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Shoot First and Ask Legal Questions Later: Evaluating the Legality of US Policy of the Targeted Killing of US Citizens Suspected of Terrorism

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Shoot First and Ask Legal Questions Later: Evaluating the Legality of US Policy on the Assassination of US Citizens Suspected of Terrorism

Abstract

In February, 2010, Director of National Intelligence Dennis Blair admitted that it is U.S. policy to deliberately target and kill U.S. citizens who are suspected of being involved in terrorism abroad. Such a policy raises serious legal questions at the international and domestic levels.

This article examines the international legal issue of assassination and targeted killings, exploring when such killings are extra-legal. Determinations of the international legal categorization of the “war on terror” are made. While the conclusion that the United States is involved in non-international armed conflict with Al Qaeda clarifies the international legal parameters of targeted killings, domestic Constitutional issues are also examined. After addressing due process concerns as well as the Constitutional treatment of issues such as executive war power, the conclusion is that there is no authority to target American citizens under the domestic rubric and such action is extra-legal regardless of the international legal framework.
I. Introduction

For many years, the United States viewed terrorism as an international and foreign policy problem, confident that it was insulated from large-scale attacks by organized groups due to its size and geographic location. September 11, 2001, permanently changed that perception. The World Trade Center, Pentagon and Pennsylvania attacks not only resulted in a devastating loss of life but also shattered the American perception of security.

In the September 11 aftermath, American leaders and policy-makers implemented a wide-range of often controversial measures intended to increase security and combat the terrorist threat. Former President Bush also announced that the United States was now involved in a “war on terror,” and that any states who harbored or aided terrorist groups, particularly Al Qaeda, would be considered terrorists as well. Congress passed a sweeping Authorization for Use of Military Force (AUMF) on September 18, 2001, which 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.”

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Among one of the most alarming responses to the September 11 attacks was the authority former President Bush gave to the Central Intelligence Agency (CIA) and later the military, to kill American citizens abroad if “strong evidence existed that the American was involved in organizing or carrying out terrorist actions against the United States or U.S. interests.”

Recently, in February 2010, Director of National Intelligence Dennis C. Blair confirmed to the House Intelligence Committee that the Obama Administration has continued to promote this policy. According to Director Blair, the decision to use lethal force against an American citizen requires “special” permission. However, the permission and the evidence that might lead to such permission being asked for or granted is exclusive to the Executive branch, with no Congressional or Judicial oversight.

As the Washington Post’s Dana Priest writes, there is currently a shortlist of United States citizens targeted for killing or capture by the military’s clandestine Joint Special Operations Command (JSOC) – evidence that this policy is not hypothetical but one which the United States government actively follows.

Such a policy, based purely on evidence gathered by the Executive branch and carried out based on Executive orders, raises serious legal questions at the international and domestic levels. The following sections will first examine the international legal context of assassination, targeted killings and terrorism, as well as distinctions in the law in times of peace compared to times of war. In turning to domestic law, American policy on assassinations and targeted killings and major Constitutional implications will be discussed.

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7 See, e.g. Ellen Nakashima, Intelligence Chief Acknowledges U.S. May Target Americans Involved in Terrorism, WASH. POST, Feb. 4, 2010 at A03.

8 Dana Priest, US Military Teams, Intelligence Deeply Involved in Aiding Yemen on Strikes, WASH. POST, Jan. 27, 2010 at A01. On April 7, 2010, the New York Times Scott Shane reported that the U.S. officially approved the targeted killing of an American-born cleric, Anwar al-Awlaki, who was linked to the Ft. Hood massacre and other instances of inciting terrorism. Al-Awlaki is currently residing in Yemen. Scott Shane, U.S. Approves Killing of American Cleric, NEW YORK TIMES, April 7, 2010 at A12.
Current literature focuses on the legality of assassinating or killing foreign leaders or foreign terrorists. Yet the issue currently under examination is the killing of Americans abroad suspected of terrorism - whether abroad or in the United States, constitutional protections apply to such citizens. Arguments that such individuals somehow do not deserve due process are not compelling. Absent a very narrow set of circumstances, the targeted killing of American citizens suspected of involvement in terrorist activities based purely on Executive branch investigation and decision violates the law of the United States and is an unacceptable and unconstitutional policy.

II. International Law Analysis

In determining appropriate responses to terrorist acts and the threat of terrorism, the United States operates in two legal spheres: the international sphere and the domestic sphere. As “international law is part of our law,”9 the United States is constrained by customary international law and treaty law as well as domestic law in contemplating a policy of assassination and targeted killings, and several factors must be taken into account.

A. Assassination, Targeted Killing and the Proper International Legal Framework

In assessing the legality of the current U.S. policy, it is imperative to make several determinations. First, one must clarify the differences between assassination, which is always prohibited, and targeted killings, which may be legal depending on the circumstances. Second, it must be determined if the United States is in a state of armed conflict with Al Qaeda. If a state of armed conflict exists, a particular definition of assassination is applied, and international

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9 The Paquete Habana, 175 U.S. 677, 700 (1900).
humanitarian law rubrics must be used to determine if a targeted killing not rising to the level of assassination is permissible.

1. Assassination

The existence of either a state of peace or of armed conflict is determinative of the elements of assassination, but the act is prohibited in either context.

a. Assassination During a State of War or Armed Conflict

During a state of war or armed conflict, the term assassination refers to the targeting of a specific individual and the use of treacherous means to kill the individual. Assassination during a time of war does not require a political motivation because all killings during a war are essentially politically motivated. The touchstone in determining illegality of the killing of an individual during a time of war is the treachery involved.\(^\text{10}\)

In examining the elements of assassination during a state of armed conflict, one should remember that the prohibition against assassination is the product of a “long and systematic refinement of the rules governing the use of force.”\(^\text{11}\) Early writers such as Saint Thomas Aquinas advanced the idea that killing a sovereign for the common good could be legally justified and even noble. Sir Thomas More also applied a utilitarian understanding to the legality


of killing an “enemy prince,” and both Gentili and Grotius contemplated the permissibility of killing a specific enemy in his camp, not solely on the field of battle. 12

However, specifically targeting an individual enemy was not an unrestricted right which could be exercised any time and any place. 13 Early scholarly writings on the subject dealt with the action entirely within the context of armed conflict as understood at the time. These scholars did not place an absolute prohibition on seeking the death of an enemy by unconventional means, but the limits of assassination should be “understood as exceptions to the legitimate wartime practice of selecting specific enemy targets.” 14

Such limits were explored by other early fathers of international law. Gentili denounced “treachery” and condemned More’s utility based arguments. Gentili found treachery “contrary to the law of God and of Nature,” and warned it could invite reprisal. 15 Gentili described treachery as the “violation of trust a victim rightfully expects from an assassin.” 16 He did not find an enemy soldier entering into the tent to of an opponent to kill him to be treacherous, since one could hardly expect to trust an enemy. However, enticing a member of the victim’s family to carry out such an act would be treachery. 17 Grotius placed similar limits on the selected killing of individuals during a time of war. Also basing the legality of a killing during war on the treachery involved, Grotius saw treachery as breach of confidence inconsistent with the law of nature, primarily because it disrupted what little order existed during war. 18

12 Schmitt, supra note 10 at 614.
13 Id
14 Id. at 617
15 ALBERICO GENTILI, THE CLASSICS OF INTERNATIONAL LAW No. 16, 168 (John C. Rolfe, trans. 1933)
16 Schmitt, supra note 10 at 615.
17 Id.
18 Id. at 616.  See also HUGO GROTIUS, THE LAW OF WAR AND PEACE (1625) in 1 THE LAW OF WAR: A DOCUMENTARY HISTORY 16, 39 (Leon Friedman, ed. 1972).
Writing a century later, Emerich de Vattel embraced the parameters set forth by Gentili and Grotius. He was the first to specifically define the illegal act of assassination during a time of war as “a murder committed by means of treachery.”\(^\text{19}\) He dismissed the idea that the manner of killing an enemy during a time of war was irrelevant because killing is justified during war as “condemned by even the vaguest ideas of honor.”\(^\text{20}\) Vattel also placed great emphasis on the idea of necessity. While a right existed to kill a specific enemy or leader without treachery, such a right did not vest if other, lesser means could suffice. Vattel believed that the scale of the conflict and the state interests in killing the enemy official provided guidance in determining necessity and he also incorporated principles of proportionality. Absent a state of violent conflict and a state threat, targeting an individual, particularly the head of the hostile nation, would result in greater injury than necessary.\(^\text{21}\)

Following a century after Vattel, early expressions of the international prohibition on assassination during a time of war were made in the United States under the Lieber Code, which was declared as a General Order in 1863. According to the Code:

The law of war does not allow proclaiming either an individual belonging to a hostile army, or a citizen, or a subject of the hostile government, an outlaw who may be slain without trial by any captor, any more than the modern law of peace allows such international outlawry; on the contrary it abhors such outrage. The sternest retaliation should follow the murder committed in consequences of such proclamation, made by whatever authority. Civilized nations look with horror upon offers of rewards for the assassination of enemies as relapses into barbarism.\(^\text{22}\)


\(^{20}\) *Id.*

\(^{21}\) Schmitt, *supra* note 10 at 616.

Despite this scholarship, early writers placed no absolute prohibition on seeking the death of an enemy through unconventional means. Moreover, “treachery” is a critical element of the current law of armed conflict, and is a narrowly defined term.\textsuperscript{23} Stealth and trickery are not precluded and do not render an otherwise lawful killing an assassination.\textsuperscript{24} According to Michael Schmitt, “treachery exists only if the victim possessed an affirmative reason to trust the assailant.”\textsuperscript{25} Treachery is a “breach of confidence,”\textsuperscript{26} and includes an attack on a targeted individual who justifiably believes there is no need to fear the attackers.\textsuperscript{27}

In contemporary times, the concept of a prohibition on assassination is also typically understood in the context of armed conflict. Earlier concepts of armed conflict were based on precise rules of war that were meant to reflect a sense of honor and nobility, yet despite the fact that modern armed conflict is a different creature altogether, treachery still remains the defining characteristic in rendering a targeted killing an assassination and thus prohibited.

Under Article 23(b) of the Hague Regulations, “it is especially forbidden to kill or wound treacherously individuals belonging to the hostile nation or army,”\textsuperscript{28} and this prohibition has been explicitly interpreted to apply to assassination in the U.S. Army Manual.\textsuperscript{29} Further, the Protocols Additional to the Geneva Conventions of 12 August 1949 retains the prohibition on assassination. Article 37 of that Protocol notes that “it is prohibited to kill, injure or capture an adversary by resort to perfidy. Acts inviting the confidence of an adversary to lead him to

\begin{footnotesize}
\begin{enumerate}
\item Schmitt, supra note 10 at 617
\item Id.
\item Id.
\item Schmitt, supra note 10 at 633.
\item Id.
\item Convention Respecting the Laws and Customs of War on Land, Oct. 18, 1907, 36 Stat. 2277, 1 Bevans 631 (Hague IV), Article 23(b).
\item See Dep’t of the Army, The Law of Land Warfare (FM 27-10), Article 31.
\end{enumerate}
\end{footnotesize}
believe that he is entitled to, or is obliged to accord, protection under the rules of international law applicable in armed conflict, with intent to betray that confidence, shall constitute perfidy.”

Essentially, assassination today can be considered the treacherous killing of one’s enemy and is always illegal.

b. Assassinations During Peacetime

According to the Army’s Law of War Branch of the Office of the Judge Advocate General, an assassination which occurs during peacetime is “murder [thus an illegal killing] of a private individual or public figure for political purposes, and in some cases . . . also requires that the act constitute a covert activity.”

An international treaty also exists which specifically addresses the topic of assassination: the Convention on the Prevention and Punishment of Crimes Against Internationally Protected Persons, Including Diplomatic Agents. (The New York Convention.) The New York Convention entered into force in 1977 and has been ratified by nearly half the world’s states. The Convention seeks to criminalize violent acts against certain internationally protected persons, and protected persons include heads of state, foreign ministers and state or international

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33 Schmitt supra note 10 at 618.
organization representatives and their family members,\textsuperscript{34} again underscoring the political motivation necessary to render a peacetime murder an assassination.

Signatories are required to promulgate internal laws prohibiting acts and establishing jurisdiction over cases in which a crime is committed on its territory, the offender is a national and the crime is committed against an internationally protected person.\textsuperscript{35} Parties also have an obligation to take measures to prevent such crimes individually or cooperatively. State parties harboring offenders have an obligation to extradite them on request or commence prosecution themselves.\textsuperscript{36} However, as commentators have noted, the Convention offers protected status to the target only when the target is abroad – the murder of protected individuals in their home state would not trigger the treaty provisions.\textsuperscript{37} The Convention thus may allow such killings to go unpunished if the perpetrator flees to a non-party state which also lacks other extradition treaties.

Other legal norms also provide evidence of a general prohibition against assassination in peacetime, including the general prohibition of murder in all the world’s legal systems, and the language of Article 2(4) of the United Nations Charter.\textsuperscript{38}

\begin{footnotesize}
\begin{itemize}
\item[\textsuperscript{34}] Id.
\item[\textsuperscript{35}] Id. at 618-19.
\item[\textsuperscript{36}] Id.
\item[\textsuperscript{37}] Schmitt supra note 10 at 619.
\item[\textsuperscript{38}] Id. at 620-21. See also, Article 2, para. 4 of the Charter of the United Nations, stating that:
\begin{enumerate}
\item[2.] The Organization and its Members, in pursuit of the Purposes stated in Article 1, shall act in accordance with the following Principles:
\begin{itemize}
\item[(4)] All Members shall refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any state, or in any other manner inconsistent with the Purposes of the United Nations.
\end{itemize}
\end{enumerate}

The prohibition against using force against the political independence of any state can be read as a peacetime prohibition on the use of assassination, particularly against a foreign head of state. Schmitt, supra note 10 at 621.
\end{itemize}
\end{footnotesize}
In either peace or wartime then, assassination is prohibited under international law. However, targeted killings in general are not outright prohibited and depend on the context of the situation.

2. Targeted Killings

The term “targeted killings” as applied to the current policy, refers to the intentional slaying of a specific alleged terrorist or group of alleged terrorists, undertaken with explicit government approval, when other reasonable means of capturing such individuals are not available.\(^{39}\)

Implicit in that definition is the concept of necessity and proportionality found in early writings on the permissibility of killing specific enemies in a manner not amounting to assassination, as described \textit{supra}. As made clear in the earlier discussion regarding the evolution of the prohibition against assassination, early scholars did not contemplate an outright ban on the specific targeting of individual enemies – rather they set limits on the scope of that action, ultimately concluding that such targeted killings occurring through means of treachery during a time of armed conflict would be illegal.

According to current Department of State Legal Adviser Harold Koh, the United States’ current policy is to engage in targeted killings of suspected terrorists, not assassinations.\(^{40}\) In carrying out these attacks, Adviser Koh has stated that the U.S. ensures that the operations are conducted consistently with law of war principles. In his March, 2010 speech to the American

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\(^{40}\) Harold Koh, text of March 24, 2010 Speech at the Annual Meeting of the American Society of International Law, Washington, D.C. Text made available to author by Prof. Antonia Chayes of the Fletcher School of Law and Diplomacy, Medford, MA.
Society of International Law, Adviser Koh noted that the following principles are adhered to in carrying out targeted killings:

- **Distinction** – which requires that attacks be limited to military objectives and civilians and civilian objects shall not be the object of the attack, and;

- **Proportionality** – which prohibits attacks that may be expected to cause incidental loss of civilian life, injury to civilians or damage to civilian objects in a way excessive to the military advantage anticipated.\(^{41}\)

Adviser Koh further defended American policy by noting that the individuals targeted are belligerents and thus lawful targets under international law.\(^{42}\) Moreover, the lack of due process does not violate international law because as the United States is engaged in a legitimate exercise of self-defense, targets are not required to be provided with due process under international law.\(^{43}\)

Yet this analysis assumes that the United States is indeed in a state of armed conflict with Al Qaeda and that humanitarian law and not human rights law applies.

3. **International Humanitarian Law vs. International Human Rights Law and Determining if the “War on Terror” is an Armed Conflict**

   a. **IHL v. IHR**

   There is a split in the international legal community regarding the legality of the targeted killing of terrorists and the issue turns on the body of law applied.\(^{44}\)

\(^{41}\) Koh, *supra* note 39.
\(^{42}\) *Id.*
\(^{43}\) *Id.*
\(^{44}\) Fisher, *supra* note 38 at 717.
Those that support a human rights analysis, including U.N. bodies such as the Commission on Human Rights, the Secretary General and the General Assembly, maintain that rules pertaining to law enforcement models are most properly applied. Thus, individuals should benefit from a presumption of innocence, and those suspected of participating in terrorist attacks should be provided with all due process protection. Under this analysis, force may only be employed if it is necessary, there are not other measures available, and is not of a lethal nature if a lesser degree of force can be effective. Thus, under the human rights analysis, the use of targeted killings that would otherwise be legal (e.g. not assassinations) would be illegal because it sanctions the use of deadly force without due process. Moreover, the uses of such killings by the United States in the war against Al Qadea have not satisfied the strict requirements of necessity and imminence.

Proponents of this view find support in the International Covenant on Civil and Political Rights, Article 6(1), which states that “every human being has the inherent right to life. This right shall be protected by law. No one shall be arbitrarily deprived of his life.” The policy of targeted killing thus deprives a suspected terrorist of life arbitrarily because of the lack of due process. International human rights law would be most properly applied if the current U.S. conflict with Al Qadea does not rise to the level of armed conflict.

However, the opposing argument is more persuasive. Those advocating the application of international humanitarian law, including the United State, note that international human rights law has traditionally been understood as applying to a state’s actions within its own territory and

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45 Id.
46 Id. at 718.
against its own people, not to actions directed against those located in a foreign territory. The law of armed conflict, as the *lex specialis* for the conduct of hostilities, determines what makes a deprivation of life arbitrary, not the higher due process standards applicable in a time of peace.49

This split highlights the ultimate issue: whether the United States may be considered to be in armed conflict with Al Qaeda. If so, then the humanitarian law rubric must be applied, providing much more leeway to engage in targeted killings, and such killings only rise to the level of prohibited assassinations if they involve treachery.

**b. What is a “War on Terror”?**50

Clearly a war on terror is not a traditional war. Terrorists typically are not state actors (although some states may sponsor terrorism) nor are there terrorist "states" in the modern sense of the term against which other states can declare war.51 Terrorists are certainly not going to act in compliance with the rules of international law and the rules of war - their very philosophies espouse the flouting of those rules and norms, and their tactics are specifically designed to harm the non-combatants and citizens those rules and norms are meant to protect.52 Terrorists are not easily identifiable, and there are myriad groups, cells and philosophies. It is difficult to declare war against an individual terrorist leader, and there will be no peace treaty or accord after a

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48 See Fisher, *supra* note 38 at 719. The fact that the United States’ policy also effects its own citizens, even located abroad, could result in requiring the United States to apply international human rights law when assessing the legality of targeting its own citizens. However, U.S. domestic law would prevent such targeting without due process, as will be discussed below.

49 Fisher, *supra* note 38 at 720. *See also* Legality of the Threat or Use of Nuclear Weapons Advisory Opinion, 1996 I.C.J. 226 at 240(July 8), finding that law of armed conflict determines the test of what is an arbitrary deprivation of life during an armed conflict.

50 Since taking office in 2009, President Barack Obama has dropped the “war on terror” rhetoric used by his predecessor and now refers to such military operations as “Overseas Contingency Operations.”


number of years of fighting. Terrorists have nothing to lose or to gain by such an accord, and there are always new recruits ready to join the cause.

Yet over the last several years, there have been indications that terrorist attacks may indeed be contemplated under international legal frameworks of armed conflict. Resolving whether the law of armed conflict governs depends in large part whether the hostilities rise to the level of armed conflict and whether the conflict is inter- or intrastate.

Under humanitarian law, armed conflicts may be international in nature, or non-international. The United States and Israel have been proponents of the view that combat against terrorists should be evaluated under the legal rules of international armed conflict, despite the fact that under Common Article 2 of the Geneva Conventions, "international armed conflict" is "any difference arising between two States and leading to the intervention of armed forces." Officials and some scholars such as Professor Cassese, who support this view point to the transnational nature of the hostilities, and note that humanitarian concerns are best addressed under the rules of international armed conflict.

In evaluating targeted killings of terrorists under the international armed conflict framework, the major issue is distinguishing between combatant and civilian. Combatants are subject to targeted attacks, and those who are not combatants are afforded protected status unless they take

53 Id. at 41.
54 Id. Hoffman writes that "The terrorist is not pursuing purely egocentric goals .... [T]he terrorist is fundamentally an altruist: he believes that he is serving a 'good' cause designed to achieve a greater good for a wider constituency ...." Id. at 43.
55 Wiebe, supra note 9 at 387.
56 Fisher, supra note 38 at 723-34.
57 Id. at 722, citing The Geneva Convention for the Amelioration of the Wounded and Sick in Armed Forces in the Field.
58 Id. See also Expert Opinion of Antonio Cassese on Whether Israel’s Targeted Killings of Palestinian Terrorists is Consonant with International Humanitarian Law on Behalf of Petitioners, HCJ 5100/94 Pub. Comm. Against Torture in Israel v. Israel (Israel 1999).
59 Fisher, supra note 38 at 722.
direct part in hostilities.\textsuperscript{60} However, terrorists do not truly satisfy the definition of combatant – therefore, the permissibility of a targeted killing may be quite narrow.\textsuperscript{61} Under a narrow interpretation, to maintain a meaningful civilian-combatant distinction would require that the United States limit its targeting of any terrorist to specific instances. They may only be targeted for as long as they are engaged in actual combat.\textsuperscript{62} A slightly broader interpretation would allow for targeting terrorists taking part in the planning or preparation of an attack as well.\textsuperscript{63}

Under this analysis, the United States’ policy of targeted killing would be legal under international law if the means employed are not treacherous and the targeted individual was engaging in combat or actively planning and preparing a terrorist attack, and was therefore, not a civilian at the time of the attack. The foreseeable problem is that as Glenn Greenwald noted in a Salon.com article, it is most likely that when targeting the individuals on the United States’ “kill list,” they will be targeted in their homes, out in a car with friends or relatives, or engaging in a variety of activities not related to terrorism.\textsuperscript{64} Such methods would rise to the level of unlawful killing because the victim would be protected under “civilian status” under international humanitarian law.

The understanding of armed conflict however, is not limited to solely international armed conflict. According to Bradley and Goldsmith, modern \textit{jus in bello} rules are triggered not only...
by war, but also by “armed conflicts” and apply to conflicts with non-state actors.\textsuperscript{65} For example, Common Article 3 of the Geneva Conventions expressly applies to armed conflicts “not of an international character,”\textsuperscript{66} providing evidence that since 1949, the law of armed conflict recognized conflicts between states and non-state actors. The two 1977 Protocols to the Geneva Conventions seek to extend humanitarian protections to these conflicts.\textsuperscript{67} The International Criminal Tribunal for the Former Yugoslavia concluded that “an armed conflict exists whenever there is . . . protracted armed violence between governmental authorities and organized armed groups.”\textsuperscript{68} An extended conflict between a state and a terrorist group would satisfy these requirements.\textsuperscript{69}

Certainly then, the fight against Al Qaeda can best be conceived of as a non-international armed conflict. The rules of non-international armed conflict were designed to reach non-state and sub-state actors and targeted killings are most properly evaluated in this context as counter-terrorism measures.\textsuperscript{70}

Under the law of non-international conflict, a civilian-combatant distinction still applies. However, combatant is not expressly defined under these rules as it is in the law of international armed conflict. Under Article 1 of Additional Protocol II, non-international armed conflict occurs between the armed forces of a state and organized armed groups.\textsuperscript{71} Terrorist groups like

\begin{footnotesize}
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\item \textsuperscript{65} Curtis A. Bradley and Jack L. Goldsmith, \textit{Congressional Authorization and the War on Terrorism}, 118 Harv. L. Rev. 2047, 2069.
\item \textsuperscript{67} Curtis and Goldsmith, \textit{supra} note 64 at 2069.
\item \textsuperscript{69} Curtis and Goldsmith, \textit{supra} note 64 at 2069.
\item \textsuperscript{70} Fisher, \textit{supra} note 38 at 725-26.
\item \textsuperscript{71} Protocol Additional to the Geneva Conventions of 12 August 1949 and Relating to the Protection of Victims of Non-International Armed Conflicts, June 8, 1977, 1125 U.N.T.S. 609.
\end{itemize}
\end{footnotesize}
Al Qaeda can be considered as organized armed groups and may therefore be targeted with lethal force at any time during an ongoing armed conflict.\textsuperscript{72} Just as soldiers not currently engaging in armed combat during a traditional war would still be considered combatants and legally targetable, so too are terrorists, even when not engaging in combat or the planning or preparation of a terrorist attack. Those who could not be identified as part of the terrorist group would be considered civilians, and subject to attack only if engaged in combat or planning and preparing a terrorist attack.

Under either analysis, rules of proportionality apply, as noted by Legal Adviser Koh in his remarks to the American Society of International Law. An act that is disproportionate is one that causes incidental loss of civilian life, injury to civilians, damage to civilian objects or any combination thereof, which is excessive in relation to the concrete and direct military advantage anticipated.\textsuperscript{73} Most scholars agree that proportionality should be determined on a case-by-case basis and from the view of a “reasonable military commander.”\textsuperscript{74}

These considerations of course raise questions as to how such targeted killings should be carried out, particularly with the use of present advancements in technology such as the unmanned aerial vehicle (UAV) or “drone.” The proportionality of a targeted killing does not turn on the weapon used however, but on its result. Moreover, the use of a specific weapon does not transform a legal targeted killing into an assassination.\textsuperscript{75} While the use of drones should be assessed on a case-by-case basis, scholars such as Adviser Koh and Prof. Kenneth Anderson

\textsuperscript{72} Given the nature of the conflict with Al Qaeda, including the series of escalating attacks from the 1993 World Trade Center bombings, to the 1998 Embassy Attacks, the attack on the USS Cole and September 11, 2001, in combination with Osama bin Laden’s public statements, there is much support for the interpretation that the Al Qaeda network is involved in an ongoing attack against the United States, not mere sporadic occasions of violence. Hence, its members do not revert back and forth to civilian status in between actual attacks.

\textsuperscript{73} Fisher \textit{supra} note 38 at 728.

\textsuperscript{74} \textit{Id.}

\textsuperscript{75} Schmitt, \textit{supra} note 10 at 632.
have indicated that in their opinion, the use of unmanned technologies does not \textit{per se} violate the laws of war and can in fact reduce civilian casualties.\footnote{Koh, \textit{supra} note 39, and Testimony of Prof. Kenneth Anderson to the House Subcommittee on National Security and Foreign Affairs, on March 23, 2010. Testimony accessible at: http://oversight.house.gov/images/stories/subcommittees/NS_Subcommittee/3.23.10_Drones/Anderson.pdf}

\section*{B. Self Defense Issues}

\subsection*{1. Traditional Self Defense}

States may also be permitted to engage in targeted killings as a self-defensive action under Article 51 of the United Nations Charter.

Article 51 states that:

\begin{quote}
Nothing in the present Charter shall impair 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. Measures taken by Members in the exercise of this right of self-defence shall be immediately reported to the Security Council and shall not in any way affect the authority and responsibility of the Security Council under the present Charter to take at any time such action as it deems necessary in order to maintain or restore international peace and security.\footnote{U.N. Charter art. 51.}
\end{quote}

The language of Article 51 is broader than Article 2(4) and the action of an armed attack does not appear to be solely confined to States – provided the armed attack is aimed at a State, there is support for the notion that an attack by a non-state actor can trigger the right to self-defense, as laid out in the United Nations Charter and under customary international law. Indeed, immediately following the September 11 attacks, the United Nations Security Council affirmed that the attacks gave the United States the right of self-defense. Resolution 1368,
passed on September 12, 2001 condemned the attacks and recognized “the inherent right of individual or collective self-defense in accordance with the Charter.” Resolution 1337, passed September 19, 2001, reaffirmed the need to “combat by all means, in accordance with the Charter of the United Nations, threats to international peace and security caused by terrorist acts.” Other international organizations, including NATO, also considered the September 11 attacks armed attacks.

Prior to the September 11 attacks, the Security Council had never approved a resolution invoking and reaffirming a state’s inherent right to self-defense in response to a terrorist attack. This willingness certainly legitimized the American military response in Afghanistan for many members of the international community. Commentators also found that the September 11 attacks were correctly perceived as an “act of war.” The United States itself noted that it applies the law of armed conflict to hostilities regardless of the characterization of that conflict as conventional or not. In interpreting Article 51, the United States maintains that it is allowed three forms of self-defense: defense against an actual use of force or hostile act, preemptive self-defense against an imminent use of force, and self-defense against a continuing threat, and the war on terror qualifies as an ongoing threat, in addition to the more conventional armed conflict in Afghanistan.

Because resort to self-defense triggers the application of international humanitarian law or the laws of war as discussed above, the legality of killing in self-defense rests on the method

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80 Wiebe, supra note 9 at 387.
used – treachery is prohibited and proportionality concerns again arise. The thornier issue as related to terrorism is the idea of state-sponsored targeted killings as anticipatory self-defense.

2. Anticipatory Self-Defense

While targeting an individual as an act of self-defense is widely accepted, controversy arises when discussing a preemptive self-defensive attack. However, in applying these concerns to the present conflict between the United States and Al Qaeda, the issue may be less controversial than anticipated.

Many scholars have maintained that an attack must occur before Article 51 is operative.\(^{82}\) In the present context, there is no question that an armed attack has occurred and as discussed earlier, Article 51 is clearly operative. However, it could be argued that Article 51 self-defense only applied immediately after September 11, and that any preemptive attacks after the initial response must be examined carefully, particularly with regard to the imminence requirement.

The prevalent view in finding an anticipatory act of self defense permissible requires that the attack must be "imminent."\(^{83}\) Under the Caroline doctrine, self-defense should "be confined to cases in which the necessity of that self-defense is instant, overwhelming, and leaving no choice of means, and no moment for deliberation."\(^{84}\) Mere preparation alone is insufficient.

In determining imminence, some envision that the attack itself must be imminent before a right to self-defense vests.\(^{85}\) Others find that it implies a broader reading of the timing of a strike

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\(^{83}\) Schmitt, supra note 10, 647-47.

\(^{84}\) Letter from Daniel Webster to Lord Ashburton, August 6, 1842, reprinted in DIGEST OF INTERNATIONAL LAW 412 (John B. Moore, ed. 1906).

or attack.\textsuperscript{86} Traditional analyses consider issues such as the relative strength of the states involved, or whether the potential victim has time to take defensive measures or engage in diplomatic action.\textsuperscript{87} Yet these elements cannot be effectively applied to the case of terrorism.

The state threatened by the terrorist group will always be “stronger,” and there will be little ability to engage in any diplomatic negotiations beforehand. Forcing a state to wait to act against a terrorist group may result in the loss of any meaningful opportunity to act at all, and given the secretive and surprise nature of terrorist attacks, it is unlikely there will be opportunities for defensive action.

As noted by Schmitt, targeted states such as the United States have a “limited window of opportunity” to react to a threatened terrorist attack.\textsuperscript{88} He suggests that the standard in evaluating an anticipatory reaction to a terrorist attack must be whether it occurred in the last possible window of opportunity.\textsuperscript{89} In attempting to determine the last possible window of opportunity against a terrorist attack, states may look to past practices of the organization, its motives, the current context and intelligence reports of any preparatory action.\textsuperscript{90}

Should a state conclude a terrorist attack can reasonably be expected, individual terrorists could be legally targeted as a method of preemptive self-defense, particularly where a terrorist group has not acted against the state previously.

Yet in the conflict between the United States and Al Qadea, Al Qadea has committed acts of terrorism against the United States, and it is expected it will continue to do so in the future. In this scenario, the timing of a preemptive attack relative to the expected attack is not relevant – the terrorist attacks are regarded as a continuous operation and traditional self-defense rules and

\textsuperscript{86} Schmitt, supra note 10 at 647-48.
\textsuperscript{87} Id.
\textsuperscript{88} Id. at 648.
\textsuperscript{89} Id.
\textsuperscript{90} Id.
rules of armed conflicted apply. Individual terrorists may be legally targeted provided the attack does not rise to the level of assassination under the armed conflict analysis.

C. Conclusions

In the international legal realm, it is accepted that assassinations, whether in times of war or peace, are always prohibited. Targeted killings not rising to the level of assassinations are permissible depending on the context.

In the case of the United States and Al Qaeda, the appropriate framework for analysis is that of international humanitarian law and non-international conflict. Under customary international law and the United Nations Charter, the September 11 attacks can be accurately described as an armed attack and the American response was clearly self-defensive. Because the “war on terror” can be considered a non-international armed conflict (at least in so far as Al Qaeda and its affiliates) with ongoing hostilities, it is permissible to target terrorists if treacherous means are not used as treacherous means would cause the targeted killing to rise to the level of assassination.

There is some discussion that terrorists should be considered as *hostes humani generis*, that is common enemies of all mankind. In this sense, terrorists would be subject to universal jurisdiction and their crimes would be crimes against humanity. While the concept is an intriguing one, it implies that terrorists would still be entitled to some process, even though they could be brought to justice by any State. If the United States wishes to maintain a policy of

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91 Schmitt, *supra* note 10 at 650.
92 *Id.*
targeted killing, it will find that working under the current self-defense and armed conflict rubric and simply avoiding targeted killings achieved through treachery will be an easier, internationally legal course.

Under international law then, the United States may engage in lawful targeted killings of terrorists abroad provided it adheres to the rules of international humanitarian law and of self-defense and avoids employing means of treachery, as laid out above. However, the United States must also overcome serious domestic legal hurdles to such a policy, hurdles which are insurmountable when discussing the targeted killings of American citizens suspected of terrorist activities.

III. Assassinations and Targeted Killings at the Domestic Level – U.S. Policies and Past Practice

For the last three decades, the official policy of the United States has prohibited assassination, as promulgated by several Executive Orders. In February, 1976, President Ford signed Executive Order 11905, which stated that “[n]o employee of the United States Government shall engage in or conspire to engage in, political assassination.”\textsuperscript{94} President Carter renewed the ban in 1978 with Executive Order 12036 and President Reagan renewed the ban in 1981 with Executive Order 12333.\textsuperscript{95} The ban was slightly modified from President Ford’s original language, and currently “[n]o person employed or acting on the behalf of the United States Government shall engage in, or conspire to engage in, assassination.”\textsuperscript{96} However, none of the Executive Orders define assassination, making the ban more difficult to apply in the post

September 11 setting. While the bans have had widespread support since 1976, there was evidence that the September 11 attacks prompted reevaluation of the Executive Order on Capitol Hill.97

Immediately following the attacks, several members of Congress cosponsored the “Terrorist Elimination Act of 2001,”98 which claimed that assassination prohibitions placed unconscionable limits on the United States in protecting its national security. It also made a humanitarian argument that the allowance of targeted killings of individuals would cause less loss of life than bombing raids over areas where terrorists are located.99 The bill had been introduced by Congressman Bob Barr prior to September 11, but he had been unable to find any co-sponsors before then. After the attacks, 14 Congressman cosponsored the bill.100 Unfortunately, in conflating assassination with targeted killings, much needless confusion as to legality was sown.

The Bush Administration did not attempt to directly challenge the ban, but sought to define its relevance, determining it was not applicable during wartime. President Bush then proceeded to sign an intelligence finding in October, 2001, which instructed the CIA to engage in “lethal covert operations” intended to destroy Osama bin Laden and the Al Qadea network. Finally, he implemented the policy directive to target American citizens suspected of terrorist activities that is still in force under the Obama Administration.101

Given the seeming policy shift of both some members of Congress and the White House regarding assassinations and the war on terror, an examination of the history leading up to the

97 Ennis, supra note 94 at 262.
99 Ennis, supra note 94 at 263.
100 Id.
101 Id.
Executive Orders banning assassination might be instructive as is keeping in mind the distinction between targeted killings and assassinations.

A. Early History

From the Revolutionary period, covert operations were certainly a part of the United States’ domestic and foreign policy. However, there is no evidence that any early President of the United States considered assassination an appropriate tool of foreign policy. According to Thomas Jefferson, assassination was to be regarded on the same level as “poison” and “perjury” and all were tools of the “dark ages” which were justly “held in horror” by civilized men and nations. The first known American-sponsored assassination attempt did not occur until 1916, during the border war with Mexico. However, the attempted assassination of Francisco “Pancho” Villa was not authorized by or even known to President Wilson.

During the inter-war period, American intelligence gathering and overall covert activities waned. It was not until World War II that the United States began to actively develop an intelligence gathering program. Part of the new intelligence program’s activities included “subversive operations abroad,” and during the war, the United States planned and executed the targeted killing of Japanese leader Admiral Yamamoto. This targeted killing would certainly be deemed legal under the international law standards discussed supra: the United States was in a state of war with Japan; the planes attacking Yamamoto attacked in the open and on a battlefield;

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104 Banks and Raven-Hansen, supra note 101 at 688.
105 Id.
106 See, e.g. John Prados, Presidents’ Secret Wars: CIA and Pentagon Covert Operations Since World War II (1986).
107 See, e.g. Christopher Andrew, For the President’s Eyes Only: Secret Intelligence and the American Presidency from Washington to Bush (1995).
and the planes were marked as military planes. No treachery was involved: the United States
Navy acquired intelligence that revealed the flight path of Yamamoto and a squadron of planes
intercepted and shot down Yamamoto’s plane – the action was not an assassination.

Immediately following World War II, President Truman considered disbanding the
nascent intelligence program but the emerging Cold War quickly underscored the need for a
formal intelligence gathering bureau that had a clear legal standing.\textsuperscript{108} In 1947, the National
Security Act\textsuperscript{109} was passed, and provided that the Department of Central Intelligence and CIA
would have the authority to “perform such other functions and duties related to intelligence
affecting the national security as the National Security Council may from time to time direct.”\textsuperscript{110}
This so called “Fifth Function” could conceivably include assassinations and targeted killings
and nothing in the 1947 Act expressly prohibited targeted killings undertaken by clandestine
intelligence organizations.\textsuperscript{111}

Following the Act’s passage, the National Security Council (NSC) passed two directives
authorizing covert operations and delegating responsibility for such operations to the CIA. It was
under these directives that the CIA’s assassination plans (surely illegal under international law
analyses) developed during the 1950s and 1960s.\textsuperscript{112}

\textsuperscript{108} Banks and Raven-Hansen, \textit{supra} note 101 at 692-93.
\textsuperscript{109} Pub. L. No 80-253, 61 Stat. 495, 498 (codified as \textit{amended} at 50 U.S.C. §403-3(d)(5)).
\textsuperscript{110} National Security Act of 1947, Pub. L. No. 80-253, §102(d)(5), 61 Stat. 495, 498 (codified as \textit{amended}
at 50 U.S.C. §403-3(d)(5)). The current version of the Act omits references to “the President” and deletes the “from
time to time” modifier. See 50 U.S.C. §403-3(d)(5).
\textsuperscript{111} Banks and Raven-Hansen, \textit{supra} note 101 at 698.
\textsuperscript{112} \textit{Id.} at 699-700.
B. The Rockefeller Commission and Church Committee

In the early 1970s, allegations of questionable CIA activities, both domestically and abroad, surfaced.\textsuperscript{113} In 1974, the Director of Central Intelligence, William Colby, testified to a subcommittee of the House Armed Services Committee regarding CIA involvement in Chile.\textsuperscript{114} His testimony ultimately made its way to the press and news stories of CIA involvement in the internal affairs of foreign states as well as domestic spying spread.\textsuperscript{115}

Unsurprisingly, the public, still sensitive from the Vietnam and Watergate fallout, became concerned with the alleged CIA activities. President Ford realized he would need to take immediate steps to assuage public displeasure and on January 4, 1975, he signed an Executive Order establishing the Commission on CIA Activities Within the United States, which was headed by Vice President Rockefeller and later became known as the Rockefeller Commission.\textsuperscript{116}

The Rockefeller Commission investigated CIA mail opening programs, its monitoring of anti-war dissidents, and also conducted a limited review of the assassination of President Kennedy. It was quickly overtaken by the congressional Church Committee, whose scope was much broader and included American plots to assassinate foreign leaders.\textsuperscript{117}

Following the creation of the Rockefeller Commission, further press reports circulated, which suggested that the CIA had been involved in certain assassination attempts on foreign

\textsuperscript{113} Ennis, \textit{supra} note 94 at 264.
\textsuperscript{114} Major Tyler J. Harder, \textit{Time to Repeal the Assassination Ban of Executive Order 12333: A Small Step in Clarifying Current Law}, 172 Mil. L. Rev. 1, 11-12 (2002).
\textsuperscript{115} Id. See, e.g. Seymour Hersh, \textit{Huge C.I.A. Operation Reported in U.S. Against Anti-War Forces}, N.Y. TIMES, Dec. 22, 1974 at 1.
\textsuperscript{116} Executive Order No. 11828, 40 C.F.R. 1219, January 7, 1975.
\textsuperscript{117} Ennis, \textit{supra} note 94 at 264.
leaders. Seeing the need for further investigation, the Senate created the Church Committee, so named for its Chairman, Frank Church, in January, 1975. The House of Representatives followed suit in February, 1975, creating the Pike Committee, named for its Chairman, Otis Pike.

The major focus of the Church Committee’s investigation was the allegation that the CIA had played a prominent role in plots to assassinate foreign heads of state. The Committee’s scope was to investigate intelligence activities that were deemed “illegal, improper or unethical,” and after multiple hearings and an exhaustive investigation, the Committee published its findings in November, 1975. The report, entitled “Alleged Assassination Plots Involved Foreign Leaders,” contained detailed accounts of five such plots. The leaders targeted were Fidel Castro of Cuba, Rafael Trujillo of the Dominican Republic, Patrice Lumumba of the then state of Congo (now the Democratic Republic of Congo), General Rene Schneider of Chile and Ngo Dinh Diem of South Vietnam. The Committee determined that four of the plots involved attempts to overthrow the governments controlled by the targeted leadership through their assassination, while General Schneider was targeted to prevent a different government from taking power in Chile.

The Church Committee was not comfortable with the CIA’s 1972 and 1973 directives prohibiting assassination and recommended that a “flat ban against assassination” be written into law. The Committee’s report included a proposed statute, which did contain a wartime

119 Banks and Raven-Hansen, supra note 101, at 701.
121 Id.
122 Banks and Raven-Hansen, supra note 101, at 702-03.
123 See Church Report, supra note 119, at 281.
exception. The statute would have made it a federal crime to assassinate, attempt to assassinate, or conspire to assassinate a foreign leader for political reasons. The wartime exception would allow for assassinations of foreign officials whose governments were the subject of a “declaration of war” by the United State or where United States Armed Forces had been introduced into hostilities pursuant to relevant provisions of the War Powers Resolution.

Both of these suggestions would merely have tracked existing international law on the topic, which distinguishes between political motivation during peacetime, and contains exceptions to target international leaders actively involved in military operations during a time of war, provided treachery is not used.

Despite statements that he did not support the policy of assassination of foreign leaders, President Ford made no move to draft Executive Order 11905 until after the Committee’s findings had been made public through the press. His prior statements rang ever more hollow as details of the report continued to leak. In an effort to avoid a restrictive Congressional ban, President Ford chose to draft the Executive Order. The Order addressed the central concerns of the Church Committee, and its recommendation to Congress that it enact a statute criminalizing assassination was dismissed. No law since has ever been written that addresses the issue, despite three separate attempts to do so. The attempts themselves also contained a

\[124\] Id. at app. A.
\[125\] Id.
\[126\] Id. at app. A(e)(2)
\[127\] Ennis, supra note 94 at 268-69.
\[129\] Ennis, supra note 94 at 269.
wartime exception, similar to the exception in the draft bill contained in the Committee report, and the last attempt merely tracked the language in President Carter’s Executive Order.\(^{130}\)

C. Current Policy on Assassinations Generally

In examining the history leading to President Ford’s initial Executive Order, there is support to conclude that the assassination prohibition contained in the Executive Order is only applicable in a time of peace and the prohibition’s scope ought to be limited to scenarios similar to those that were subject to the investigation of the Church Committee. However, it could be argued that the Executive Orders proffered by Presidents Carter and Reagan appeared to broaden the scope of the assassination ban by removing the qualifying term “political” and simply banning “assassinations.” As noted supra, “political” motivation is only a valid consideration during peacetime – the removal of the term indicates that assassination would remain unlawful either during times of peace or times of war, under the appropriate standards for each scenario.

The most likely interpretation is that the Executive Orders were meant to specifically prohibit the covert assassination of foreign leaders during a time of peace, absent any Congressional oversight. This interpretation is bolstered by the Hughes-Ryan Amendment which provided that:

No funds appropriated under the authority of this or any other Act may be expended by or on behalf of the Central Intelligence Agency for operations in foreign countries, other than activities intended solely for obtaining necessary intelligence, unless and until the President finds that each such operation is important to the national security of the United State and reports, in a timely fashion, a description and scope of such operation to the appropriate committees of the Congress.\(^{131}\)

\(^{130}\) Id.

The Amendment carved a clear role for Congress in reviewing proposals for covert action, and denied funding for any actions not so reviewed by Congress. It also implied that assassinations were not approved covert operations, and that were the CIA to engage in such operations, they would need Congressional oversight. It did not outright ban such activities. Additionally, the idea that leaders might be targeted during times of war, as in the case of Yamamoto, would not run afoul of United States’ law and practice, nor would it run afoul of international law. In fact, the United States has publicly targeted foreign leaders either under self-defense claims (specifically for terrorism) or during times of war, including Muammar Qadhafi in 1986, Saddam Hussein during the 1990s, and Osama bin Laden prior to September 11, 2001. Even with evidence of a wartime exception however, the United States would have to refrain from employing “treacherous means” to accomplish any targeted killing, as required by international law.

D. Policy on the Targeted Killing of Terrorists in a “War on Terror”

Typically, under United States statutes, terrorism has been treated as a crime. The Pan American Flight 103 bombers, 1993 World Trade Center bombers and 1998 African Embassy bombers were all treated as criminals under United States law, arrested, tried and convicted. In fact, treating terrorism as a criminal issue was previously the domestic norm before the September 11 attacks, and despite the enormity of the attacks, it was certainly still possible to deal with the September 11 attackers and planners under the criminal system. 18 U.S.C. §§

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133 Id.
134 Id. at 1218-1220.
2331-2339D provides for all the necessary elements and punishments to encompass the September 11 attacks.

Yet, as noted supra, due to the sheer magnitude of the September 11 attacks, the United States believed itself to be the victim of an armed attack and perceived its responsive actions to be in self-defense. Terrorism is perceived as an ongoing threat and the United States is currently at war with terrorists groups, particularly Al Qaeda and its affiliates around the globe.135

In this situation, many in public life jump to the conclusion that bin Laden, while not a traditional head of state, is a target for assassination. However, the conflation of targeted killing and assassination leads to much consternation and confusion. An order to kill bin Laden could be lawful under international law, depending on the manner chosen and would certainly not violate any American laws or prohibition. The ban on assassination is largely redundant as the United States is bound to refrain from assassination under international law. Yet as discussed in detail above, not all targeted killings are assassinations, and therefore during a time of armed conflict or when acting in self-defense, targeted killings of terrorists are arguably quite legal. While it is doubtful that the ban on assassination contemplated in the previously discussed Executive Orders would have prevented the targeting of individuals during a time of war, such Executive Orders would not be necessary to protect such individuals – they are already granted some protections under other laws.

135 For discussion on the AUMF as a means of declaring war, in contrast to an official declaration of war from Congress, see Bradley and Goldsmith, supra note 63. “In light of the longstanding political branch practice of initiating war without a formal declaration of war, consistent judicial approval of this practice, changes in international law that render war declarations less relevant, and general scholarly consensus, it seems clear that Congress need not issue a formal declaration of war in order to provide its full authorization for the President to prosecute a war.” Id. at 2062.
Because a war on terror is unlike a conventional war, many of the activities will be covert. One could maintain that because such covert actions will be the norm, Congressional oversight would be needed under the Hughes-Ryan Amendment. However, the AUMF issued by Congress following the September 11 attacks certainly appeared to give the Executive branch sweeping authority in going after the individuals who planned the September 11 attacks.

The real question is what authority does the President have to target individuals not involved with the September 11 attacks, but currently engaging in terrorist activities in this ongoing “war on terror?” Given the fact that the criminal statutes regarding terrorism were not meant to have extra-territorial application it is plausible to argue that non-nationals engaged in terrorist activities against the United States and located abroad would not be entitled to any further protections than those outlined in the international law section, supra. If such non-nationals were discovered engaging in terrorist activities within the United States, due process language in the Constitution which refers to “person” and not “citizen” would indicate that they would also enjoy due process rights.

However, when dealing with the question of the legality of the targeted killing of American citizens located abroad, there is no question that such a policy is illegal – even if the AUMF were read to grant such authority, it could not be given. This issue will now be examined in the following section.

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136 Banks and Raven-Hansen, supra note 101 at 674.
137 Id.
IV. Major US Constitutional Issues

A policy of engaging in the targeted killing of terrorists abroad can pass international legal muster under self-defense and armed conflict analyses and specifically targeting terrorist leaders during a “war on terror” passes domestic hurdles as well. However, the current policy specifically contemplates the targeted killing of American citizens suspected of terrorism, and such a policy cannot pass Constitutional tests.

A. Constitutional Concerns – Due Process

Due process rules are meant to protect persons not from the deprivation of life, liberty or property, but from the mistaken or unjustified deprivation of life, liberty or property.138 As set out in the Fifth Amendment to the United States Constitution, “no person shall . . . be deprived of life, liberty or property, without due process of law.”139 “An essential principle of due process is that a deprivation of life, liberty or property be preceded by notice and opportunity for hearing appropriate to the nature of the case.”140

In determining if the procedural process due has been granted, courts will often apply a balancing test to the situation. Recognizing that “tension . . . exists between the autonomy that the Government asserts is necessary in order to pursue effectively a particular goal and the process that a citizen contends he is due before he is deprived of a constitutional right,”141 the courts will weigh the private interest to be affected by the official action against the Government’s asserted interested including the function involved and the burden the

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139 U.S. CONST. amend. V.
140 Cleveland Board of Education v. Loudermill, 470 U.S. 532, 542 (1985)
Government would face if it provided the greater process.\textsuperscript{142} Under the Matthews test, a court attempts to contemplate a “judicious balancing” of those concerns and analyzes the risk of “erroneous deprivation” of the private interest if the process were reduced and the “probable value” of additional or substitute procedural safeguards.\textsuperscript{143}

Since the start of the war on terror, a line of cases dealing with due process and indefinite detentions have arisen.\textsuperscript{144} While there are no cases covering the targeted killing of American citizens engaged in terrorist activities abroad, Hamdi v. Rumsfeld can be instructively analogized to the current issue.

In Hamdi, an American citizen was captured as an alleged enemy combatant during military operations in Afghanistan. He was seized by members of the Northern Alliance in Afghanistan and eventually turned over to American military authorities.\textsuperscript{145} After initial interrogation in Afghanistan, Hamdi was transferred to Guantanamo Bay in 2002. In April, 2002, authorities learned that Hamdi was an American citizen and he was transferred to a brig in South Carolina.\textsuperscript{146} The United States maintained that Hamdi was an enemy combatant and could thus be detained indefinitely without formal charges or a proceeding.\textsuperscript{147}

When Hamdi’s case was taken up by the Supreme Court, Justice O’Connor’s plurality opinion first dealt with the question of whether the Executive had the authority to detain citizens who qualify as enemy combatants.\textsuperscript{148} Under 18 U.S.C. §4001(a), “no citizen shall be imprisoned or otherwise detained by the United States except pursuant to an Act of Congress.” §4001(a)

\textsuperscript{142} Matthews v. Eldridge, 424 U.S. 319, 335 (1976).
\textsuperscript{143} Hamdi, 542 U.S. at 529.
\textsuperscript{145} Hamdi, 542 U.S. at 509-10.
\textsuperscript{146} Id.
\textsuperscript{147} Id.
\textsuperscript{148} Hamdi, 542 U.S. at 516.
had been passed by Congress in 1971 in an effort to repeal the Emergency Detention Act of 1950\textsuperscript{149} which allowed for executive detentions during times of emergency of individuals thought likely to engage in espionage or sabotage.\textsuperscript{150} The plurality found authority for the Executive to detain prisoners as part of the authority granted him in the AUMF after September 11. However, the detention could not be indefinite.\textsuperscript{151}

The deeper question was what process was due to an American citizen who was deemed an enemy combatant, and though while legally detained, wished to challenge his status. In applying the \textit{Matthews} test outlined above, the plurality opinion underlined the substantial interests on both sides of the case – Hamdi’s interest in physical liberty was one of the most elemental of liberty interests\textsuperscript{152} and the Court noted that it was not offset by the circumstances of war or the accusation of treasonous behavior because it “is clear that commitment for \textit{any} purpose constitutes a \textit{significant} deprivation of liberty that requires due process protection.”\textsuperscript{153} Obviously, the Government had a compelling interest of national security and argued that in reducing the process available to detained individuals, it furthered the goal of national security by preventing military officers engaged in battle from becoming distracted by litigation.\textsuperscript{154}

In reaffirming the “fundamental nature of a citizen’s right to be free from involuntary confinement by his own government without due process of law,”\textsuperscript{155} the Court found that the process offered by the Government was inadequate and that citizen detainees were entitled to receive notice of the factual basis for the classification as an enemy combatant and a fair

\textsuperscript{149} 50 U.S.C. §811 \textit{et. seq.}
\textsuperscript{150} \textit{Hamdi}, 542 U.S. at 517.
\textsuperscript{151} \textit{Id.} at 518-21.
\textsuperscript{152} \textit{Id.} at 529. \textit{See also} Foucha v. Louisiana, 504 US 71, 80 (1992) (Freedom from bodily restraint has always been at the core of the liberty interest protected by the Due Process Clause.)
\textsuperscript{153} \textit{Hamdi}, 542 U.S. at 540, citing Jones v. United States, 463 U.S. 354, 361 (1983). (emphasis added)
\textsuperscript{154} \textit{Hamdi}, 542 U.S. at 531-32.
\textsuperscript{155} \textit{Id.} at 531.
opportunity to rebut such allegations before a neutral decision-maker. The Court did recognize the exigencies of the battlefield and allowed that while the “full protections that accompany challenges to detentions in civil settings may be unworkable, the threats to military operations posed by a basic system of independent review are not so weighty as to trump a citizen’s core rights to challenge meaningfully the Government’s case and to be heard by an impartial adjudicator.”156

In their dissenting opinion, Justices Scalia and Stevens sought to impose even further limits on government power than the plurality opinion and found even more protection for due process. According to Justices Scalia and Stevens, when the Government has accused a citizen of waging war against it, the tradition has been to prosecute the person in federal court.157 Where the exigencies of war prevent such process, Article I, §9 cl. 2 of the Constitution, commonly known as the Suspension Clause, allows Congress to relax the usual protections temporarily.158 Absent such a suspension, the Executive’s assertion of a military emergency is not sufficient to permit detention without charge and there is no assertion that the AUMF was an implementation of the Suspension Clause.159 Justices Scalia and Stevens would have thus reversed the judgment of the District Court as did the plurality, but would have required strict due process procedures and not attempted to reach the balancing test the plurality adopted, which diluted the fundamental right to personal liberty.160

In applying Hamdi to the current policy, it is absurd to conclude that a right to due process exists when contemplating the indefinite detention of an American citizen captured on

156 Id. at 535.
157 Hamdi, 542 U.S. at 554 (Scalia, J. and Stevens, J. dissenting)
158 Id.
159 Id.
160 Hamdi, 542 U.S. at 554-56 (Scalia, J. and Stevens, J. dissenting)
the battlefield and taking up arms against the United States, but that such a right does not exist when the government proposes, through Executive order only, to deprive an American citizen of his life for the same actions. The due process clause does not allow for the execution of a person on the basis of information which he had no opportunity to deny or explain.\footnote{Simmons v. South Carolina, 512 U.S. 154 (1994).}

As laid out by Blackstone and originally understood by the Framers, “to bereave a man of life . . . without accusation or trial, would be so gross and notorious an act of despotism, as must at once convey the alarm of tyranny throughout the whole kingdom.”\footnote{1 W. BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND 131-33 (1765).} While the Executive branch might defend the policy of targeting individuals suspected of terrorism by claiming to protect national security interests, there is case law suggesting that this claim would also fail.

As noted by the dissent, there have been permissible types of non-criminal detention that did not require the protections of criminal procedure.\footnote{Hamdi, 542 U.S. at 556-57 (Scalia, J. and Stevens, J. dissenting).} These exceptions were based on civil commitment of the mentally ill or temporary detention in quarantine for infectious persons. However, a “finding of dangerousness, standing alone, is ordinarily not a sufficient ground upon which to justify indefinite involuntary commitment.”\footnote{Kansas v. Hendricks, 521 U.S. 346, 358 (1997).} While few would argue that a citizen abroad strongly suspected of aiding terrorist cells is not dangerous, it is logical to determine that a finding of dangerousness alone is not a sufficient ground upon which to execute a citizen either.

In addition to the clear due process violation of the current policy, there is even further Constitutional evidence that such a policy of targeting American citizens is both unconscionable and unconstitutional. American citizens living abroad and assisting terrorists are certainly
committing serious crimes, indeed one crime so serious it was set forth in the Constitution itself. Article III, §3 cl. 1 states:

Treason against the United States, shall consist only in levying War against them, or in adhering to their Enemies, giving them Aid and Comfort. No Person shall be convicted of Treason unless on the Testimony of two Witnesses to the same overt Act, or on Confession in open Court.\textsuperscript{165}

Article III, §3 cl. 2 states that Congress shall have the power to declare the punishment of treason. Under 18 U.S.C. §2381, Congress has declared that: “whoever, owing allegiance to the United States, levies war against them or adheres to their enemies, giving them aid and comfort within the United States or elsewhere, is guilty of treason and shall suffer death, or shall be imprisoned not less than five years and fined under this title but not less than $10,000; and shall be incapable of holding any office under the United States.” Treason is placed in the criminal section of the United States Code, and accordingly, criminal due process protections attach to those suspected of and accused of committing treason. The Constitution itself contemplates due process for those who commit treason, requiring at least two witnesses and stipulating that any confession must be made in open court, not a secret military tribunal, and guilt can most certainly not be determined based on secret evidence given to the Executive and adjudicated by the Executive alone.

Supporters of the current policy will also undoubtedly argue that because we are at war, and that it would be difficult to try such suspects, the rules may be relaxed and it is within the Executive’s power to maintain national security by carrying out such acts. Not so. Our constitutional system does not permit two constitutions, one in war and one in peace. As the

\textsuperscript{165} U.S. CONST. Art. III, §3 cl. 1 (emphasis added).
Supreme Court made so clear in *Ex parte Milligan*, decided in the aftermath of the gravest threat to this nation’s existence: “it is the birthright of every American citizen when charged with a crime, to be tried and punished according to law.” “Martial rule can never exist where the courts are open, and in the proper and unobstructed exercise of their jurisdiction.” While the Government insisted that the "safety of the country in time of war demands that [a] broad claim for martial laws shall be sustained," the Court noted that "if this were true, it could be well said that a country, preserved at the sacrifice of all the cardinal principles of liberty, is not worth the cost of preservation.”

What the Executive branch is attempting with this policy of targeted killing is to bypass the nicety of even accusing a citizen of treason, and skip right to the execution. However, the courts of the United States, which would plainly have jurisdiction, are open and unobstructed. Whether citizens abroad are suspected of engaging in terrorism or treason, process is due. The United States would surely balk at the suggestion that it summarily executes people, but that is exactly what the policy under review here contemplates.

Perhaps most concerning on a practical level is the evidence gleaned from the detention cases that quite often, the Executive’s determinations as to a detainees’ guilt or danger are incorrect. For example, Attorney George Brent Mickum, who has defended a number of Guantanamo Bay detainees, noted that five of his clients were alleged to be terrorist operatives

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166 71 U.S. 2 (1866).
167 Milligan, 71 U.S. at 118.
168 Id. at 127.
169 Id. at 125-26.
170 It is undisputed that the protections of the United States Constitution apply to citizens abroad and that United States’ government officials acting abroad must do so under Constitutional constraints. See Reid v. Covert, 354 U.S. 1 (1957). “As developed by its progeny . . . Reid must be interpreted to hold that the Constitution protects American citizens against the arbitrary exercise of power by federal officials abroad. More precisely, the case must be interpreted to compel federal officials to act within the proscriptions of the Constitution regardless of whether they act at home or abroad.” John A. Ragosta, *Aliens Abroad: Principles for the Application of Constitutional Limitations to Federal Action*, 17 N.Y.U. J. Int’l. L. & Pol. 287. (1985).
based on intelligence and than in every case, the intelligence was incorrect.\textsuperscript{171} In the detention cases, the accused were able to challenge their detainment and classifications – if a citizen is never notified that he is suspected of terrorism and is then the victim of a targeted killing based on incorrect intelligence, he can never challenge that classification and such actions are an affront to the United States’ Constitution and notions of due process. As Chief Justice Chase noted in his concurring opinion in \textit{Milligan} “it is more important to the country and to every citizen that he should not be punished under an illegal sentence, sanctioned by a court of last resort, than that he should be punished at all.”\textsuperscript{172} Such a sentiment is no less applicable to the execution of a citizen, whether suspected of treason or not.

\textbf{B. Commander in Chief Clause – Could the President Have Such a War Power?}

An enduring theory of constitutional interpretation often raises its head during times of national crisis or emergency. While a minority view, the idea of a vigorous, all-powerful unitary executive is frequently used to justify Executive overstep during time of war.\textsuperscript{173} Commentators like John Yoo would assuredly argue that the President has \textit{carte blanche} in the conduct of a war or armed conflict and that the policy of targeted killings is merely incidental to that power.

However, while it is true that the President has certain inherent powers that Congress may not limit, those powers are further divided into two areas: those which are exclusive or plenary powers - unregulable by Congress, and those which are concurrent powers - exercisable by the President but nonetheless subject to Congressional override.\textsuperscript{174}

In the area of "exclusive" powers, the Executive is largely free to do as he pleases, despite


\textsuperscript{172} \textit{Milligan}, 71 U.S. at 132 (Chase, C.J. concurring)

\textsuperscript{173} See \textit{e.g.} John C. Yoo, \textit{The Continuation of Politics by Other Means: The Original Understanding of War Powers}, 84 Cal. L. Rev. 167 (1996).

\textsuperscript{174} \textsc{Michael J. Glennon}, \textsc{Constitutional Diplomacy} 15 (Princeton University Press, 1990.)
congressional displeasure. But Congress may limit the President's powers as Commander in Chief, because the war power is a concurrent power. In certain areas of the war power, the President's powers are considered "default powers." That is because the President may only have exclusive authority if Congress fails to act in a manner in which it is constitutionally authorized to act. Regardless, no President or Congress may do what the Constitution says it may not. These concepts were clearly delineated by the Supreme Court in Youngstown Sheet & Tube Co. v. Sawyer.

Youngstown arose when President Truman issued an order directing the Secretary of Commerce to "take possession of and operate most of the Nation's steel mills." This order was issued due to a labor dispute between the companies and their employees during 1951 after all efforts to resolve the dispute failed, and a nation-wide strike was called.

President Truman believed that the necessity of steel as a "component of substantially all weapons and other war materials" entitled him to issue an order to seize the steel mills and maintain production as an "aggregate of his constitutional powers as the Nation's Chief Executive and the Commander in Chief of the Armed Forces of the United States." The mill owners argued that President Truman's order was nothing more than executive lawmaking outside the bounds of the President's constitutional powers.

Justice Black delivered the opinion of the Court, first noting that "the President's power, if any, to issue the order must stem either from an act of Congress or from the Constitution

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175 Id. at 72
176 343 U.S. 579 (1952).
177 Youngstown, 343 U.S. at 582.
178 Id. at 583.
179 Id.
180 Youngstown, 343 U.S. at 582.
181 Id.
itself."  Here, there had been absolutely no congressional act or authorization. It was clear that "if the President had authority to issue the order he did, it must be found in some provision of the Constitution." Truman contended that his presidential power should be implied from the cumulative effect of executive powers listed in the Constitution.

The majority noted that the President relied on "particular provisions in Article II which say that the 'executive Power shall be vested in a President ....' and that 'he shall take Care that the Laws be faithfully executed' and that he 'shall be Commander in Chief of the Army and Navy of the United States." The order could not be sustained, however, as an "exercise of the President's military power as Commander in Chief ...." While the Government relied on cases upholding broad war powers, the Court did not find those cases to be persuasive. Justice Black noted that "even though the theater of war be an expanding concept, we cannot with faithfulness to our constitutional system hold that the Commander in Chief of the Armed Forces has the ultimate power to take possession of private property."

Nor could the order be upheld under the executive power generally. The Court stated: "In the framework of our Constitution, the President's power to see that the laws are ... executed refutes the idea that he is ... a lawmaker. The Constitution limits his functions in the lawmaking process to the recommending of laws he thinks wise and the vetoing of laws he thinks bad." In the instant case, President Truman did not direct the implementation of a congressional policy in a manner indicated by Congress. Instead, he ordered that presidential policy be executed in a manner directed by him. The Court noted that, should Congress choose to adopt such a policy of

182 Id. at 585.
183 Id. at 587.
184 Id.
185 Youngstown, 343 U.S. at 587.
186 Id.
187 Id.
188 Id.
189 Youngstown, 343 U.S. at 587.
seizing the mills, its authority to do so would be without question.\footnote{Id.} \footnote{Id. at 588.} \footnote{Id. at 588-89.} \footnote{Id. at 589.} \footnote{Youngstown, 343 U.S. at 634 (Jackson, J. concurring)} \footnote{Id. at 635.}

While President Truman argued that other Presidents "without congressional authority have taken possession of private business enterprises in order to settle labor disputes,"\footnote{Id. at 588.} the Court was unambiguous when it stated that even if such actions have happened before, "Congress has not lost its exclusive constitutional authority to make laws necessary and proper to carry out the powers vested by the Constitution in 'the Government of the United States, or in any Department or Officer thereof.'"\footnote{Id. at 588-89.} In the majority's conclusion, Justice Black wrote that "the Founders of this Nation entrusted the law making power to Congress alone in both good and bad times. It would do no good to recall the historical events, the fears of power and the hopes for freedom that lay behind their choice. Such a review would but confirm our holding that the seizure order cannot stand."\footnote{Id. at 589.}

While the majority opinion offered a clear and concise analysis of the bounds of the President's war power, Justice Jackson's famous concurrence also defined the bounds of presidential power. In his concurrence, Justice Jackson first noted that "comprehensive and undefined presidential powers hold both practical advantages and grave dangers for the country ... in time of transition and public anxiety."\footnote{Youngstown, 343 U.S. at 634 (Jackson, J. concurring)} However, while the "Constitution diffuses power the better to secure liberty, it also contemplates that practice will integrate the dispersed powers into a workable government .... Presidential powers are not fixed but fluctuate, depending upon their disjunction or conjunction with those of Congress."\footnote{Id. at 635.}

Justice Jackson devised three categories that were illustrative of the general interactions
between Congress and the President and the legal consequences in each paradigm. The first interaction occurs when "the President acts pursuant to an express or implied authorization of Congress ...."196 In this instance, presidential authority is "at its maximum, for it includes all that he possesses in his own right, plus all the Congress can delegate."197 If the President's actions in this situation are deemed unconstitutional, it is because the "Federal Government as an undivided whole lacks power."198

The second paradigm contemplates the President acting in "absence of either a congressional grant or denial of authority."199 In this case, he may "only rely upon his own independent powers, but there is a zone of twilight in which he and Congress may have concurrent authority, or in which its distribution is uncertain."200 In this type of situation, inaction on the part of Congress may "enable, if not invite" independent presidential action.201

The final paradigm considers "when the President takes measures incompatible with the expressed or implied will of Congress."202 In this instance, the President's power is at "its lowest ebb, for then he can rely only upon his own constitutional powers minus any constitutional powers of Congress over the matter."203 Presidential control in these situations can only be sustained by a court if the court "disab[les] Congress from acting upon the subject matter."204

Although Youngstown was decided over fifty years ago, it is still relevant today. The decision "resolved a major constitutional crisis, and it did so ... correctly."205 Youngstown stands

196 Id.
197 Id.
198 Id. at 635-36.
199 Youngstown, 343 U.S. at 637 (Jackson, J., concurring).
200 Id.
201 Id.
202 Id.
203 Youngstown, 343 U.S. at 637. (Jackson, J., concurring).
204 Id. at 638.
for the proposition that "the President of the United States possesses no inherent, unilateral legislative power in time of war or emergency."\textsuperscript{206} Further, \textit{Youngstown} made it clear that the President "is not and cannot be the sole judge of the scope of his constitutional and statutory powers."\textsuperscript{207}

\textit{Youngstown} remains one of the defining war powers cases and is perhaps even more relevant today. Even if ordering the targeted killing of Americans was not so clearly outside the pale of constitutionality, the President cannot permissibly maintain this policy in light of the \textit{Youngstown} analysis.

While some might argue that in this area, the President is operating in a zone of twilight, or even acquiescence given Congress’s failure to pass a ban on assassinations, with his powers at their height, this argument fails on several levels. The act of assassinating or ordering the targeted killing of any individuals, let alone citizens, does not enjoy “a systematic, unbroken, executive practice, long pursued to the knowledge of the Congress and never before questioned . . . making as it were such exercise of power part of the structure of our government . . . a gloss on ‘executive Power’ vested in the President by §1 of Art. II.”\textsuperscript{208} Indeed, the existence and findings of the Church Committee indicates that such actions were not long pursued to the knowledge of Congress, and when Congress did gain knowledge, it took moves to end the practice. Historically, the Lieber Code, issued as an Order in 1863, embraced a prohibition against assassination, as do the still-existing Executive Orders discussed \textit{supra}.

Moreover, the AUMF cannot be deemed as authorization for such actions. In determining the scope of the "necessary and appropriate force" authorized in the AUMF, two additional factors must be considered: Executive Branch practice during prior wars, and the

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\item \textsuperscript{206} \textit{Id.}
\item \textsuperscript{207} \textit{Id.} at 216.
\item \textsuperscript{208} \textit{Youngstown}, 343 U.S. at 610-11 (Frankfurter, J., concurring).
\end{itemize}
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International laws of war prohibit the treacherous killing of an individual during a time of war. Past Executive Branch practice in the area of assassination has, to one’s knowledge, been limited to targeting foreign leaders. While this targeting raises international legal questions, it does not necessarily run afoul of United States Constitutional provisions. Here, the practice in question is the targeting of American citizens suspected of terrorism – a policy one would hope lacks precedent. In looking to the AUMF for authorization for this policy, the Executive must continue its search, because Congress could not grant such a power.

Further, under Justice Jackson's widely accepted categorization of presidential power, “the strongest of presumptions and the widest latitude of judicial interpretation" attach "[w]hen the President acts pursuant to an express or implied authorization of Congress."\footnote{Youngstown, 343 U.S. at 635, 637.} Justice Jackson’s cannon of construction applies “fully to presidential acts in wartime that are authorized by Congress.”\footnote{Bradley and Goldsmith, supra note 63, at 2051.} Naturally, wartime acts not authorized by Congress lack the presumption of validity. According to Bradley and Goldsmith, the Supreme Court has invalidated a number of these acts precisely because they lacked congressional authorization.\footnote{Bradley and Goldsmith, supra note 63, at 2053.} Congressional approval is certainly important in filling in the details of the law in the war on terrorism. Before determining what else Congress or the President may do, one must assess what Congress has already done. In this area, what Congress has done is to occupy the field in the area of how terrorists and traitors are to be treated – under Title 18 of the United States Code, clear provisions exist to define and punish both terrorism and treason. The President’s power is in fact
at its lowest ebb because Congress has clearly spoken.

Even if the above was not true, such targeted killings without any opportunity to be heard are such a gross violation of due process and the Constitution, that even if Congress were to pass a law authorizing the President to carry out such a policy, the legislation would be unconstitutional on its face – the Federal Government as a whole would lack the power. If the President were to implement the legislation, he would surely be in violation of his solemn duty to see that the laws are faithfully executed – fidelity to the highest law of the land, the Constitution, must trump all other obligations. The Constitution clearly protects the right to due process and holds inviolate the principle that an individual may not be stripped of his life, liberty or property without such process, even if that citizen is indeed a traitor to his nation. The Framers were not willing to compromise such values, and current leaders must not throw them aside so lightly - “[i]mplicit in the term ‘national defense’ is the notion of defending those values and ideas which set this Nation apart .... It would indeed be ironic if, in the name of national defense, we would sanction the subversion of ... those liberties ... which makes the defense of the Nation worthwhile”213

C. Suggested Future Action

This paper does not attempt to argue that a compelling state interest in national security does not exist. However, national security does not trump all other fundamental rights of citizens of the United States. While ideally the United States should institute a policy of extraditing for full trial those citizens abroad it believes are committing acts of treason and terrorism, realities on the ground may make this option impossible at times. Part of the difficulty in conducting a war on terrorism is the unconventional nature of such a conflict, and the ability

of groups to vanish into the countryside and find safe-havens in sympathetic states which would refuse extradition.

The standard should of course be extradition with full protection of due process rights. However, in a scenario in which extradition is impossible, the current policy still must be altered. In addition to the international legal considerations of targeting any person through means of treachery, Constitutional problems of due process and separation of powers are pressing. To alleviate such illegalities, the following guidelines should be adopted when extradition and trial is truly impossible and not merely inconvenient. First, treacherous means should not be used in order to avoid violating international law, and all other rules relating to the conduct of non-international armed conflict must be followed. Second, the evidence and decision cannot come solely from the Executive branch. To ensure some process, judicial overview is required. Further, to avoid separation of powers problems, the Legislative branch must have a role as well. Any evidence gathered by Executive branch employees thus should be turned over to a special committee which might be comprised of ranking members of the House and Senate Intelligence Committees and several respected federal judges. Members of this committee should review the evidence gathered and have their own, if limited, investigatory powers. Based upon the decision of the committee regarding the targeting of a particular individual, the President then may order such a targeted killing, but only within the confines of international law regarding such acts.

V. Conclusion

As part of its effort to fashion an effective response to the terrorist threat posed by Al Qadea, the United States has promulgated a policy of targeted killings of terrorists abroad, including American citizens suspected of terrorism or terrorist involvement. In assessing the
legality of such a policy, two bodies of law must be examined: international law and domestic U.S. law.

Under international law analyses, multiple factors must be considered. First, it is necessary to note the distinction between assassination and targeted killing. During a time of armed conflict, an assassination consists of the targeted killing of an individual through treacherous means. During peacetime, assassination consists of the targeted killing of an individual for political reasons, typically through covert means. Under international law, assassination is never permissible, whether during armed conflict or peace.

On the other hand, the targeted killing of an individual or group of individuals that does not rise to the level of assassination may be permissible. The permissibility of targeted killing rests on whether an international human rights rubric or an international humanitarian law rubric is applied.

Under international human rights analyses, targeted killings not rising to the level of assassination would be impermissible as violative of individuals’ due process rights under covenants such as the International Covenant on Civil and Political Rights. However, international human rights law is most properly applied to a state in relation to its treatment of its own citizens, not its actions in a foreign territory. International humanitarian law provides that the law of armed conflict, as the *lex specialis* for the conduct of hostilities, determines what makes a deprivation of life arbitrary, not the higher due process standards applicable in a time of peace.

Ultimately then, it must be determined if the United States can be considered to be in a state of armed conflict with Al Qaeda, such that international humanitarian frameworks apply. In assessing the conflict between the United States and Al Qaeda, the fight against Al Qaeda can
best be conceived of as a non-international armed conflict. The rules of non-international armed conflict were designed to reach non-state and sub-state actors and targeted killings are most properly evaluated in this context as counter-terrorism measures. Terrorist groups like Al Qadea can be considered as organized armed groups and may therefore be targeted with lethal force at any time during an ongoing armed conflict. Those who could not be identified as part of the terrorist group would be considered civilians, and subject to attack only if engaged in combat or planning and preparing a terrorist attack. Rules of proportionality are applicable, and proportionality should be determined on a case-by-case basis and from the view of a “reasonable military commander.”

Thus, targeted killings that do not rise to the level of assassination and proportionally target members of organized armed groups like Al Qadea are permissible under international law. Such killings are also permissible under concepts of self-defense because an armed attack triggers the application of international humanitarian law or the laws of war and the legality of killing in self-defense rests on the method used – treachery is prohibited and proportionality concerns again arise. In contemplating preemptive or anticipatory self-defense generally, such attacks must be carefully examined with respect to the imminence requirement. Yet when dealing with terrorist threats, the standard in evaluating an anticipatory reaction to a terrorist attack must be whether it occurred in the last possible window of opportunity. Should a state conclude a terrorist attack can reasonably be expected, individual terrorists could be legally targeted as a method of preemptive self-defense, particularly where a terrorist group has not acted against the state previously.

Yet in the conflict between the United States and Al Qadea, Al Qadea has committed acts of terrorism against the United States, and it is expected it will continue to do so in the future.
The terrorist attacks are regarded as a continuous operation and traditional self-defense rules and rules of armed conflicted apply. Individual terrorists may be legally targeted provided the attack does not rise to the level of assassination under the armed conflict analysis.

Ultimately, the U.S. policy of targeted killing, of foreign or American terrorists, can be deemed legal under international law. It is when analysis turns to domestic legal issues that the policy fails to maintain its legality.

First, it is again imperative to refrain from conflating assassination with targeted killings. While the United States would still be bound by international law prohibiting assassination, its own history also indicates recognition that assassination is not permissible, a conclusion embodied in various Executive Orders under Presidents Ford, Carter and Reagan. Yet these Executive Orders would in no way prevent the targeted killing of terrorists, specifically Osama bin Laden and members of Al Qaeda after the September 11 attacks, provided the killings continued to comply with international rules prohibiting treachery.

The true domestic legal issues arise when the policy of ordering the targeted killing of American citizens located abroad and suspected of terrorism is examined. Such a policy violates the Constitution of the United States.

First, constitutional protections travel with American citizens abroad — they enjoy the same protections from the United States government abroad as they would at home. Therefore, they are entitled to due process as contemplated by the Fifth Amendment. In applying the detention cases to the current policy, particularly *Hamdi*, it is absurd to conclude that a right to due process exists when contemplating the indefinite detention of an American citizen captured on the battlefield and taking up arms against the United States, but that such a right does not exist when the government proposes to deprive an American citizen of his *life* for the same
actions. The due process clause does not allow for the execution of a person on the basis of information which he had no opportunity to deny or explain.

Further due process concerns arise under Article III §3 cl. 1 of the Constitution, which defines treason and details the process due to those believed to have engaged in treason, such as Americans working with terrorists groups. Treason is placed in the criminal section of the United States Code, and accordingly, criminal due process protections attach to those suspected of and accused of committing treason. The Constitution itself contemplates due process for those who commit treason, requiring at least two witnesses and stipulating that any confession must be made in open court. Guilt cannot be determined based on secret evidence given to the Executive and adjudicated by the Executive alone.

The power to order targeted killings of American citizens also is not possessed by the President as a “war power.” Not only is the war power a concurrent power, requiring Congressional action or inaction to determine its strength, no President or Congress may do what the Constitution says it may not.

Under Justice Jackson’s Youngstown analysis, the President’s powers are at their ebb. The assassination or targeted killing of citizens is not a systematic and unbroken executive practice. Moreover, the AUMF cannot be deemed as authorization for such actions. Further, in determining what else the President may do, one must assess what Congress has already done. In this area, what Congress has done is to occupy the field in the area of how terrorists and traitors are to be treated – under Title 18 of the United States Code, clear provisions exist to define and punish both terrorism and treason. The President’s power is in fact at its lowest ebb because Congress has clearly spoken.
Even had Congress not spoken, the President would have no power to order such killings, nor would he if Congress passed a law authorizing the President to carry out such a policy - the legislation would be unconstitutional on its face because the Federal Government as a whole lacked the power. The Constitution clearly protects the right to due process and holds inviolate the principle that an individual may not be stripped of his life, liberty or property without such process, even if that citizen is indeed a traitor to his nation.

In examining future policy, ideally the United States should institute a policy of extraditing for full trial those citizens abroad it believes are committing acts of treason and terrorism. When realities on the ground may make this option impossible and not merely inconvenient, to alleviate the Constitutional violations discussed above and ensure some process, judicial overview is required as is legislative branch participation. A special committee comprised of appropriate members of Congress and judiciary, which reviews the evidence gathered and makes recommendations to the Executive as to the targeting of a particular individual could provide some level of due process.

Therefore, in the international sphere, United States policy is in compliance with the applicable legal framework. Domestically, its policy violates its own Constitution and should be reexamined. While ideally a policy of extradition should be implemented, some method of ensuring a modicum of due process such as the one outlined above, should be adopted before the current policy is acted upon.