central Intelligence Agency, "CIA and the Rule of Law," Address at Harvard Law School, April 10, 2012, available at <http://www.cfr.org/rule-of-law/cia-general-counsel-stephen-prestons-remarks-rule-law-april-2012/p27912>.

activities must be authorized pursuant to law, suggesting that such legal authority might flow from independent executive powers or from a specific congressional authorization. According to his remarks, such activities must additionally comport with “applicable prohibitions and limitations embodied in the United States Constitution, federal statutes, Executive Orders and other Presidential directives, and Agency regulations.” Moreover, he stated, “all intelligence activities of the Agency are subject to strict internal and external scrutiny,” and that any contemplated activity must comport with “covert action procedures of the National Security Act of 1947, such that Congress is properly notified by means of a Presidential Finding.” While he did specifically mention several constitutional amendments—the “First, Fourth, and Fifth amendments to the Constitution, which protect the rights of American citizens and certain others”—he did not further elaborate on the due process rights to which U.S. citizens targeted abroad might be entitled.

Mr. Preston noted that “international law principles may be applicable” as well. He described these principles as including the inherent right of national self-defense, and, as an additional justification, existence of an armed conflict.” In terms of execution of the contemplated action, he stated the Agency would comply with international legal principles by “implement[ing] its authorities in a manner consistent with the four basic principles in the law of armed conflict governing the use of force: Necessity, Distinction, Proportionality, and Humanity.” Mr. Preston did not distinguish in this regard between uses of force in the context of armed conflict or as a use of force in self defense outside an armed conflict. He did not address the question whether CIA agents conducting lethal operations are required to meet the qualifications for lawful combatants under the law of war.

Issues

The Administration’s explanations of its legal authority to carry out targeted lethal operations provides a broad overview of how it views the scope of its authority and of hostilities in general, but leaves unanswered a number questions. The remarks delivered publicly so far consistently mention both the existence of an armed conflict as well as the inherent right of self-defense as justifications for targeted killings outside of “hot” battlefields, but do not clarify whether both justifications apply to all such operations, or whether any given operation is justified under one rubric or the other. It may be that the Administration has concluded that a self-defense theory is necessary to justify extending military action beyond the traditional theater of military operations onto territory not controlled by a party to a conflict, which seems consistent with past practice and remarks to the effect that sovereignty is respected, but which seems to contradict the assertion that a separate self-defense analysis need not be conducted prior to each targeted attack.⁸⁹ Some observers have interpreted the Administration remarks as confirming that there is reliance on (or at least the reservation of a right to rely on) a theory of self-defense to target those falling outside of an armed conflict,⁹⁰ while others perceive that the Administration has effectively adopted the proposed classification of hostilities as a “transnational armed conflict,”⁹¹ which would

⁸⁹ See Brennan Remarks at Wilson Center, *supra* footnote 72.

⁹⁰ See, e.g., *Rise of the Drones II: Examining the Legality of Unmanned Targeting*, Hearing before Subcomm. on National Security and Foreign Affairs of the H. Comm. on Oversight and Government Reform, 111th Cong. (2010) (statement of Professor Kenneth Anderson).

⁹¹ See Geoffrey S. Corn, *Self-Defense Targeting: Blurring the Line between the Jus ad Bellum and the Jus in Bello* 16 (October 22, 2011), available at SSRN: <http://ssrn.com/abstract=1947838> or <http://dx.doi.org/10.2139/ssrn.1947838> (interpreting Mr. Brennan’s remarks as “leav[ing] virtually no doubt that the United States has embraced the concept of transnational armed conflict; that the nation is engaged in an armed conflict against al Qaeda; that this armed conflict is non-international within the meaning of the jus in bello; and that it transcends national borders”).

appear to have the effect of reducing the threshold justification necessary to support the resort to the use of force in the territory of another state and bring into play the more permissive rules regarding the use of deadly force as a first resort against targeted threats. In any event, the Administration apparently regards the law of armed conflict as governing its use of force, without regard to the level of hostilities in a given geographic area, and does not appear to regard international human rights law as having a legal bearing on the conduct of operations.

The assumption that all strikes form part of an armed conflict presents some challenges regarding the geographical scope of conflict and the traditional definition of “armed conflict.” Some of the policy measures the Administration has stated are in place, for example, a preference for capture when feasible and the restriction of targets to certain operational leaders rather than any person deemed to have combatant status,⁹² do not appear to be required by the law of war. These asserted heightened policy standards may serve to bring U.S. practice closer to that of U.S. allies who regard counterterrorism operations to fall under the category of law enforcement unless the traditional qualifications of an armed conflict are met,⁹³ while perhaps maintaining some measure of operational flexibility.⁹⁴ In light of the effects U.S. practice will likely have on the development of international law, it may be worth questioning whether an approach that aligns actual practice with a narrower claim of right with respect to counterterrorism operations might be more conducive to the development of international law regarding the use of force in a direction that arguably poses less risk of reducing human rights standards. A reliance on a law of war theory also is arguably at odds with the reluctance to use force within the United States, which is clearly the territory of a party to the conflict where the use of force presents no sovereignty concerns.⁹⁵

The proposed redefinition of “imminence” as a requirement for justifying the use of force in self defense on the territory of another country may pose some challenge to the international law regarding the use of force. The standard definition of imminence from the *Caroline* case, “instant, overwhelming, and leaving no choice of means and no moment for deliberation,” appears to have been completely reversed in the case of a non-state actor, such that thorough deliberation is necessary to determine whether a potential target poses an imminent threat. The new “imminence” requirement appears to refer to the window of opportunity for striking rather than the perceived immediacy of the threat of an armed attack. If the international convergence of views regarding the imminence requirement hardens into international law, it remains to be seen whether it will remain cabined to cases involving terrorist organizations.

⁹² See Brennan Remarks at Harvard, *supra* footnote 69.

⁹³ See *id.* Mr. Brennan explained that:

Others in the international community—including some of our closest allies and partners—take a different view of the geographic scope of the conflict, limiting it only to the “hot” battlefields. As such, they argue that, outside of these two active theatres, the United States can only act in self-defense against al-Qa’ida when they are planning, engaging in, or threatening an armed attack against U.S. interests if it amounts to an “imminent” threat.

In practice, the U.S. approach to targeting in the conflict with al-Qa’ida is far more aligned with our allies’ approach than many assume. This Administration’s counterterrorism efforts outside of Afghanistan and Iraq are focused on those individuals who are a threat to the United States, whose removal would cause a significant – even if only temporary – disruption of the plans and capabilities of al-Qa’ida and its associated forces. Practically speaking, then, the question turns principally on how you define “imminence.”

⁹⁴ Laurie R. Blank, *Targeted Strikes: The Consequences of Blurring the Armed Conflict and Self-Defense Justifications*, Emory University School of Law Public Law & Legal Theory Research Paper Series, Research Paper No. 11-182, at 3 (2011), available at <http://ssrn.com/abstract=1981379>.

⁹⁵ See Blank, *supra* footnote 94, at 23-24 (opining that “[i]n a traditional belligerency-neutrality framework, one would expect to see U.S. territory viewed as part of the battlefield; the fact that courts consistently trend the other way highlights both the difference in approach and the uncertainty involved in defining today’s conflicts”).

While the Administration has not explicitly confirmed that CIA plays a role in lethal operations using advanced technology, numerous media reports citing unnamed officials and the participation of the CIA General Counsel in the series of official speeches designed to promote transparency in counterterrorism policy suggest that CIA is responsible for some strikes. Some observers have argued that CIA personnel are civilians and that their participation in hostilities could make them “unlawful belligerents” as well as lawful targets for attack.

Finally, there remains for discussion the issue of the effect of the U.S. citizenship of possible targets on the identification process and legal analysis. While Attorney General Eric Holder stated that due process under the Fifth Amendment does protect U.S. citizens who are senior operational leaders of Al Qaeda or associated forces, he noted the Administration’s position that the Constitution does not require the President to get permission from a court before targeting such a citizen.⁹⁶ Noting that “due process” and “judicial process” are not necessarily the same thing, particularly if national security is at issue, Mr. Holder averred that the “Constitution guarantees due process, not judicial process.”⁹⁷ Moreover, he stated:

The conduct and management of national security operations are core functions of the Executive Branch, as courts have recognized throughout our history. Military and civilian officials must often make real-time decisions that balance the need to act, the existence of alternative options, the possibility of collateral damage, and other judgments – all of which depend on expertise and immediate access to information that only the Executive Branch may possess in real time. *The Constitution’s guarantee of due process is ironclad, and it is essential – as a recent court decision makes clear, it does not require judicial approval before the President may use force abroad against a senior operational leader of a foreign terrorist organization with which the United States is at war – even if that individual happens to be a U.S. citizen.*⁹⁸

The court decision to which Mr. Holder referred is likely a challenge brought by Anwar Al-Awlaki’s father seeking an injunction prohibiting the targeting of his son prior to the killing.⁹⁹ The judge ruled against Nasser Al-Awlaki for lack of jurisdiction on the basis that the father lacked constitutional standing to bring a court case as the “next friend” of his son¹⁰⁰ and that the political question doctrine barred judicial resolution of the case.¹⁰¹ Although the court did not directly address due process, the judge suggested during the course of the discussion related to third-party standing that Anwar Awlaki could have availed himself of the court system to vindicate his rights should he have chosen to do so, although such an action would likely have made the issue of targeted killing moot. It is not clear why an action by an individual challenging his alleged inclusion on a “kill list” would be any less of a political question than an identical challenge brought by a third party. Perhaps the Administration has interpreted the court’s determination that national security concerns make the issue a non-justiciable one as pertinent to the question of due process, which seems reasonable in light of the tension between the concept of due process and the doctrine of non-justiciability.

⁹⁶ Holder, *supra* footnote 81.

⁹⁷ *Id.*

⁹⁸ *Id.* (emphasis added).

⁹⁹ Al-Aulaqi v. Obama, 727 F. Supp. 2d. 1 (D.D.C. 2010).

¹⁰⁰ *Id.* at 16-23. In essence, next friend status was defeated due to a lack of any valid assertion that Anwar Al-Awlaki, as the real party in interest, could not avail himself of the court system on his own behalf or that he had any desire to do so, in which case the court determined the father could not demonstrate that he was pursuing his son’s actual interests.

¹⁰¹ *Id.* at 44-53.

At any rate, Mr. Holder's remarks seemed focused on the justification for targeted killing and the applicable oversight rather than describing what non-judicial process is accorded to U.S. citizens who may be targeted. Mr. Holder added:

That is not to say that the Executive Branch has – or should ever have – the ability to target any such individuals without robust oversight. Which is why, in keeping with the law and our constitutional system of checks and balances, the Executive Branch regularly informs the appropriate members of Congress about our counterterrorism activities, including the legal framework, and would of course follow the same practice where lethal force is used against United States citizens.

The Supreme Court has applied a sliding scale analysis to determine what process may be due before a person may be deprived of a liberty interest, which balances the government's legitimate need for autonomy to pursue effectively a particular goal and the citizen's right to ensure that he is not deprived of a liberty interest erroneously or arbitrarily.¹⁰² Under the formula first articulated in *Mathews v. Eldridge*, "the process due in any given instance is determined by weighing 'the private interest that will be affected by the official action' against the Government's asserted interest, 'including the function involved' and the burdens the Government would face in providing greater process."¹⁰³ The balancing of these concerns entails an analysis of the risk of an erroneous deprivation of the private interest using a reduced process and the "probable value, if any, of additional or substitute safeguards."¹⁰⁴ In *Hamdi v. Rumsfeld*, the Court described due process to be accorded a U.S. citizen deprived of liberty in connection with hostilities, where such deprivation involved detention without trial until the end of hostilities, as entailing, at a minimum, the right to "receive notice of the factual basis for his classification, and a fair opportunity to rebut the Government's factual assertions before a neutral decisionmaker."¹⁰⁵ The *Hamdi* Court rejected the government's argument under those circumstances that the government's proffer of a statement by an intelligence official provided a sufficient basis upon which to uphold the detention, and that separation-of-powers concerns in the realm of military decision-making "ought to eliminate entirely any individual process, restricting the courts to investigating only whether legal authorization exists for the broader detention scheme."¹⁰⁶

While Mr. Holder assessed that the interests on both sides of the scale are "extraordinarily weighty" in the context of targeted killings,¹⁰⁷ he did not articulate the Administration's rationale for concluding that due process in such cases does not require notice or an opportunity to be heard. Mr. Holder's remarks with respect to due process seem to conform more with Justice Thomas's dissenting opinion in *Hamdi*, in which Justice Thomas argued that in the context of wartime detention for non-punitive purposes, "due process requires nothing more than a good-faith executive determination."¹⁰⁸ Justice Thomas would have

¹⁰² *Mathews v. Eldridge*, 424 U.S. 319 (1976).

¹⁰³ *Id.* at 335 (quoted by *Hamdi v. Rumsfeld*, 542 U.S. 507, 529 (2004) (O'Connor, J., plurality opinion)).

¹⁰⁴ *Id.*

¹⁰⁵ 542 U.S. at 533 (O'Connor, J., plurality opinion); *id.* at 553 (Souter, J., concurring).

¹⁰⁶ *Id.* at 527-28 (paraphrasing government brief).

¹⁰⁷ Holder, *supra* footnote 81. He added:

An individual's interest in making sure that the government does not target him erroneously could not be more significant. Yet it is imperative for the government to counter threats posed by senior operational leaders of al Qaeda, and to protect the innocent people whose lives could be lost in their attacks.

¹⁰⁸ 542 U.S. at 590 (Thomas, J., dissenting) (discussing precedential value of *Moyer v. Peabody*, 212 U.S. 78 (1909), in which temporary detention for precautionary purposes to quell a labor insurrection was held to be justified in the face of a due process challenge, in part because "Public danger warrants the substitution of executive process for judicial process. This was admitted with regard to killing men in the actual clash of arms, and we think it obvious, although it was disputed, that the same is true of temporary detention to prevent apprehended harm.").

upheld the government's asserted detention authority on the basis of the President's determination as comporting with the Due Process Clause without subjecting the determination to "judicial second-guessing."¹⁰⁹ Moreover, in his view, proper application of the *Mathews v. Eldridge* test would have resulted in the finding he advocated, because it is "obvious and unarguable" that no governmental interest is more compelling than the security of the Nation."¹¹⁰ Moreover, he thought it difficult to explain why detention would differ from other central war making functions, such as bombings of particular targets:

Because a decision to bomb a particular target might extinguish life interests, the plurality's analysis seems to require notice to potential targets. To take one more example, in November 2002, 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, and four others. It is not clear whether the CIA knew that an American was in the vehicle. But the plurality's due process would seem to require notice and opportunity to respond here as well. I offer these examples not because I think the plurality would demand additional process in these situations but because it clearly would not. The result here should be the same.¹¹¹

If Justice Thomas is correct that the *Hamdi* plurality would have found that the constitutional guarantee of due process does not require notice and an opportunity to be heard be given to U.S. persons to be targeted by missile strikes, then perhaps the Court would agree that the Due Process Clause is satisfied by executive determination alone in accordance with law of war principles, or perhaps, by an assessment of imminent risk to national security in a self-defense operation. Mr. Holder explained that operations that "take place on a traditional battlefield" are not subject to the same legal requirements that he outlined for targeted killings of senior operational leaders of enemy forces (who are U.S. citizens). This statement could be interpreted to mean that intelligence standards may be less exacting during traditional military engagements of opposing forces than in targeting of U.S. citizens selected in advance, or that there is no obligation to capture if feasible or make a determination as to imminence of risk, but it is not clear how the Due Process Clause is thought to figure into that assessment. It may be that some sort of assessment of reasonableness of government action associated with a seizure subject to the Fourth Amendment forms part of the analysis rather than a balancing of interests under the Fifth Amendment.¹¹²

¹⁰⁹ *Id.* at 592.

¹¹⁰ *Id.* at 595 (citing *Haig v. Agee*, 453 U.S. 280, 307 (1981)).

¹¹¹ *Id.* at 596-97 (citations omitted).

¹¹² *See id.* at 597 (citing by analogy *Tennessee v. Garner*, 471 U.S. 1 (1985), in which the Supreme Court found unconstitutional as an unreasonable seizure the apprehension by use of deadly of a nondangerous fleeing burglary suspect).
