
Eye in the Sky: U.S. Citizen Casualties in the Shadow War

*“Can the Executive order the assassination of a U.S. citizen without first affording him any form of judicial process whatsoever, based on the mere assertion that he is a dangerous member of a terrorist organization?”*¹

I. INTRODUCTION

In the wake of the September 11, 2001 terrorist attacks, the protection of U.S. national security became the impetus for far-reaching legal action.² In response to recent U.S. national security measures, legal scholarship has continuously examined the use of military force, and the legal justifications and constraints surrounding such action.³ One particular area of this debate focuses on the controversial use of unmanned aerial vehicles (UAVs), or drones, and the legality of carrying out UAV-targeted strikes against alleged members of Al Qaeda throughout the Middle East and Asia-Pacific regions.⁴

Following the 9/11 attacks, the United States directed hostilities into Afghanistan, engaging the Taliban government and Al Qaeda.⁵ Thereafter, the United States extended its use of force beyond Afghanistan, developing a

1. Al-Aulaqi v. Obama, 727 F. Supp. 2d 1, 9 (D.D.C. 2010).

2. See *Legislation Related to the Attack of September 11, 2001*, THE LIB. OF CONGRESS, <http://thomas.loc.gov/home/terrorleg.htm> (last visited Oct. 28, 2013) (summarizing legislation responding to 9/11 attacks).

3. See generally NOAM LUBELL, EXTRATERRITORIAL USE OF FORCE AGAINST NON-STATE ACTORS (2010); Ryan Goodman, *The Detention of Civilians in Armed Conflict*, 103 AM. J. INT'L L. 48 (2009); Ganesh Sitaraman, *Counterinsurgency, the War on Terror, and the Laws of War*, 95 VA. L. REV. 1745 (2009); James P. Terry, *Torture and the Interrogation of Detainees*, 32 CAMPBELL L. REV. 595 (2010); Elizabeth Sepper, Note, *The Ties That Bind: How the Constitution Limits the CIA's Actions in the War on Terror*, 81 N.Y.U. L. REV. 1805 (2006).

4. See, e.g., Kurt Larson & Zachary Malamud, *The United States, Pakistan, the Law of War and the Legality of the Drone Attacks*, 10 J. INT'L BUS. & L. 1, 11-21 (2011) (discussing legal justifications behind drone strikes in Pakistan); Afsheen John Radsan & Richard Murphy, *Measure Twice, Shoot Once: Higher Care for CIA-Targeted Killing*, 2011 U. ILL. L. REV. 1201, 1208-15 (2011) (detailing law applicable to U.S. strikes on Al Qaeda and Taliban); John Yoo, *Assassination or Targeted Killings After 9/11*, 56 N.Y.L. SCH. L. REV. 57, 75-79 (2011) (examining U.S. force against Al Qaeda and legal constraints limiting such force); see also Dennis C. Blair, Op-Ed., *Drones Alone Are Not the Answer*, N.Y. TIMES, Aug. 14, 2011, <http://www.nytimes.com/2011/08/15/opinion/drones-alone-are-not-the-answer.html> (arguing against unilateral drone attack approach in reducing Al Qaeda's threat); Scott Shane & Michael D. Shear, *Visions of Drones Swarming U.S. Skies Hit Bipartisan Nerve*, N.Y. TIMES, Mar. 8, 2013, <http://www.nytimes.com/2013/03/09/us/politics/visions-of-drones-in-us-skies-touch-bipartisan-nerve.html> (reporting range of public reaction to Senator Rand Paul's filibuster of U.S. drone use).

5. Ryan J. Vogel, *Drone Warfare and the Law of Armed Conflict*, 39 DENV. J. INT'L L. & POL'Y 101, 110 (2010) (noting United States' initial engagement after 9/11).

covert program to carry out strikes against terrorist threats in Pakistan and Yemen, and eventually in Somalia under the Obama Administration.⁶ Two strikes in Yemen conducted under the Obama Administration claimed the lives of three U.S. citizens, raising issues of whether the United States may target U.S. citizens with alleged terrorist connections, or carry out operations resulting in the collateral deaths of U.S. citizens.⁷

On September 30, 2011, the Central Intelligence Agency (CIA) carried out a drone attack on a convoy traveling in Yemen, killing Anwar al-Awlaki (also spelled Anwar al-Aulaqi) and Samir Khan.⁸ The target of the attack was al-Awlaki, a dual U.S.-Yemeni citizen whom U.S. officials had long suspected of encouraging terrorism.⁹ The Obama Administration authorized the targeted killing of al-Awlaki in April 2010 after he allegedly became more active in terrorist plots against the United States.¹⁰ Khan, a U.S. citizen living in Yemen who also had terrorist connections, was traveling with al-Awlaki when the CIA engaged his convoy.¹¹ Less than a month later, a U.S. military strike killed al-Awlaki's son, Abdulrahman al-Awlaki (Abdulrahman), bringing the total of

6. See Mark Mazzetti & Eric Schmitt, *U.S. Expands Its Drone War Into Somalia*, N.Y. TIMES, July 1, 2011, <http://www.nytimes.com/2011/07/02/world/africa/02somalia.html> (reporting 2011 drone strike in Somalia expanded covert program); *Pakistan Drone Statistics Visualised*, THE BUREAU OF INVESTIGATIVE JOURNALISM (July 2, 2012), <http://www.thebureauinvestigates.com/2012/07/02/resources-and-graphs> [hereinafter *Pakistan Drone Statistics*] (displaying graphical data regarding drone strikes in Pakistan from 2004 to present); *Yemen Strikes Visualised*, THE BUREAU OF INVESTIGATIVE JOURNALISM (July 2, 2012), <http://www.thebureauinvestigates.com/2012/07/02/yemen-strikes-visualised> [hereinafter *Yemen Strikes*] (displaying graphical data regarding drone strikes in Yemen from 2002 to present).

7. See Mark Mazzetti et al., *How a U.S. Citizen Came To Be in America's Cross Hairs*, N.Y. TIMES, Mar. 9, 2013, <http://www.nytimes.com/2013/03/10/world/middleeast/anwar-al-awlaki-a-us-citizen-in-american-cross-hairs.html> (discussing buildup to deaths of three U.S. citizens in drone strikes); Scott Shane, *Judging a Long, Deadly Reach*, N.Y. TIMES, Sept. 30, 2011, <http://www.nytimes.com/2011/10/01/world/american-strike-on-american-target-revives-contentious-constitutional-issue.html> (examining controversy and legal issues surrounding targeted killing of Anwar al-Awlaki).

8. See Mark Mazzetti et al., *Two-Year Manhunt Led to Killing of Awlaki in Yemen*, N.Y. TIMES, Sept. 30, 2011, <http://www.nytimes.com/2011/10/01/world/middleeast/anwar-al-awlaki-is-killed-in-yemen.html> (reporting CIA drone strike killed al-Awlaki and Khan).

9. See Designation of Anwar al-Aulaqi Pursuant to Executive Order 13224 and the Global Terrorism Sanctions Regulations, 75 Fed. Reg. 43,233-34 (July 23, 2010) (describing al-Awlaki's citizenship); NAT'L COMM'N ON TERRORIST ATTACKS UPON THE U.S., THE 9/11 COMMISSION REPORT 2-4, 8-10, 221, 229-30 (2004), available at <http://www.9-11commission.gov/report/911Report.pdf> [hereinafter 9/11 COMMISSION REPORT] (detailing Khalid al-Mihdhar's and Nawaf al-Hazmi's involvement in Pentagon Attack and relationship with al-Awlaki); Mazzetti et al., *supra* note 7 (noting al-Awlaki as target of attack); James Risen & David Johnston, *Report on 9/11 Suggests a Role by Saudi Spies*, N.Y. TIMES, Aug. 2, 2003, <http://www.nytimes.com/2003/08/02/us/report-on-9-11-suggests-a-role-by-saudi-spies.html> (characterizing al-Awlaki as "spiritual adviser" to two 9/11 hijackers). The United States suspected al-Awlaki of encouraging terrorism based on his connection as spiritual advisor to al-Mihdhar and al-Hazmi, two hijackers who participated in the 9/11 attacks. See 9/11 COMMISSION REPORT, *supra*, at 221, 229-30; Risen & Johnston, *supra*.

10. See Scott Shane, *U.S. Approves Targeted Killing of American Cleric*, N.Y. TIMES, Apr. 6, 2010, <http://www.nytimes.com/2010/04/07/world/middleeast/07yemen.html> (reporting al-Awlaki's alleged participation in terrorist attacks and U.S. authorization for subsequently targeting him).

11. See Mazzetti et al., *supra* note 8 (noting Khan's connections to Al Qaeda and death in drone strike).

dead U.S. citizens on Yemeni soil to three during the Obama Administration.¹²

This Note explores whether the United States acted lawfully in carrying out the strikes that killed al-Awlaki, Khan, and Abdulrahman by first examining the evolution of international law and the laws of war.¹³ Part II.B traces the development of domestic law in relation to the war on terrorism and what constitutional protections, if any, apply to U.S. citizens abroad.¹⁴ Next, Part II.C brings to light the Obama Administration's justifications for engaging terrorists—including U.S. citizens—through drone strikes.¹⁵ Part II.D examines the context of the United States' use of force against al-Awlaki, Khan, and Abdulrahman.¹⁶ Finally, this Note assesses whether this use of force was proper under international and domestic constitutional law.¹⁷

II. HISTORY

A. International Law and Laws of War

1. Historical Laws of War

The laws of war consider when one state is legally justified in using force against another.¹⁸ Historically, the laws of war break down into two concepts: *jus ad bellum* and *jus in bello*.¹⁹ *Jus ad bellum*, which modern scholars refer to as “just war theory,” examines whether there are proper justifications behind waging war.²⁰ Traditional principles of *jus ad bellum* only permit a country to

12. See Peter Finn & Greg Miller, *Anwar al-Awlaki's Family Speaks out Against His Son's Death in Airstrike*, WASH. POST, Oct. 17, 2011, http://www.washingtonpost.com/world/national-security/anwar-al-awlakis-family-speaks-out-against-his-sons-deaths/2011/10/17/gIQA8kFssL_story.html (reporting death of Abdulrahman in Yemen by U.S. military strike); Laura Kasinof, *Strikes Hit Yemen as Violence Escalates in Capital*, N.Y. TIMES, Oct. 15, 2011, <http://www.nytimes.com/2011/10/16/world/middleeast/yemeni-security-forces-fire-on-protesters-in-sana.html> (observing Abdulrahman as fourth U.S. citizen to die in Yemen and third during Obama Administration). A fourth U.S. citizen, Kamal Derwish, died in a 2002 drone strike in Yemen; however, as this strike occurred under the Bush Administration it is outside the scope of this Note. See Dana Priest, *Surveillance Operation in Pakistan Located and Killed Al Qaeda Official*, WASH. POST, May 15, 2005, <http://www.washingtonpost.com/wp-dyn/content/article/2005/05/14/AR2005051401121.html> (recalling death of Derwish in November 2002 by CIA drone strike).

13. See *infra* Part II.A.

14. See *infra* Part II.B.

15. See *infra* Part II.C.

16. See *infra* Part II.D.

17. See *infra* Part III.

18. See Larson & Malamud, *supra* note 4, at 2 (introducing purpose of laws of war).

19. See Richard P. DiMaggio, *The Evolution of the Just War Tradition: Defining Jus Post Bellum*, 186 MIL. L. REV. 116, 126-27 (2005) (examining *jus in bello* and *jus ad bellum* as traditional categories of just war discussions); Larson & Malamud, *supra* note 4, at 2 (discussing traditional categories of laws of war). It is important to distinguish between the two categories because a state can violate one but not the other. See DiMaggio, *supra*, at 127 (stating scholars often discuss two categories synonymously rather than as separate and distinct principles). Failure to comply with both concepts, however, constitutes a breach of international law. See Larson & Malamud, *supra* note 4, at 4.

20. See WILLIAM V. O'BRIEN, *THE CONDUCT OF JUST AND LIMITED WAR* 16 (1981) (conditioning armed

wage war if certain requirements are met: there is a just cause, there is right intention, the state has proper authority and publicly declares war to its own citizens and the foreign state, the war is waged only as a last resort, there is a probability of success, and there is macro-proportionality.²¹

In contrast, *jus in bello*, Latin for “justice in war,” focuses on actors once war is under way, analyzing whether those involved are fighting justly.²² For a state to comply with the concept of *jus in bello* it must satisfy two criteria: micro-proportionality and discrimination.²³ Micro-proportionality limits a state to acting only when the benefits of force outweigh the costs, making them proportional to the military objective.²⁴ Discrimination requires a state to distinguish between combatants and noncombatants, engaging only the former.²⁵ Although *jus in bello* requires consideration of both combatants and civilians, the protection of civilians assumed greater significance as modern warfare placed them at greater risk.²⁶

conflict upon exceptional justifications); DiMeglio, *supra* note 19, at 127 (defining *jus ad bellum* as restricting when states may resort to warfare); Larson & Malamud, *supra* note 4, at 2-3 (defining *jus ad bellum* and just war theory).

21. See O'BRIEN, *supra* note 20, at 16 (listing criteria required for invoking just right of war); DiMeglio, *supra* note 19, at 127-28 (enumerating traditional factors in analyzing *jus ad bellum*); Larson & Malamud, *supra* note 4, at 3 (enumerating requirements of *jus ad bellum*). Just cause for a war traditionally falls under the following categories: self-defense, protecting civilians within its borders, and vindicating violation of sovereignty and territorial integrity. See DiMeglio, *supra* note 19, at 128. Pursuing a just cause may take the form of a defensive or offensive war. See O'BRIEN, *supra* note 20, at 21-22. The right to self-defense is axiomatic and so important that many times it supersedes the requirement of probable success. See *id.* By contrast, although an offensive war is part of traditional just war theory, modern, positive international law seemingly prohibits it. See *id.* at 22. Right intention requires a state to fight a war pursuant to the previously mentioned just cause and not for some illegitimate purpose such as national glory. See DiMeglio, *supra* note 19, at 128. Macro-proportionality weighs the proportion of good versus evil, not the proportion of force used against another state. See *id.* at 127. Proportionality comes from Christian war theory requiring a state to assess whether the good achieved from war would outweigh the evil it causes. See Judith Gail Gardam, *Proportionality and Force in International Law*, 87 AM. J. INT'L L. 391, 394-95 (1993) (examining proportionality concept and its origins).

22. See DiMeglio, *supra* note 19, at 129 (differentiating *jus in bello* from *jus ad bellum*); Larson & Malamud, *supra* note 4, at 3 (defining *jus in bello* as “justice in war”). The concept stands on the foundation that states are not unlimited in the damage they may inflict on their opponent. See Gardam, *supra* note 21, at 397 (examining existence of limitations upon states once war commences). Directly linked to the limitations imposed on war is the idea that the only legitimate aim of war is to weaken the opponent's military forces. See *id.*

23. See DiMeglio, *supra* note 19, at 129 (outlining two requirements necessary to comply with *jus in bello*).

24. See *id.* at 130 (defining aim of micro-proportionality); Gardam, *supra* note 21, at 399 (describing necessity for proportionality between amount of force and objective). Examples of disproportionate force include using weapons that cause needless suffering or “denying quarter to an enemy who is *hors de combat*” (no longer able to fight). See Gardam, *supra* note 21, at 399.

25. See DiMeglio, *supra* note 19, at 130 (defining element of discrimination); Gardam, *supra* note 21, at 397-98 & n.39 (explaining importance of discriminating as among combatants and noncombatants). Some civilian casualties are tolerated, and the concept of proportionality determines to what level *jus in bello* permits collateral damage. See Gardam, *supra* note 21, at 398 & n.39.

26. See DiMeglio, *supra* note 19, at 130 (describing noncombatants as innocent of causing war); Gardam, *supra* note 21, at 397-98 (examining developments of *jus in bello* as war modernized).

2. Modern Codifications of International Law

At the turn of the twentieth century, world powers gathered to codify the laws of war in order to define them more precisely.²⁷ The most significant codification of *jus in bello*—commonly referred today as international humanitarian law (IHL)—arises from the 1949 Geneva Conventions.²⁸ All four of the Geneva Convention treaties protect those who are not actively engaged in combat, with Geneva Convention IV specifically providing for the protection of civilians during wartime.²⁹ On August 2, 1955, the United States ratified all four Geneva Conventions.³⁰

The Charter of the United Nations (U.N.)—generally considered a codification of the principles of *jus ad bellum*—sets forth the purposes of the U.N. organization.³¹ The U.N. seeks to “maintain international peace and security,” and “develop friendly relations among nations.”³² Because of its commitment to international peace, Article 2(4) of the U.N. Charter provides an important restriction on the resort to force, stating: “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”³³ Thus, Article

27. See Convention (IV) Respecting the Laws and Customs of War on Land and its Annex: Regulations Concerning the Laws and Customs of War on Land pmbl., Oct. 18, 1907, 36 Stat. 2277, T.S. No. 539 (stating purpose of treaty); Radsan & Murphy, *supra* note 4, at 1209 (describing timing behind codification of international humanitarian law).

28. See Larson & Malamud, *supra* note 4, at 5 (characterizing Geneva Conventions as “modern codification of *Jus in Bello*”); Radsan & Murphy, *supra* note 4, at 1209 (describing Geneva Conventions as “bed-rock of IHL”); see also *What is International Humanitarian Law?*, INT’L COMMITTEE OF THE RED CROSS (July 2004), http://www.icrc.org/eng/assets/files/other/what_is_ihl.pdf [hereinafter *International Humanitarian Law*] (defining IHL and stating its sources). IHL, sometimes referred to as the law of war or the law of armed conflict, is contained “in agreements between States—treaties or conventions—, in customary rules, which consist of State practise [sic] considered by them as legally binding, and in general principles.” *International Humanitarian Law, supra*.

29. See Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field, Aug. 12, 1949, 6 U.S.T. 3114, 75 U.N.T.S. 31; Geneva Convention for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea, Aug. 12, 1949, 6 U.S.T. 3217, 75 U.N.T.S. 85; Geneva Convention Relative to the Treatment of Prisoners of War, Aug. 12, 1949, 6 U.S.T. 3316, 75 U.N.T.S. 135 [hereinafter Geneva Convention III]; Geneva Convention Relative to the Protection of Civilian Persons in Time of War, Aug. 12, 1949, 6 U.S.T. 3516, 75 U.N.T.S. 287 [hereinafter Geneva Convention IV]; INT’L & OPERATIONAL LAW DEP’T, U.S. ARMY JUDGE ADVOCATE GEN.’S LEGAL CTR. & SCH., LAW OF WAR DOCUMENTARY SUPPLEMENT (John B. Reese et al. eds., 2011) [hereinafter JAG SUPPLEMENT], available at http://www.loc.gov/rr/frd/Military_Law/pdf/law-of-war-documentary-supplement_2011.pdf (collecting various international law documents, including Geneva Conventions); Radsan & Murphy, *supra* note 4, at 1209 (describing content of Geneva Conventions).

30. See Philip Dore, Comment, *Greenlighting American Citizens: Proceed with Caution*, 72 LA. L. REV. 255, 263-64 (2011) (detailing timing of U.S. ratification); see also *supra* note 29 (introducing four Geneva Conventions).

31. See Larson & Malamud, *supra* note 4, at 4.

32. U.N. Charter art. 1, paras. 1-2 (outlining purpose behind organization).

33. U.N. Charter art. 2, para. 4; see Larson & Malamud, *supra* note 4, at 4 (stating U.N. Charter’s principle prohibition on use of force); Mary Ellen O’Connell, *Remarks: The Resort to Drones Under International Law*, 39 DENV. J. INT’L L. & POL’Y 585, 589 (2011) (explaining breadth of U.N. Charter Article

2(4) prohibits all use of force except at de minimis levels, such as firing a single bullet across a boundary.³⁴ The U.N. Charter does, however, provide an exception to this rule in Article 51, which states: “Nothing in the present Charter shall impair the inherent right of individual or collective *self-defense* if an armed attack occurs against a Member of the United Nations”³⁵ Thus, a U.N. member may only use force against another state if the other state is responsible for an attack against it.³⁶

3. *Engaging in Hostilities Under IHL*

a. *Civilians and Combatants*

IHL provides protections to all civilians during times of war because civilians are considered absolutely innocent of causing war.³⁷ With this immunity, however, comes prohibition, as civilians may not participate in the hostility; if they do, they lose immunity for the duration of their participation in the conflict.³⁸ Lawful combatants are “armed forces of a Party to a conflict” and have a privileged status in that they cannot be prosecuted for engaging the enemy, but can be targeted by the enemy.³⁹ In contrast, unlawful combatants commit hostile acts during war without having any privilege to participate in combat.⁴⁰ Terrorists may only be labeled combatants—lawful or unlawful—if

2(4)).

34. See O’Connell, *supra* note 33, at 589 (explaining Article 2(4)’s general ban on use of force).

35. U.N. Charter art. 51 (emphasis added) (providing exception to Article 2(4)); see O’Connell, *supra* note 33, at 590 (outlining exception in Article 51). The U.N. Charter also provides a second exception in Article 39, granting the Security Council authority to act in response to acts of aggression. See U.N. Charter art. 39 (imposing duty on Security Council); O’Connell, *supra* note 33, at 590 (explaining second exception to Article 2(4)). If a state invokes its right to self-defense, it must notify the Security Council. See U.N. Charter art. 51 (imposing notification requirement).

36. See U.N. Charter art. 51 (allowing self-defense exception to general restriction on use of force); O’Connell, *supra* note 33, at 590 (describing when state may use force against another).

37. See *supra* note 29 and accompanying text (examining protections of civilians in Geneva Convention IV); see also *supra* note 26 and accompanying text (discussing *jus in bello* protection of civilians in war).

38. See Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts (Protocol I) art. 51, June 8, 1977, 1125 U.N.T.S. 3 [hereinafter Additional Geneva Protocol I] (outlining when civilian immunity applies).

39. *Id.* art. 43 (defining combatant); see Mary Ellen O’Connell, *Combatants and the Combat Zone*, 43 U. RICH. L. REV. 845, 851 (2009) (defining combatant); Dore, *supra* note 30, at 264 (distinguishing civilians from combatants). Geneva Convention III provides the criteria for distinguishing civilians from combatants, requiring combatants to meet the following conditions: “(a) that of being commanded by a person responsible for his subordinates; (b) that of having a fixed distinctive sign recognizable at a distance; (c) that of carrying arms openly; [and] (d) that of conducting their operations in accordance with the laws and customs of war.” Geneva Convention III, *supra* note 29, art. 4(A)(2); see Dore, *supra* note 30, at 264 (reciting Geneva Convention III’s requirements distinguishing civilians from combatants).

40. See Michael H. Hoffman, *Terrorists Are Unlawful Belligerents, Not Unlawful Combatants: A Distinction with Implications for the Future of International Humanitarian Law*, 34 CASE W. RES. J. INT’L L. 227, 228 (2002) (detailing rise of term “unlawful combatant” and lack of privilege); O’Connell, *supra* note 39, at 851 (defining unlawful combatant).

they are located in a zone of armed hostilities.⁴¹

b. Type of Armed Conflict

To invoke IHL, a dispute must rise to the level of an armed conflict—that is, involve more than sporadic violence—otherwise domestic, international criminal, and international human rights law (IHRL) applies.⁴² If deemed an armed conflict, the conflict can either be international or noninternational.⁴³ An international armed conflict is a conflict between states in which traditional IHL applies, namely the “1907 Hague Conventions, the four Geneva Conventions of 1949, custom, and, to those that are party, the [Additional Geneva Protocol I].”⁴⁴ A noninternational armed conflict is one between a state and nonstate actor in which, “Common Article 3 of the Geneva Conventions, custom, domestic law, and, to those that are party, the [Additional Geneva Protocol II]” apply.⁴⁵ Some scholars consider a third category—internationalized noninternational armed conflicts—for conflicts between states and nonstate actors located in another state, in which a hybrid of international and domestic law applies.⁴⁶ The United States has signed, but not ratified,

41. See O’Connell, *supra* note 39, at 853 (explaining combatant label first requires finding of armed conflict); cf. Hoffman, *supra* note 40, at 229 (stating “unlawful belligerent” proper label for terrorist). Labeling terrorists as combatants is difficult because they often operate in a time of peace against legally protected sites and persons, whereas unlawful combatants operate in a time of war against lawful objectives. See Hoffman, *supra* note 40, at 229 (examining commonly occurring difference between terrorists and combatants); see also George H. Aldrich, *The Taliban, Al Qaeda, and the Determination of Illegal Combatants*, 96 AM. J. INT’L L. 891, 893 (2002) (assessing Al Qaeda unlawful combatants). Regardless of the lawful-unlawful label, where a state uses military force, some form of IHL should apply. See Hoffman, *supra* note 40, at 229-30 (stating IHL applies despite recognition of “misfit between the characteristics of [terrorists] and existing IHL”).

42. See Radsan & Murphy, *supra* note 4, at 1209 (distinguishing armed conflict from sporadic violence); *When Is War Not a War?—The Proper Role of the Law of Armed Conflict in the “Global War on Terror”*, INT’L COMMITTEE OF THE RED CROSS (Mar. 16, 2004), http://www.icrc.org/eng/resources/documents/misc/5xc_mnj.htm [hereinafter *When Is War Not a War?*] (indicating applicable law in absence of armed conflict). Because IHL can significantly reduce one’s “menu of rights”—allowing for killing, detention without review, and military tribunals—it is crucial to distinguish an armed conflict from mere violence. See *When Is War Not a War?*, *supra* (noting importance of distinction between armed conflict and violence). The principal distinction between IHL and IHRL is that the former allows for the killing of enemy combatants. See Report on Terrorism and Human Rights, Inter-Am. Comm’n H.R., OEA/Ser.L/V/II.116, doc. 5 rev. 1 corr. ¶ 109 (2002) (observing differences between IHL and IHRL); see also Dore, *supra* note 30, at 264 (explaining right to target combatants in armed conflict under laws of war).

43. See Radsan & Murphy, *supra* note 4, at 1209 (identifying two types of armed conflict); Vogel, *supra* note 5, at 110 (differentiating international and noninternational armed conflicts).

44. Vogel, *supra* note 5, at 110 (footnotes omitted); see *supra* notes 27, 29, 38 and accompanying text (enumerating various international agreements applicable to armed conflicts between states).

45. Vogel, *supra* note 5, at 110-11 (footnotes omitted); see Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of Non-International Armed Conflicts (Protocol II) art. 1, June 8, 1977, 1125 U.N.T.S. 609 [hereinafter *Additional Geneva Protocol II*] (stating treaty applies to noninternational conflicts); Geneva Convention III, *supra* note 29, art. 3 (prohibiting certain actions regardless of conflict type).

46. See Vogel, *supra* note 5, at 111 (acknowledging emergence of new category of armed conflict). *But see When Is War Not a War?*, *supra* note 42 (suggesting two traditional types of conflict sufficiently cover

Additional Geneva Protocols I and II; however, the United States regards much of Additional Geneva Protocol I and nearly all of Additional Geneva Protocol II as customary international law, and attempts to comply with both protocols whenever feasible.⁴⁷

B. Domestic Law and Use of Force

1. Authorization for Use of Military Force

One week following the 9/11 attacks, Congress passed a joint resolution entitled Authorization for Use of Military Force (AUMF), permitting the President to attack those responsible for the terrorist acts.⁴⁸ Invoking its Article 51 right of self-defense under the U.N. Charter, the Joint Resolution stated that the United States needed to defend itself because “such acts continue to pose an unusual and extraordinary threat to the national security and foreign policy of the United States”⁴⁹ The U.N. Security Council responded to the attack nearly a week earlier by passing a resolution reaffirming the same principles of self-defense.⁵⁰ The AUMF also contained a provision ensuring its consistency with domestic law by stating the provision “intended to constitute specific statutory authorization within the meaning of section 5(b) of the War Powers Resolution.”⁵¹

2. Constitutional Protections

Targeting U.S. citizens abroad implicates the Fourth and Fifth Amendments.⁵² These fundamental protections apply to U.S. citizens whether

“war on terror”). The label *war on terror* can fit into international armed conflicts or noninternational conflicts depending on the location of the militant group. *See id.* (observing rhetorical nature of phrase *war on terror*). For example, engaging the Taliban in Afghanistan is a separate armed conflict (international) from engaging Al Qaeda (noninternational). *See Aldrich, supra* note 41, at 893 (finding merit in characterizing United States’ involvement in Afghanistan and Al Qaeda conflicts separately).

47. *See JAG SUPPLEMENT, supra* note 29, at v-vi (displaying treaties United States has signed and ratified); Radsan & Murphy, *supra* note 4, at 1210 (outlining U.S. approach to Additional Geneva Protocols I and II).

48. *See* Authorization for Use of Military Force, Pub. L. No. 107-40, 115 Stat. 224 (2001) (authorizing use of force against those responsible for 9/11 attacks).

49. *Id.*; *see supra* note 35 and accompanying text (introducing Article 51 exception to general prohibition of use of force).

50. *See* S.C. Res. 1368, ¶¶ 1, 5, U.N. Doc. S/RES/1368 (Sept. 12, 2001) (condemning attacks and reaffirming right to self-defense); *see also* Larson & Malamud, *supra* note 4, at 7 (describing international community’s response to 9/11 attacks).

51. Authorization for Use of Military Force § 2(b)(1); *see* U.S. CONST. art. I, § 8 (empowering Congress in areas relating to hostilities and military force); U.S. CONST. art. II, § 2, cl. 1 (making President “Commander in Chief” of Army, Navy, and Militia); 50 U.S.C. § 1541 (2006) (outlining statutory requirements to comply with U.S. Constitution); Larson & Malamud, *supra* note 4, at 8 (describing triggering mechanism for AUMF).

52. *See* Complaint at 5-16, *Al-Aulaqi v. Panetta*, No. 12-cv-01192-RMC (D.D.C. 2013) (setting forth causes of action arising under Fourth and Fifth Amendments); *see also* U.S. CONST. amend. IV (stating “right of the people to be secure in their persons . . . against unreasonable . . . seizures”); U.S. CONST. amend. V

they are located in the United States or abroad.⁵³ However, an exception to this premise occurs when application of the Bill of Rights outside of the United States is infeasible—that is “impractical and anomalous.”⁵⁴ Infeasibility depends on a fact-specific analysis, namely where the U.S. citizen is located, the practical necessities of the situation, and possible alternatives to infringing on constitutional protections, such as offering a hearing before an impartial decision-maker rather than a jury trial.⁵⁵

a. Procedural Due Process Protections

In the context of the war on terror, one of the first cases to test the U.S. Constitution’s reach abroad was *Hamdi v. Rumsfeld*.⁵⁶ A military group opposed to the Taliban government apprehended Yaser Esam Hamdi, a U.S. citizen located in Afghanistan, for allegedly taking up arms with the Taliban, and turned him over to the U.S. military.⁵⁷ After U.S. officials transferred Hamdi to Guantanamo Bay, but refrained from formally charging him, Hamdi’s father filed a writ of habeas corpus as next friend, challenging the indefinite detention.⁵⁸ The United States Supreme Court ruled that the U.S. government could label its own citizens as enemy combatants because the AUMF authorized use of force against those fighting in Afghanistan.⁵⁹

(stating “[n]o person shall . . . be deprived of life, liberty, or property, without due process of law”).

53. See *Reid v. Covert*, 354 U.S. 1, 5-6 (1957) (requiring United States to act in accordance with constitutional limitations inside or outside United States); Benjamin McKelvey, Note, *Due Process Rights and the Targeted Killing of Suspected Terrorists: The Unconstitutional Scope of Executive Killing Power*, 44 VAND. J. TRANSNAT’L L. 1353, 1369 (2011) (detailing reach of Bill of Rights outside United States).

54. See *Reid*, 354 U.S. at 74-75 (Harlan, J., concurring) (examining when Bill of Rights might not reach citizen outside United States).

55. See *id.* (setting forth context to consider in determining feasibility of Constitution’s reach). In a case arising out of the hostilities in Afghanistan, the Court determined when the Suspension Clause could apply extraterritorially. See *Boumediene v. Bush*, 553 U.S. 723, 771 (2008) (holding Suspension Clause applicable to Guantanamo detainees); see also U.S. CONST. art. I, § 9, cl. 2 (stating “[t]he Privilege of . . . Habeas Corpus shall not be suspended, unless . . . public Safety may require it”). In determining whether the Suspension Clause would reach the petitioners (alien combatants captured in Afghanistan and held at Guantanamo) the *Boumediene* Court set forth and considered the following specific factors: “the citizenship and status of the detainee and the adequacy of the process through which that status determination was made; . . . the nature of the sites where apprehension and then detention took place; and . . . the practical obstacles inherent in resolving the prisoner’s entitlement to the writ.” *Boumediene*, 553 U.S. at 766. The *Boumediene* factors imply that the U.S. Constitution reaches noncitizens abroad when reasonable to apply it to them. See *Radsan & Murphy*, *supra* note 4, at 1239 (suggesting habeas reach as model for due process reach). The decision “suggests that the U.S. government, as a matter of due process, has a constitutional obligation to apply fair and reasonable procedures when it engages in targeted killing of people abroad—whatever their citizenship.” *Id.* at 1240 (relating habeas-reach analysis to other constitutional provisions).

56. 542 U.S. 507 (2004) (plurality opinion); see Michael Epstein, Note, *The Curious Case of Anwar al-Aulaqi: Is Targeting a Terrorist for Execution by Drone Strike a Due Process Violation When the Terrorist Is a United States Citizen?*, 19 MICH. ST. J. INT’L L. 723, 734 & n.75 (2011) (noting *Hamdi* as early case arising out of war in Afghanistan).

57. See *Hamdi*, 542 U.S. at 510 (discussing Hamdi’s detainment while in Afghanistan).

58. See *id.* at 510-11.

59. See *id.* at 518-19 (holding U.S. citizenship does not bar enemy combatant label).

Next, the Court relied on its *Mathews v. Eldridge*⁶⁰ decision in determining whether the principle of procedural due process should prevent the government from holding Hamdi indefinitely.⁶¹ *Mathews* provides a three-factor balancing test to determine the process due in such a situation; the Court must weigh:

First, the private interest that will be affected by the official action; second, the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards; and finally, the Government's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail.⁶²

The Court stated that substantial interests lay on both sides, but the lack of process risked erroneous deprivation of liberty; therefore, "short shrift" could not be paid to the privilege of U.S. citizenship.⁶³ The Court concluded in a plurality opinion that Hamdi was entitled to receive notice of the justification for his detainment and could challenge those justifications before a neutral decision-maker.⁶⁴

In *Hamdan v. Rumsfeld*,⁶⁵ militia forces captured Salim Ahmed Hamdan, a Yemeni national, during battle between the Taliban and the United States.⁶⁶ Subsequently, militia forces turned Hamdan over to the U.S. military, at which point U.S. officials transported him to Guantanamo Bay.⁶⁷ After two years, Hamdan was charged with conspiracy, an offense triable by military commission, to which he filed a petition challenging the means of prosecution.⁶⁸ The Supreme Court held military tribunals could not hear conspiracy charges because no major treaties directing the laws of war identified conspiracy as a violation.⁶⁹ Additionally, Hamdan could not be tried in a military tribunal because it would violate Common Article 3 of the Geneva Convention, which requires a "regularly constituted court."⁷⁰ Common Article 3 applied to Hamdan's case because the Court deemed the conflict between Al

60. 424 U.S. 319 (1976).

61. See *Hamdi*, 542 U.S. at 528-29 (detailing use of *Mathews* balancing test).

62. *Mathews*, 424 U.S. at 335 (internal quotations omitted).

63. See *Hamdi v. Rumsfeld*, 542 U.S. 507, 529-32 (2004) (plurality opinion) (analyzing whether government owed any process to Hamdi).

64. See *id.* at 533.

65. 548 U.S. 557 (2006), *superseded by statute*, Military Commissions Act of 2006, Pub. L. No. 109-366, 120 Stat. 2600.

66. See *id.* at 566.

67. See *id.*

68. See *id.* at 566-67.

69. See *Hamdan*, 548 U.S. at 610.

70. See *id.* at 628-33 (holding Geneva Conventions bar military tribunals); see also Geneva Convention III, *supra* note 29, art. 3(1)(d) (requiring "regularly constituted court" before sentencing or carrying out executions).

Qaeda and the United States to be noninternational and Al Qaeda to be a nonstate actor.⁷¹

b. Substantive Due Process Protections

Substantive due process under the Fifth Amendment protects an individual's right to life, and government action that "shocks the conscience" violates this right.⁷² In the context of seizures, substantive due process analysis is only proper in those cases in which an officer attempts to seize a suspect, but inadvertently injures or kills a bystander.⁷³ Such cases typically fall into two categories: accidental shootings of bystanders by a police officer in pursuit of a suspect, and injuries or deaths to bystander-motorists or pedestrians during a police chase.⁷⁴ In either category, demonstrating that official conduct *shocks*

71. See *Hamdan v. Rumsfeld*, 548 U.S. 557, 630-31 (2006) (explaining conflict between Al Qaeda and United States as noninternational), *superseded by statute*, Military Commissions Act of 2006, Pub. L. No. 109-366, 120 Stat. 2600; *see also supra* note 56 and accompanying text (discussing noninternational armed conflict). The conflict was noninternational because such conflicts require two sovereign states, and Al Qaeda is a nonstate actor. See *Hamdan*, 548 U.S. at 630-31. Because the Supreme Court ruled an armed conflict existed between the United States and Al Qaeda, and Congress authorized the United States to use force, domestic law permits the United States to exercise belligerent powers. See John C. Dehn & Kevin Jon Heller, *Targeted Killing: The Case of Anwar al-Aulaqi*, 159 U. PA. L. REV. PENNUMBRA 175, 190 (2011) (summarizing domestic law as providing authority to attack Al Qaeda).

72. See U.S. CONST. amend. V (stating "[n]o person shall . . . be deprived of life . . . without due process of law"); *Cnty. of Sacramento v. Lewis*, 523 U.S. 833, 841, 846-47 (1998) (articulating right to life and shocks-the-conscience test); *Rochin v. California*, 342 U.S. 165, 172 (1952) (originating shocks-the-conscience language). In assessing whether conduct shocks the conscience, and consequently violates substantive due process, courts typically weigh four factors originally set forth in *Johnson v. Glick*:

[T]he need for the application of force, the relationship between the need and the amount of force that was used, the extent of injury inflicted, and whether force was applied in a good faith effort to maintain or restore discipline or maliciously and sadistically for the very purpose of causing harm.

Johnson v. Glick, 481 F.2d 1028, 1033 (2d Cir. 1973). These factors are improper, however, where "application of force might implicate a more specific constitutional right governed by a different standard." *Graham v. Connor*, 490 U.S. 386, 393 (1989). Courts apply the same analysis to substantive due process claims under the Fifth and Fourteenth Amendments. See *Molina v. District of Columbia*, 824 F. Supp. 2d 4, 9 (D.D.C. 2011).

73. See *Graham*, 490 U.S. at 388 (requiring Fourth Amendment analysis for claims arising from seizure of target); *Warfield v. City of Chi.*, 565 F. Supp. 2d 948, 963-64 (N.D. Ill. 2008) (using substantive due process analysis where officer fired gun near bystanders). Bystanders may not bring claims under the Fourth Amendment because seizures only occur when the government intentionally terminates freedom of movement; "[t]he means of detention must be intentionally applied 'to the object of the detention.'" *Warfield*, 565 F. Supp. 2d at 963 (quoting *Berg v. Cnty. of Allegheny*, 219 F.3d 261, 269 (3d Cir. 2000)).

74. See, e.g., *Meals v. City of Memphis*, 493 F.3d 720, 730-31 (6th Cir. 2007) (holding no substantive due process violation in police chase resulting in bystander-motorists' deaths); *Rucker v. Harford Cnty.*, 946 F.2d 278, 281-82 (4th Cir. 1991) (holding no substantive due process violation after bystander's death by accidental shooting); *Temkin v. Frederick Cnty. Comm'rs*, 945 F.2d 716, 723 (4th Cir. 1991) (holding no substantive due process violation in police chase resulting in bystander-motorist's injuries); *Warfield*, 565 F. Supp. 2d at 964 (holding no substantive due process violation where officer fired into area containing bystanders).

the conscience is an extremely difficult standard to meet.⁷⁵

c. Fourth Amendment Protections

Under the Fourth Amendment, a law enforcement officer may only use deadly force when probable cause suggests that the suspect poses a threat of imminent and serious physical harm to the officer or to a third party.⁷⁶ Courts must utilize the Fourth Amendment's objective-reasonableness standard to assess whether an officer used excessive force during a seizure.⁷⁷ Reasonableness depends on the context of each case and requires weighing the following factors: "[T]he severity of the crime at issue, whether the suspect poses an immediate threat to the safety of the officers or others, and whether he is actively resisting arrest or attempting to evade arrest by flight."⁷⁸ Borrowing from the law of self-defense, imminence is temporal in nature, described as occurring "'almost immediately,' 'upon the instant,' or 'at once;'" however, government officials may use force in situations where private citizens cannot.⁷⁹

75. See *Meals*, 493 F.3d at 730 (holding absent harmful intent, officer's conduct did not violate due process despite ignoring department policy); *Rucker*, 946 F.2d at 282 (noting absent intention to harm bystander, officer must shoot into crowd to violate due process); *Warfield*, 565 F. Supp. 2d at 964 (noting recklessness even falls short of shocks-the-conscience standard).

76. See *Scott v. Harris*, 550 U.S. 372, 383-84 (2007) (permitting deadly force to prevent imminent harm to public); *Tennessee v. Garner*, 471 U.S. 1, 11-12 (1985) (allowing deadly force when probable cause suggests suspect poses threat of serious physical harm). In *Garner*, a police officer's use of deadly force to stop a suspect who was fleeing from the burglary of an unoccupied house violated the Fourth Amendment because the officer "could not reasonably have believed that Garner . . . posed any threat," and the officer justified the use of force solely on the need to prevent escape. See *Garner*, 471 U.S. at 21. By contrast, in *Scott*, a law enforcement officer did not violate the Fourth Amendment when he terminated a high-speed pursuit of a fleeing motorist (Harris) by pushing his vehicle off the road—causing him to crash and rendering him a paraplegic—because the high-speed pursuit posed imminent threat of injury to pedestrians and other motorists. See *Scott*, 550 U.S. at 383-84. The Supreme Court found dispositive: the number of lives at risk, Harris's culpability, and the innocence of bystanders. See *id.* at 384.

77. See *Garner*, 471 U.S. at 7 (subjecting apprehension by deadly force to Fourth Amendment's reasonableness requirement); *Graham*, 490 U.S. at 388 (holding objective-reasonableness standard proper method to analyze excessive-force claim); see also J. Michael McGuinness, *Shootings by Police Officers Are Analyzed Under Standards Based on Objective Reasonableness*, N.Y. ST. B.J., Sept. 2000, at 17, 20-21 (detailing objective-reasonableness standard).

78. *Graham v. Connor*, 490 U.S. 386, 396 (1989) (setting forth factors in assessing reasonableness); see McGuinness, *supra* note 77, at 20 (collecting case law regarding objective reasonableness).

79. See JOSHUA DRESSLER, UNDERSTANDING CRIMINAL LAW 206 (2d ed. 1995) (describing temporal nature of imminence through various terms); V.F. Nourse, *Self-Defense and Subjectivity*, 68 U. CHI. L. REV. 1235, 1242 (2001) (quoting WAYNE R. LAFAVE, CRIMINAL LAW § 5.7(d), at 495-96 (3d ed. 2000)); see also Luis E. Chiesa & Alexander K.A. Greenawalt, *Beyond War: Bin Laden, Escobar, and the Justification of Targeted Killing*, 69 WASH. & LEE L. REV. 1371, 1430 (2012) (arguing officers have authorization to use force where private citizen cannot under laws of self-defense).

C. Obama Administration Justifications

The Obama Administration grounds its ability to carry out drone strikes on the basis that the United States is at war.⁸⁰ Because Al Qaeda continues to pose a threat through its ongoing attempts to attack the United States, the AUMF allows the President to use lethal force against Al Qaeda as a matter of self-defense.⁸¹ Furthermore, the legal authority to use force is not limited to those members of Al Qaeda located in Afghanistan because Congress and the federal courts did not geographically restrict where the United States could carry out attacks.⁸² Nonetheless, the AUMF does not permit the United States to “use military force whenever or wherever [it] want[s]” because international law requires the United States to respect the sovereignty of other nations.⁸³ The United States may only breach that sovereignty when the other nation consents, or when the other nation is unwilling or unable to eliminate a threat.⁸⁴

80. See U.S. DEP’T OF JUSTICE, LAWFULNESS OF A LETHAL OPERATION DIRECTED AGAINST A U.S. CITIZEN WHO IS A SENIOR OPERATIONAL LEADER OF AL-QA’IDA OR AN ASSOCIATED FORCE 2 (undated) [hereinafter DOJ WHITE PAPER], available at http://msnbcmedia.msn.com/i/msnbc/sections/news/020413_DOJ_White_Paper.pdf (stating “United States is in an armed conflict with al-Qa’ida and its associated forces”); Eric Holder, Attorney Gen., U.S. Dep’t of Justice, Address at Northwestern University School of Law (Mar. 5, 2012), available at <http://www.justice.gov/iso/opa/ag/speeches/2012/ag-speech-1203051.html> (characterizing United States as “a nation at war”); Harold Hongju Koh, Legal Advisor, U.S. Dep’t of State, The Obama Administration and International Law, Annual Meeting of the American Society of International Law (Mar. 25, 2012), available at <http://www.state.gov/s/l/releases/remarks/139119.htm> (stating United States “finds itself engaged in several armed conflicts”); see also *Hamdan v. Rumsfeld*, 548 U.S. 557, 630-31 (2006) (holding armed conflict exists between Al Qaeda and United States), *superseded by statute*, Military Commissions Act of 2006, Pub. L. No. 109-366, 120 Stat. 2600.

81. See Holder, *supra* note 80 (observing Al Qaeda as a “continuing threat”); Koh, *supra* note 80 (recognizing “ongoing armed conflict[]” between United States and Al Qaeda); see also Authorization for Use of Military Force, Pub. L. No. 107-40, §2(a), 115 Stat. 224, 224 (2001) (authorizing force against those responsible for 9/11 terrorist attacks).

82. See DOJ WHITE PAPER, *supra* note 80, at 3-5 (arguing United States may use force against Al Qaeda outside active hostilities area); Holder, *supra* note 80 (observing lack of geographical scope in authorizing force against Al Qaeda); see also Authorization for Use of Military Force §2(a) (authorizing President to take military action without referencing geographical territory). Attorney General Holder stated: “We are at war with a stateless enemy [Al Qaeda], prone to shifting operations from country to country . . . [A] Qaeda and its associates have direct[ed] several attacks . . . against us from countries other than Afghanistan.” Holder, *supra* note 80.

83. Holder, *supra* note 80; see U.N. Charter art. 2, para. 4 (prohibiting attack on another state’s territory); Larson & Malamud, *supra* note 4, at 4 (stating U.N. Charter’s principle prohibition on use of force). The Obama Administration has been clear in its intention to comply with domestic and international law regarding the war on terror and the use of drones. See Koh, *supra* note 80 (“[T]he Obama Administration is firmly committed to complying with all applicable law . . . in all aspects of . . . ongoing armed conflicts.”).

84. See DOJ WHITE PAPER, *supra* note 80, at 5 (identifying two scenarios under which extraterritorial use of force proper under international law); Holder, *supra* note 80 (noting circumstances under which force in foreign territory complies with international legal principles); Koh, *supra* note 80 (explaining factors determining permissible extraterritorial use of force); see also Charlie Savage, *Secret U.S. Memo Made Legal Case To Kill a Citizen*, N.Y. TIMES, Oct. 8, 2011, <http://www.nytimes.com/2011/10/09/world/middleeast/secret-us-memo-made-legal-case-to-kill-a-citizen.html> (reporting contents of legal memorandum justifying targeting of Awlaki). Harold Koh, Legal Advisor to the U.S. Department of State, identified three factors to consider before using extraterritorial force: “the imminence of the threat, the sovereignty of the other states involved,

Further consideration must be given to those combatants who are U.S. citizens, although citizenship does not grant one immunity from attack.⁸⁵ In considering the constitutional rights of a U.S. citizen as a potential target, the Obama Administration concluded that governmental interests in protecting U.S. citizens outweigh any intrusion into Fourth Amendment interests.⁸⁶ Fifth Amendment due process protections, along with international law, permit the United States to target its own citizens when: “[T]he individual poses an imminent threat of violent attack against the United States . . . capture is not feasible[,] and . . . the operation would be conducted in a manner consistent with applicable law of war principles.”⁸⁷

According to the Obama Administration, imminence requires considering the United States’ window of opportunity to attack, the potential harm to U.S. citizens from missing that window, and the prevention of future attacks against the United States.⁸⁸ Feasibility requires considering the terrorist’s location, the terrorist’s actions, and whether the United States can capture the terrorist without risk to civilians or military personnel before the terrorist harms U.S. citizens.⁸⁹ To comply with international law, use of force must satisfy the

and the willingness and ability of those states to suppress the threat the target poses.” Koh, *supra* note 80.

85. See DOJ WHITE PAPER, *supra* note 80, at 5 (stating “U.S. citizenship . . . does not give . . . [a] person constitutional immunity from attack”); Holder, *supra* note 80 (examining potential constitutional protections for U.S. citizens engaged in hostilities against United States); see also *Ex parte Quirin*, 317 U.S. 1, 15 (1942) (holding U.S. citizenship does not shield enemy belligerent from consequences of his belligerency). During World War II, a U.S. citizen and seven German citizens received training at a sabotage school in Germany to carry out attacks on war facilities in the United States. See *Quirin*, 317 U.S. at 7. After entering the United States, the saboteurs were arrested and tried before a military tribunal, having had their habeas corpus petitions denied. See *id.* at 6-7. The Supreme Court held that the military commission was lawful in regard to all petitioners, including the U.S. citizen. See *id.* at 20 (affirming decision of lower court to deny petitions for habeas corpus).

86. See DOJ WHITE PAPER, *supra* note 80, at 9 (arguing no Fourth Amendment violation during strike against U.S. citizen in limited circumstances).

87. Holder, *supra* note 80 (stating requirements to target U.S. citizens); see DOJ WHITE PAPER, *supra* note 80, at 6 (setting forth three necessary requirements allowing for use of lethal force without further process); Savage, *supra* note 84 (reporting legal memorandum justifying targeting of Awlaki required infeasibility of capture and imminent threat). A high-level U.S. official, possessing sufficient knowledge of the situation, must make the determination on whether an individual poses an imminent threat. See DOJ WHITE PAPER, *supra* note 80, at 6.

88. See Holder, *supra* note 80 (laying out factors in determining whether actor poses imminent threat); see also DOJ WHITE PAPER, *supra* note 80, at 7 (describing imminence in context of war on terror). Imminence “does not require the United States to have clear evidence that a specific attack on U.S. persons and interests will take place in the immediate future.” DOJ WHITE PAPER, *supra* note 80, at 7. Instead, officials should assess imminence based on whether the individual “is an operational leader of al-Qa’ida or an associated force and is personally and continually involved in planning terrorist attacks against the United States,” and whether “there is . . . evidence suggesting that he has renounced or abandoned such activities.” *Id.* at 8. Attorney General Holder asserted that because Al Qaeda continually plans attacks against the United States and does not act as a traditional military force, the imminence requirement “does not require the President to delay action until some theoretical end-stage of planning—when the precise time, place, and manner of an attack become clear.” Holder, *supra* note 80. Such a delay “would create an unacceptably high risk that . . . Americans would be killed.” *Id.*

89. See Holder, *supra* note 80 (explaining factors in determining feasibility); see also DOJ WHITE PAPER,

fundamental principles of necessity, discrimination, and proportionality.⁹⁰ Thus, the United States may strike its own citizens in certain instances, even in the absence of judicial process.⁹¹ The Obama Administration has acknowledged that the legal framework surrounding drone strikes needs to be further developed, which will require congressional involvement.⁹²

D. U.S. Drone Strikes on Americans

1. Anwar al-Awlaki

Al-Awlaki, a dual U.S.-Yemeni citizen, was born in New Mexico in 1971 to Yemeni parents, but spent most of his childhood in Yemen where the glory of fighting the Soviet army in Afghanistan pervaded his cultural upbringing.⁹³ Al-Awlaki eventually returned to the United States in 1991 to attend college in Denver, at which point he began preaching as an imam.⁹⁴ Later, al-Awlaki

supra note 80, at 8 (expanding upon idea of feasibility of capture). Holder further stated: “Given the nature of how terrorists act and where they tend to hide, it may not always be feasible to capture a United States citizen terrorist who presents an imminent threat of violent attack.” Holder, *supra* note 80.

90. See DOJ WHITE PAPER, *supra* note 80, at 8 (requiring lethal operations to comply with “fundamental law-of-war principles”); Holder, *supra* note 80 (noting “fundamental law of war principles”). Necessity reflects the *jus ad bellum* requirement that force be used only as a last resort. See O’BRIEN, *supra* note 20, at 16 (describing last-resort requirement before invoking rights of war); DiMeglio, *supra* note 19, at 127 (listing “last resort” among traditional requirements of *jus ad bellum*). Discrimination and proportionality arise in the *jus in bello* principle. See DiMeglio, *supra* note 19, at 129 (outlining requirements of *jus in bello*). The Department of Justice (DOJ) White Paper and Attorney General Holder identified a fourth principle—humanity—requiring the United States to use weapons that do not inflict unnecessary suffering; however, *jus in bello*’s requirement of “proportionality” incorporates this principle. See DOJ WHITE PAPER, *supra* note 80, at 8 (setting forth humanity as one of four fundamental law-of-war principles); Gardam, *supra* note 21, at 399 (explaining weapon causing unnecessary suffering constitutes violation of *jus in bello*); Holder, *supra* note 80 (introducing principle of humanity).

91. See Holder, *supra* note 80 (describing circumstances in which judicial process impracticable).

92. See Scott Shane, *Election Spurred a Move To Codify U.S. Drone Policy*, N.Y. TIMES, Nov. 24, 2012, <http://www.nytimes.com/2012/11/25/world/white-house-presses-for-drone-rule-book.html> (reporting Obama Administration’s push to formalize rules and procedures regarding drone use).

93. See *Al-Aulaqi v. Obama*, 727 F. Supp. 2d 1, 10 (D.D.C. 2010) (outlining al-Awlaki’s birth and upbringing); Mazzetti et al., *supra* note 8 (noting al-Awlaki’s parents’ Yemeni citizenship); Scott Shane & Souad Mekhennet, *Imam’s Path from Condemning Terror To Preaching Jihad*, N.Y. TIMES, May 8, 2010, <http://www.nytimes.com/2010/05/09/world/09awlaki.html> (describing al-Awlaki’s childhood move to Yemen and cultural upbringing). Al-Awlaki was born in New Mexico because his father, Nasser al-Awlaki (Nasser), was studying agriculture there. See Shane & Mekhennet, *supra*. Nasser was a prominent Yemeni figure who was close to the authoritarian Yemeni President, Ali Abdullah Saleh, and served as Yemen’s agriculture minister and chancellor of two universities. See *id.*

94. See Susan Schmidt, *Imam from Va. Mosque Now Thought To Have Aided Al-Qaeda*, WASH. POST, Feb. 27, 2008, http://articles.washingtonpost.com/2008-02-27/politics/36918436_1_qaeda-al-qaeda-al-ayeri (stating al-Awlaki pursued engineering degree upon returning to United States); Shane & Mekhennet, *supra* note 93 (discussing al-Awlaki moving to Colorado, pursuing engineering degree, and preaching at mosque). Al-Awlaki studied engineering at Colorado State University and upon graduation preached at the Islamic Center of Fort Collins. See Schmidt, *supra* (noting where al-Awlaki studied engineering); Shane & Mekhennet, *supra* note 93 (introducing al-Awlaki’s success as imam at local mosque). While in Colorado, al-Awlaki allegedly encouraged another student to leave the United States for Chechnya to take part in the jihad

relocated to San Diego and eventually Virginia, where he continued to preach while developing his first terrorist connections as a spiritual leader to two 9/11 hijackers—Khalid al-Mihdhar and Nawaf al-Hazmi.⁹⁵ Following the 9/11 attacks, FBI agents questioned al-Awlaki, but could not conclude al-Awlaki's connection to Mihdhar and Hazmi was more than a coincidence.⁹⁶ After raids on domestic Muslim communities in response to the 9/11 attacks, al-Awlaki became enraged and left the United States, eventually returning to Yemen.⁹⁷

In Yemen, al-Awlaki became a popular figure through various Internet video-sermons and blog postings, calling for attacks on the United States.⁹⁸ In 2009, al-Awlaki's role in targeting the United States grew from merely encouraging such attacks to an active participation in them as a leader of Al Qaeda in the Arabian Peninsula (AQAP).⁹⁹ From this position, al-Awlaki generated ties to Umar Farouk Abdulmutallab, the Nigerian man who attempted to detonate a bomb hidden in his underwear during a flight bound for Detroit on December 25, 2009.¹⁰⁰ In response to his active participation in

against the Russians. See Shane & Mekhennet, *supra* note 93 (examining al-Awlaki's implicit support of jihad).

95. See 9/11 COMMISSION REPORT, *supra* note 9, at 221, 229-30 (detailing al-Awlaki's extended contact with two 9/11 hijackers); Shane & Mekhennet, *supra* note 93 (reporting al-Awlaki's move to San Diego and Virginia, and his development of terrorist connections). In San Diego, al-Awlaki preached at the Arribat al-Islami mosque, before leaving for Virginia to become imam of a larger mosque, Dar al-Hijrah. See Shane & Mekhennet, *supra* note 93.

96. See 9/11 COMMISSION REPORT, *supra* note 9, at 221, 229-30 (examining FBI investigations of al-Mihdhar's and al-Hazmi's relationship to al-Awlaki). The FBI and the 9/11 Commission shared the belief that al-Hazmi's connection to al-Awlaki in Virginia may have been more than a coincidence; however, the FBI lacked sufficient evidence to detain al-Awlaki, and the 9/11 Commission was unable to draw a conclusion about the relationship. See *id.*; see also Schmidt, *supra* note 94 (observing FBI lacked reason to detain al-Awlaki).

97. See *Al-Aulaqi*, 727 F. Supp. 2d at 10 (noting al-Awlaki's return to Yemen in 2004); Shane & Mekhennet, *supra* note 93 (reporting raids on Muslim communities as impetus for al-Awlaki leaving United States).

98. See Jarret M. Brachman & Alix N. Levine, *You Too Can Be Awlaki!*, FLETCHER F. WORLD AFF., Winter 2011, at 25, 28-32 (detailing al-Awlaki's rise to popularity through Internet postings and videos); Aamer Madhani, *Cleric al-Awlaki Dubbed 'bin Laden of the Internet'*, USA TODAY, Sept. 30, 2011, http://www.usatoday.com/news/nation/2010-08-25-1A_Awlaki25_CV_N.htm (reporting al-Awlaki's popularity and dangerousness due to his many Internet sermons); Shane & Mekhennet, *supra* note 93 (setting forth al-Awlaki's statement, "jihad against America is binding . . . on every . . . able Muslim.").

99. Designation of Anwar al-Aulaqi Pursuant to Executive Order 13224 and the Global Terrorism Sanctions Regulations, 75 Fed. Reg. 43,233, 43,234 (July 23, 2010) (alleging al-Awlaki's leadership and decision-making role in AQAP); Shane, *supra* note 10 (reporting al-Awlaki's shift from encouragement to participation in attacks against United States).

100. See *Al-Aulaqi v. Obama*, 727 F. Supp. 2d 1, 10 (D.D.C. 2010) (underscoring al-Awlaki's ties to Abdulmutallab); Shane, *supra* note 10 (linking al-Awlaki to Abdulmutallab); see also Anahad O'Connor & Eric Schmitt, *Terror Attempt Seen as Man Tries To Ignite Device on Jet*, N.Y. TIMES, Dec. 25, 2009, <http://www.nytimes.com/2009/12/26/us/26plane.html> (chronicling Abdulmutallab's attempt to ignite explosive while aboard plane). U.S. officials were also concerned about al-Awlaki's connection to Nidal Malik Hasan, the United States Army Major convicted and sentenced to death for the November 5, 2009 shooting at Fort Hood, Texas; however, al-Awlaki was reportedly "noncommittal" to Hasan's plan. See Mazzetti et al., *supra* note 7 (reporting al-Awlaki's "cautious and noncommittal" replies to Hasan's emails); Shane, *supra* note 10

terrorist activities, the United States sought to cut off al-Awlaki's financial interests by officially classifying him as a "Specially Designated Global Terrorist."¹⁰¹ Additionally, the U.N. placed him on their list of known Al Qaeda associates, freezing al-Awlaki's assets and ability to travel internationally.¹⁰² Despite concerns over al-Awlaki's participation in AQAP and involvement in terrorist plots, the United States failed to charge al-Awlaki with any crime.¹⁰³

In early 2010, the United States placed al-Awlaki on "kill lists," which authorized Joint Special Operations Command (JSOC) and the CIA to target al-Awlaki should they locate him.¹⁰⁴ A secret memorandum, the contents of which were leaked to the media, considered legal justifications for targeting al-Awlaki, including his active participation in a war between the United States and Al Qaeda, the significant threat he posed to Americans, and the infeasibility of his capture.¹⁰⁵ Al-Awlaki's father, Nasser, attempted to challenge his son's placement on the U.S. government's kill lists, but the United States District Court for the District of Columbia ruled that he did not have standing to bring the case, and even if he did, the political question doctrine would bar his claim.¹⁰⁶ The court found that because al-Awlaki was not yet in custody, and therefore had the ability to challenge his placement on the lists, his father could not establish next-friend standing.¹⁰⁷ After an unsuccessful attempt in May 2011, the CIA killed al-Awlaki in a September 30,

(noting intense scrutiny of al-Awlaki due to his link to Hasan); *see also* Billy Kenber, *Nidal Hasan Convicted of Fort Hood Killings*, WASH. POST, Aug. 23, 2013, http://articles.washingtonpost.com/2013-08-23/world/41439110_1_nidal-malik-hasan-death-sentence-fort-hood (reporting verdict and sentencing in Hasan trial); Robert D. McFadden, *Army Doctor Held in Ft. Hood Rampage*, N.Y. TIMES, Nov. 5, 2009, <http://www.nytimes.com/2009/11/06/us/06forthood.html> (describing Hasan's suspected role in Fort Hood shootings).

101. *See* Designation of Anwar al-Aulaqi Pursuant to Executive Order 13224 and the Global Terrorism Sanctions Regulations, 75 Fed. Reg. at 43,234 (blocking al-Awlaki's U.S. property interests); *see also Al-Aulaqi*, 727 F. Supp. 2d at 10 (noting U.S. Treasury Department's Office of Foreign Assets Control classified al-Awlaki "Specially Designated Global Terrorist").

102. *See* Press Release, Security Council, Security Council Al-Qaida and Taliban Sanctions Committee Adds Names of Four Individuals to Consolidated List, U.N. Press Release SC/9989 (July 20, 2010), *available at* <http://www.un.org/News/Press/docs/2010/sc9989.doc.htm> (reporting U.N.'s action to freeze al-Awlaki's property interests and block his travel).

103. *See Al-Aulaqi*, 727 F. Supp. 2d at 10.

104. *See id.* at 11 (setting forth plaintiff's claim regarding United States' placement of al-Awlaki on kill lists); Dana Priest, *U.S. Military Teams, Intelligence Deeply Involved in Aiding Yemen on Strikes*, WASH. POST, Jan. 27, 2010, <http://www.washingtonpost.com/wp-dyn/content/article/2010/01/26/AR2010012604239.html> (detailing JSOC's authorization to kill or capture al-Awlaki based on confidential sources); Shane, *supra* note 10 (outlining approval of targeted killing of al-Awlaki).

105. *See* Savage, *supra* note 84. The Justice Department's Office of Legal Counsel—principally David Barron and Martin Lederman—prepared the secret, fifty-page legal memorandum, but confidential sources discussed its contents with reporters. *See id.* (describing creation and disclosure of secret memorandum).

106. *See* *Al-Aulaqi v. Obama*, 727 F. Supp. 2d 1, 12, 35, 52 (D.D.C. 2010) (outlining claims for relief and dismissal of case).

107. *See id.* at 16-20 (ruling al-Awlaki's father did not establish standing through al-Awlaki's hiding from U.S. officials).

2011 drone strike.¹⁰⁸

2. Samir Khan

Samir Khan, an American citizen born in Saudi Arabia to Pakistani parents, moved at age seven to New York, where he grew up.¹⁰⁹ In 2001, at age fifteen, he attended a summer camp sponsored by the Islamic Organization of North America, which influenced him to become a devout, practicing Muslim.¹¹⁰ When he and his parents moved to North Carolina in 2004, Khan became increasingly radical, eventually creating an Internet blog entitled, “Inshallahshaheed”—meaning “a martyr soon if God wills”—that he operated from his parents’ basement.¹¹¹ To Khan, jihad was a mandatory requirement for all Muslims, and he was fulfilling his obligation through his blog.¹¹² Bloodshed became a recurrent theme in his postings, and he attempted to convey the religious grounds for attacking American soldiers.¹¹³ Law-enforcement officials, however, never confronted Khan about his blog because he was only disseminating information, rather than inciting violence.¹¹⁴

In 2009, Khan followed in al-Awlaki’s footsteps, traveling to Yemen to join AQAP and continue his support of jihad.¹¹⁵ From his position in AQAP, Khan proclaimed he was “proud to be a traitor to America.”¹¹⁶ In Yemen, Khan published the ideological online magazine *Inspire*, which featured advice on how to wage jihad.¹¹⁷ Khan’s articles, along with al-Awlaki’s sermons, were effective in Al Qaeda’s outreach to English speaking sympathizers.¹¹⁸ On September 30, 2011, Khan died in the same UAV strike that killed his mentor

108. See Mazzetti et al., *supra* note 8 (examining multiple strikes targeting al-Awlaki).

109. See Alice Fordham, *25-Year-Old American Is Killed with Mentor Anwar al-Aulaqi in Drone Strike*, WASH. POST, Sept. 30, 2011, http://www.washingtonpost.com/world/national-security/second-american-is-killed-with-mentor-aulaqi-in-drone-strike/2011/09/30/gIQA2gIBL_story.html (exploring Khan’s background); Michael Moss & Souad Mekhennet, *An Internet Jihad Aims at U.S. Viewers*, N.Y. TIMES, Oct. 15, 2007, <http://www.nytimes.com/2007/10/15/us/15net.html>.

110. See Moss & Mekhennet, *supra* note 109 (reporting Khan’s initial influences).

111. See *id.*

112. See *id.*

113. Michael Moss, *What To Do About Pixels of Hate*, N.Y. TIMES, Oct. 21, 2007, <http://www.nytimes.com/2007/10/21/weekinreview/21moss.html> (exploring Khan’s belief of religious justification for attack on U.S. soldiers); Moss & Mekhennet, *supra* note 109 (describing Khan’s increasingly violent rhetoric).

114. See Fordham, *supra* note 109 (reporting FBI could not shut down Khan’s blog because no incitement of violence); Moss & Mekhennet, *supra* note 109 (noting lack of law enforcement confrontation).

115. See Brachman & Levine, *supra* note 98, at 38; Robbie Brown & Kim Severson, *2nd American in Strike Waged Qaeda Media War*, N.Y. TIMES, Sept. 30, 2011, <http://www.nytimes.com/2011/10/01/world/middleeast/samir-khan-killed-by-drone-spun-out-of-the-american-middle-class.html>.

116. See Fordham, *supra* note 109 (internal quotation marks omitted).

117. See Brown & Severson, *supra* note 115 (reporting creation of Khan’s magazine); Fordham, *supra* note 109 (examining general content of Khan’s magazine).

118. See Brachman & Levine, *supra* note 98, at 38 (outlining Khan’s transformation into key member of AQAP); Fordham, *supra* note 109 (labeling Khan and al-Awlaki “effective . . . propagandists and recruiters”).

al-Awlaki.¹¹⁹ U.S. officials specifically decided not to add Khan to the kill lists because there was little evidence tying Khan to any specific plot, and CIA officials were not aware that he was traveling with al-Awlaki when they carried out the strike, making his death collateral damage.¹²⁰

3. *Abdulrahman al-Awlaki*

Abdulrahman, a U.S. citizen and the son of al-Awlaki, was born in Denver, Colorado in 1995.¹²¹ In late September 2011, long after his family moved to Yemen, Abdulrahman left his home in Sanaa, the Yemeni capital, to try to locate his father; however, the CIA killed al-Awlaki in a drone strike before Abdulrahman could reach him.¹²² Less than three weeks later, a reported JSOC military strike carried out in Yemen left nine dead, including sixteen-year-old Abdulrahman.¹²³ U.S. officials indentified Ibrahim al-Banna, a senior AQAP operative, as the target of the military strike and claimed no U.S. officials knew Abdulrahman was at the targeted location, meaning his death was also collateral damage.¹²⁴ U.S. officials did not confirm whether the military strike killed Abdulrahman, nor did they indicate whether they were investigating the strike; instead, a Central Command spokesman stated, “it’s of utmost importance to us to avoid civilian casualties or collateral damage.”¹²⁵

III. ANALYSIS

A. *Use of Force in Yemen and Applicable Laws*

1. *Use of Force in Response to 9/11*

To address the legality of the U.S. strikes that killed al-Awlaki, Khan, and

119. See Fordham, *supra* note 109; Mazzetti et al., *supra* note 8.

120. See Fordham, *supra* note 109 (stating CIA officials not aware of Khan’s presence with al-Awlaki); Mazzetti et al., *supra* note 7 (reporting Khan’s absence from kill lists); Savage, *supra* note 84 (reporting Khan’s death as collateral damage).

121. See Finn & Miller, *supra* note 12.

122. See *id.* (introducing events surrounding Abdulrahman’s movement in Yemen); Mazzetti et al., *supra* note 8 (describing drone strike killing Abdulrahman’s father).

123. See Finn & Miller, *supra* note 12 (reporting nine dead in attack in Yemen); Craig Whitlock, *U.S. Airstrike That Killed American Teen in Yemen Raises Legal, Ethical Questions*, WASH. POST, Oct. 22, 2011, http://www.washingtonpost.com/world/national-security/us-airstrike-that-killed-american-teen-in-yemen-raises-legal-ethical-questions/2011/10/20/gIQAdvUY7L_story.html (setting forth JSOC as responsible for attack). Reporters were unable to confirm whether a piloted fighter jet or a UAV fired the missile killing Abdulrahman. See Whitlock, *supra*.

124. See Whitlock, *supra* note 123. Intelligence placing Ibrahim al-Banna at the targeted location—a modest outdoor eating establishment—was incorrect, thus, al-Banna did not perish in the strike. See Mazzetti et al., *supra* note 7. U.S. officials, speaking on the condition of anonymity, stated Abdulrahman was “a bystander, in the wrong place at the wrong time.” Whitlock, *supra* note 123.

125. See Whitlock, *supra* note 123 (internal quotation marks omitted) (noting U.S. officials’ unwillingness to make definitive public statement on Abdulrahman’s death).

Abdulahman, this Note must first determine whether international and domestic law permit the United States to use force in Yemen.¹²⁶ Domestically, the initial resort to force contemplated in the AUMF complied with statutory and constitutional law requiring Congress and the President to exercise collective judgment in entering into hostilities.¹²⁷ Specifically, the AUMF represented collective action, with Congress authorizing the President to use all necessary force to prevent the United States from enduring future acts of terrorism.¹²⁸ The Supreme Court impliedly held the AUMF to be constitutional by ruling that it gave the President the authority to engage in conduct that is a “fundamental incident of waging war.”¹²⁹

Under international law, the AUMF complied with the modern codification of *jus ad bellum* because the AUMF invoked the right of self-defense as permitted by Article 51 of the U.N. Charter.¹³⁰ The United States could breach the territorial integrity of nations such as Afghanistan—and perhaps Yemen—because terrorist-actors presented an “extraordinary threat to the national

126. See U.S. CONST. art. I, § 8, cls. 10-16 (empowering Congress in areas relating to hostilities and military force); *id.* art. II, § 2, cl. 1 (making President “Commander in Chief” of Army, Navy, and Militia); 50 U.S.C. § 1541 (2006) (outlining statutory requirements to comply with U.S. Constitution); U.N. Charter art. 2, para. 4 (prohibiting force infringing on another state’s sovereignty); U.N. Charter art. 51 (setting forth self-defense exception); O’BRIEN, *supra* note 20, at 16 (listing criteria required before using force); DiMeglio, *supra* note 19, at 127-128 (enumerating requirements to comply with *jus ad bellum* principle). Domestic law requires the “collective judgment of both the Congress and the President . . . apply to the introduction of United States Armed Forces into hostilities, or into situations where imminent involvement in hostilities is clearly indicated by the circumstances, and to the continued use of such forces in hostilities or in such situations.” 50 U.S.C. § 1541(a). International law requires compliance with the customary *jus ad bellum* principle as well as the principle’s modern codification in the U.N. Charter. See U.N. Charter art. 2, para. 4 (codifying general prohibition against use of force); *id.* art. 51 (allowing use of force in self-defense); O’BRIEN, *supra* note 20, at 16 (outlining traditional *jus ad bellum* requirements); DiMeglio, *supra* note 19, at 127-128 (reiterating traditional requirements of *jus ad bellum* principle).

127. See U.S. CONST. art. I, § 8, cl. 11 (granting Congress power to declare War); U.S. CONST. art. II, § 2, cl. 1 (declaring President Commander-in-Chief of armed forces); 50 U.S.C. § 1541 (requiring joint participation by legislative and executive branches in entering hostilities); Authorization for Use of Military Force, Pub. L. No. 107-40, § 2, 115 Stat. 224, 224 (2001) (representing congressional approval for President to act).

128. See Authorization for Use of Military Force §2 (authorizing use of force against those responsible for 9/11 attacks pursuant to self-defense right). In drafting the AUMF, Congress was careful to grant the President authority to use force consistent with statutory and constitutional law. See *id.* § 2(b) (containing provision intended to comply with War Powers Resolution); see also 50 U.S.C. § 1541 (outlining requirements to conform to U.S. Constitution). The provision was “intended to constitute specific statutory authorization within the meaning of section 5(b) of the War Powers Resolution.” Authorization for Use of Military Force § 2(b)(1).

129. See *Hamdi v. Rumsfeld*, 542 U.S. 507, 519 (2004) (plurality opinion) (holding AUMF conferred powers implicit to its purpose); see also Dore, *supra* note 30, at 263 (noting Supreme Court’s treatment of AUMF).

130. See Authorization for Use of Military Force, Pub. L. No. 107-40, pmb., 115 Stat. 224 (2001) (enacting joint resolution to exercise self-defense); U.N. Charter art. 51 (allowing state to exercise self-defense notwithstanding general prohibition on use of force); see also Larson & Malamud, *supra* note 4, at 4 (noting U.N. Charter modern codification of *jus ad bellum*).

security . . . of the United States.”¹³¹ Additionally, the AUMF seemingly complied with customary *jus ad bellum* requirements.¹³² The AUMF provided a public declaration, announcing a just cause: the United States’ intention of defending against “extraordinary threats to the nation[’s] security.”¹³³ The Executive had proper authority to resort to force after the 9/11 attacks.¹³⁴ The United States employed force as a last resort, authorizing it only after sustaining the 9/11 attacks.¹³⁵ This use of force satisfied the principle of macro-proportionality, pitting good versus evil, or the United States versus terrorists.¹³⁶ Finally, although it is unclear if the AUMF complied with the probability-of-success requirement, self-defense justifications may supersede probability of success because they are considered fundamentally axiomatic.¹³⁷

2. Hostilities and Applicable Law

All three branches of the U.S. government consider the hostilities resulting from the AUMF to be an armed conflict between the United States and those parties contemplated in the AUMF, including Al Qaeda and the Taliban.¹³⁸ First, in the Department of Justice White Paper (DOJ White Paper) and separate speeches by Eric Holder, U.S. Attorney General, and Harold Koh, Legal Advisor to the U.S. Department of State; the Obama Administration referred to the United States as a nation at war.¹³⁹ Second, in its initial authorization of force and subsequent legislation, Congress impliedly confirmed the characterization of the disputes as armed conflicts.¹⁴⁰ Third, in

131. Authorization for Use of Military Force pmb. (declaring terrorist attacks continue to pose threat to United States). The U.N. Security Council confirmed the United States’ right to use force as a means of self-defense in passing its own resolution shortly after September 11, 2001. See S.C. Res. 1368, *supra* note 50, ¶ 5 (responding to 9/11 attacks by confirming state’s right to self-defense); Larson & Malamud, *supra* note 4, at 7-8 (noting international community’s response shortly after 9/11 attacks).

132. See *infra* notes 133-137 and accompanying text.

133. Authorization for Use of Military Force pmb. (declaring intention of Joint Resolution); see O’BRIEN, *supra* note 20, at 21 (noting self-defense justification axiomatic); DiMeglio, *supra* note 19, at 126-27 (describing traditional *jus ad bellum* principles; among them, right intention and public declaration).

134. See Authorization for Use of Military Force § 2(a) (authorizing President to use force against those responsible for 9/11 attacks); see also DiMeglio, *supra* note 19, at 127 (requiring proper authority to wage war under *jus ad bellum* principles).

135. See Authorization for Use of Military Force pmb. (stating September 18, 2001 date of enactment); see also DiMeglio, *supra* note 19, at 127 (noting last resort requirement of *jus ad bellum* principle).

136. See Authorization for Use of Military Force, Pub. L. No. 107-40, § 2(a), 115 Stat. 224 (2001) (authorizing use of force against those responsible for 9/11 attack); see also DiMeglio, *supra* note 19, at 127 (explaining macro-proportionality weighs good against evil rather than proportion of force against another).

137. See O’BRIEN, *supra* note 20, at 21.

138. See *infra* notes 139-141 and accompanying text; see also Radsan & Murphy, *supra* note 4, at 1209 (providing basis for armed conflict qualifications); *When Is War Not a War?*, *supra* note 42 (outlining war on terror and its potential armed conflict characterization).

139. See DOJ WHITE PAPER, *supra* note 80, at 2 (asserting “armed conflict with al-Qa’ida and its associated forces”); Holder, *supra* note 80 (characterizing United States as “a nation at war”); Koh, *supra* note 80 (stating United States “finds itself engaged in several armed conflicts”).

140. See Vogel, *supra* note 5, at 107 & n.30 (declaring congressional support for Executive’s

hearing the Guantanamo cases—particularly *Hamdi v. Rumsfeld* and *Hamdan v. Rumsfeld*—the Supreme Court held that the United States was involved in an armed conflict.¹⁴¹

With at least a domestic consensus that the United States is a party to an armed conflict, it is appropriate to apply some form of IHL depending on whether the armed conflict is international or noninternational.¹⁴² In *Hamdan v. Rumsfeld*, the Supreme Court labeled the conflict between the United States and Al Qaeda noninternational because Al Qaeda was deemed a nonstate actor.¹⁴³ The Obama Administration supported this position in justifying its right to carry out drone strikes.¹⁴⁴ Thus, according to domestic law, the law applicable to the United States' armed conflict with Al Qaeda is Common Article 3 of the Geneva Conventions, custom, domestic law, and Additional Geneva Protocol II.¹⁴⁵

3. *Extending Armed Conflict to Yemen and AQAP*

In response to the 9/11 attacks, the United States initially deployed forces into Afghanistan, aiming at the Taliban—the then-functioning Afghani government—and Al Qaeda forces supporting it.¹⁴⁶ Subsequently, the use of force extended beyond the borders of Afghanistan to Pakistan and Yemen in the form of the aforementioned drone strikes.¹⁴⁷ Extending use of force beyond

characterization of current conflicts as armed conflicts). *See generally* Military Commissions Act of 2006, Pub. L. No. 109-366, 120 Stat. 2600 (authorizing trial by military commission for violations of laws of war); National Defense Authorization Act for Fiscal Year 2010, Pub. L. No. 111-84, 123 Stat. 2190 (providing funding for defense of United States); Authorization for Use of Military Force, Pub. L. No. 107-40, 115 Stat. 224 (2001) (authorizing Executive to use force in response to 9/11 attacks).

141. *See Hamdan v. Rumsfeld*, 548 U.S. 557, 630-31 (2006) (holding armed conflict existed between Al Qaeda and United States), *superseded by statute*, Military Commissions Act of 2006, Pub. L. No. 109-366, 120 Stat. 2600; *Hamdi v. Rumsfeld*, 542 U.S. 507, 518 (2004) (plurality opinion) (holding detention of individuals constitutional as incident to war).

142. *See Radsan & Murphy*, *supra* note 4, at 1209 (requiring armed conflict before application of IHL); *supra* notes 139-141 (finding domestic consensus regarding United States' involvement in armed conflict); *supra* Part II.A.3.b (discussing types of armed conflict and applicable law); *see also* Aldrich, *supra* note 41, at 893 (discussing United States as party to two separate armed conflicts). *But see* O'Connell, *supra* note 39, at 858 (discussing force against Al Qaeda outside Afghanistan may not rise beyond sporadic violence). In her essay, *Combatants and the Combat Zone*, Professor Mary Ellen O'Connell states that use of force against Al Qaeda cannot qualify as a global armed conflict because armed conflicts have an "identifiable territorial or spatial dimension" and are limited in duration. *See id.*; *see also* *When Is War Not a War?*, *supra* note 42 (describing four requirements for armed conflict).

143. *Hamdan v. Rumsfeld*, 548 U.S. at 630-31.

144. *See Koh*, *supra* note 80 (resolving to abide by Additional Geneva Protocol II thereby implying existence of noninternational armed conflict).

145. *See Hamdan*, 548 U.S. at 631-32 (applying Common Article 3 because Al Qaeda and United States engaged in noninternational armed conflict); Vogel, *supra* note 5, at 110-11 (stating law applicable to noninternational conflict); *see also supra* note 45 and accompanying text (describing nonintentional conflict, Additional Geneva Protocol II).

146. *See Vogel*, *supra* note 5, at 111.

147. *See supra* note 6 and accompanying text (examining expansion of force beyond Afghanistan); *see*

the initial attacks in Afghanistan supports the Supreme Court and the Obama Administration's conclusion that the United States is at war with a nonstate actor.¹⁴⁸ This requires imputing the applicable IHL and domestic law to wherever the armed conflict may occur.¹⁴⁹ In other words, the law regulating the armed conflict—in this case Common Article 3 of the Geneva Conventions, custom, domestic law, and Additional Geneva Protocol II—applies functionally, rather than territorially.¹⁵⁰

Accordingly, to carry out strikes in Yemen against terrorism suspects within the bounds of international law the assessment contemplates the activity of the nonstate actor and whether such activity coordinates with Al Qaeda or other groups responsible for the 9/11 attacks.¹⁵¹ The evidence suggests that the Yemeni-based organization AQAP did coordinate their activity with Al Qaeda.¹⁵² First, AQAP produced publications as a means of outreach to, and recruitment of, Al Qaeda sympathizers.¹⁵³ These publications went as far as advising potential Al Qaeda supporters on how to wage jihad against the United

also supra Part II.D (describing attacks in Yemen resulting in U.S. citizen deaths).

148. See *Hamdan v. Rumsfeld*, 548 U.S. 557, 630-31 (2006) (holding conflict between Al Qaeda and United States noninternational), *superseded by statute*, Military Commissions Act of 2006, Pub. L. No. 109-366, 120 Stat. 2600; Koh, *supra* note 80 (characterizing Al Qaeda as nonstate actor). Additionally, the AUMF 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.” Authorization for Use of Military Force, Pub. L. No. 107-40, § 2(a), 115 Stat. 224, 224 (2001) (emphasis added).

149. See Dehn & Heller, *supra* note 71, at 191 (stating IHL applies to all enemy locations if enemy coordinated with Al Qaeda). The AUMF does not reference geographic limitations on the use of force, presumably allowing the President to carry out attacks against Al Qaeda worldwide so long as the attack complied with other aspects of international law. See Authorization for Use of Military Force §2(a); Holder, *supra* note 80 (observing lack of geographical scope in authorizing force against Al Qaeda). *But see* O’Connell, *supra* note 39, at 858 (expressing need for armed conflict to possess limits on duration and territory); *When Is War Not a War?*, *supra* note 42 (maintaining armed conflict necessitates territorial boundaries and definable beginning and end points).

150. Dehn & Heller, *supra* note 71, at 190; see *Hamdan*, 548 U.S. at 631-32 (applying Common Article 3 to noninternational conflict between United States and Al Qaeda); Vogel, *supra* note 5, at 110-11 (stating applicable law to noninternational conflict).

151. See Dehn & Heller, *supra* note 71, at 191 (requiring involvement with groups contemplated by AUMF for designation as lawful target). *But see* O’Connell, *supra* note 39, at 885 (stressing necessity of boundaries in armed conflict); *When Is War Not a War?*, *supra* note 42 (requiring territorial boundaries in armed conflict). The strikes on Al Qaeda in Yemen and Pakistan do qualify as an armed conflict: Statistics of drone strikes indicate use of force extending beyond sporadic violence; Al Qaeda continues to be the target of such force; the strikes are confined to a set region, namely, Yemen, Pakistan, and Somalia; and although the conflict has extended over eleven years, Al Qaeda continues to plot and carry out attacks on the United States. See Mazzetti & Schmitt, *supra* note 6 (discussing drone use in Somalia); O’Connor & Schmitt, *supra* note 100 (reporting terrorist attempt to ignite explosives aboard plane bound for Detroit); *Pakistan Drone Statistics*, *supra* note 6 (compiling data regarding drone use in Pakistan); *Yemen Strikes*, *supra* note 6 (tracking data concerning drone use in Yemen); see also *When Is War Not a War?*, *supra* note 42 (listing four requirements for armed conflict characterization in “war on terror”).

152. See *infra* notes 153-155 and accompanying text.

153. See Brown & Severson, *supra* note 115 (reporting AQAP’s creation of online magazine *Inspire*); Fordham, *supra* note 109 (characterizing AQAP members as “effective . . . propagandists and recruiters”).

States.¹⁵⁴ Second, and more important, AQAP supported or coordinated at least one terrorist attack against the United States, playing a role in the failed underwear-bombing attempt on December 25, 2009.¹⁵⁵ Thus, the evidence supports the conclusion that the noninternational armed conflict and the law it invokes—Common Article 3 of the Geneva Conventions, custom, domestic law, and Additional Geneva Protocol II—extend to terrorist groups located in Yemen, including AQAP.¹⁵⁶

B. Legality of Drone Strikes Under International Law

1. September 30, 2011 Drone Strike

Both Common Article 3 and Additional Geneva Protocol II permit a combatant in a noninternational armed conflict (here the United States) to engage and kill the enemy (here Al Qaeda and AQAP) so long as the use of force complies with broader principles of *jus in bello*.¹⁵⁷ Assessing the drone strike under the *jus in bello* discrimination requirement, the United States may only justify the strike if al-Awlaki was a combatant.¹⁵⁸ On a general level, al-Awlaki's leadership role in AQAP—an organization sufficiently aligned with Al Qaeda and a party to the noninternational conflict against the United States—made him a lawful target.¹⁵⁹ Furthermore, al-Awlaki actively engaged in at least one plot against the United States, which qualified him as a

154. See Fordham, *supra* note 109 (describing contents of *Inspire* magazine).

155. See *Al-Aulaqi v. Obama*, 727 F. Supp. 2d 1, 10 (D.D.C. 2010) (acknowledging al-Awlaki's ties to Abdulmutallab); Designation of Anwar al-Aulaqi Pursuant to Executive Order 13224 and the Global Terrorism Sanctions Regulations, 75 Fed. Reg. 43,233, 43,234 (July 23, 2010) (noting al-Awlaki's leadership role in AQAP); O'Connor & Schmitt, *supra* note 100 (examining Abdulmutallab's attempt to ignite explosives on Detroit-bound plane); Shane, *supra* note 10 (linking al-Awlaki to Abdulmutallab).

156. See Dehn & Heller, *supra* note 71, at 191 (finding armed conflict laws apply to AQAP upon showing connection to Al Qaeda); see also Vogel, *supra* note 5, at 110 (setting forth law applicable to noninternational armed conflict).

157. See Larson & Malamud, *supra* note 4, at 3-4 (noting codifications of *jus in bello* in Geneva Conventions); O'Connell, *supra* note 39, at 853 (explaining combatants privileged to engage in armed conflict); Dore, *supra* note 30, at 264 (noting combatant privilege to engage in acts otherwise unlawful for civilians). Common Article 3, however, protects all "[p]ersons taking no active part in the hostilities." Geneva Convention III, *supra* note 29, art. 3(1). Additional Geneva Protocol II supplements Common Article 3 by offering further protection for victims of noninternational armed conflict. See Additional Geneva Protocol II, *supra* note 45, pmb1. In general, Additional Geneva Protocol II protects enemies who are *hors de combat*, the civilian population, and all others who have ceased to take part in the hostilities. See generally *id.*

158. See DiMeglio, *supra* note 19, at 130 (noting *jus in bello* prohibition against using force against civilian); Gardam, *supra* note 21, at 397-98 & n.39 (explaining importance of discriminating combatants from noncombatants).

159. See Designation of Anwar al-Aulaqi Pursuant to Executive Order 13224 and the Global Terrorism Sanctions Regulations, 75 Fed. Reg. at 43,234 (alleging al-Awlaki's position in AQAP); *supra* notes 153-155 and accompanying text (finding AQAP party to noninternational armed conflict against United States); see also *Hamdan v. Rumsfeld*, 548 U.S. 557, 630-31 (2006) (stating Al Qaeda party to noninternational armed conflict with United States), *superseded by statute*, Military Commissions Act of 2006, Pub. L. No. 109-366, 120 Stat. 2600; Dore, *supra* note 30, at 264 (allowing targeting of combatants).

combatant, albeit an unlawful one.¹⁶⁰

Jus in bello's discrimination requirement also provides that the U.S. strike could not have resulted in excessive loss of civilian life.¹⁶¹ The September 30, 2011 drone strike killed al-Awlaki, Khan, and other members of AQAP.¹⁶² Notwithstanding the collateral deaths, evidence seemingly supports the proposition that the United States did not violate the discrimination requirement.¹⁶³ First, the United States carried out the attack in a remote place, minimizing further collateral damage.¹⁶⁴ Second, evidence suggests the collateral deaths were not of privileged civilians, but rather were of "other top operatives from Al Qaeda" the United States could lawfully target.¹⁶⁵ Khan himself was a member of AQAP, who worked along with al-Awlaki as an "effective . . . propagandist[] and recruiter[]," although the United States left him off of the kill lists.¹⁶⁶ Third, assuming the other passengers were not combatants, the danger al-Awlaki presented to U.S. citizens carried such weight that micro-proportionality and discrimination could still permit the attack.¹⁶⁷

Jus in bello's micro-proportionality requirement prevents the United States

160. See Geneva Convention III, *supra* note 29, art. 4 (providing basis for qualifying as lawful combatant); Aldrich, *supra* note 41, at 893 (explaining Al Qaeda as unlawful combatants); *supra* notes 99-100 and accompanying text (describing al-Awlaki's active involvement in terrorism plot). Al-Awlaki was not a lawful combatant because he was not privileged to participate in combat, failing to satisfy the requirements set out in Geneva Convention III. See Geneva Convention III, *supra* note 29, art. 4(A)(2) (enumerating criteria in assessing qualification as lawful combatant); Aldrich, *supra* note 41, at 893 (explaining Al Qaeda as criminal organization and unlawful combatants not party to Geneva Conventions); Hoffman, *supra* note 40, at 228 (explaining lawfulness of participation in combat). Specifically, al-Awlaki did not have a "fixed distinctive sign recognizable at a distance," "carry[] arms openly," or conduct his "operations in accordance with the laws and customs of war" because he plotted against civilian targets. See Geneva Convention III, *supra* note 29, art. 4(A)(2)(b)-(d) (enumerating requirements distinguishing lawful combatant); O'Connor & Schmitt, *supra* note 100 (reporting plot to kill civilians on Detroit-bound plane); *supra* note 29 and accompanying text (setting forth measures to protect civilians in Geneva Convention IV). Ultimately, whether al-Awlaki was a lawful or unlawful combatant, the United States, as a party to the Geneva Conventions, must still have complied with IHL in its conduct during the armed conflict with Al Qaeda. See JAG SUPPLEMENT, *supra* note 29, at v-vi (displaying treaties United States signed and ratified, including Geneva Conventions); Hoffman, *supra* note 40, at 230 (acknowledging IHL applies to use of military force regardless of combatant label).

161. See Gardam, *supra* note 21, at 398 & n.39 (explaining some collateral damage permitted in armed conflict). IHL tolerates some civilian casualties so long as civilians are not the target of the attack and are not in excess of *jus in bello*'s micro-proportionality requirements. See *id.* at 407.

162. See Mazzetti et al., *supra* note 8.

163. See *infra* notes 164-167 and accompanying text (assessing evidence relating to discrimination requirement).

164. See Mazzetti et al., *supra* note 8 (reporting location of September 30, 2011 drone strike).

165. See *id.* (stating drone strike killed al-Awlaki, Khan, and other AQAP actors).

166. See Brachman & Levine, *supra* note 98, at 38 (detailing Khan's transformation into key component of AQAP); Fordham, *supra* note 109 (describing Khan and al-Awlaki as "effective . . . propagandists and recruiters"); Mazzetti et al., *supra* note 7 (detailing Obama Administration's decision to leave Khan off of kill lists).

167. Al-Aulaqi v. Obama, 727 F. Supp. 2d 1, 10 (D.D.C. 2010) (noting al-Awlaki's ties to terrorist plot in United States); Shane, *supra* note 10 (linking al-Awlaki to Abdulmutallab); see also O'Connor & Schmitt, *supra* note 100 (examining Abdulmutallab's attempt to ignite explosive device on Detroit-bound plane).

from using a level of force that unduly outweighs the costs.¹⁶⁸ In al-Awlaki's and Khan's cases, the United States used lethal force—the highest level of force—which required a significant justification: eliminating a substantial threat to U.S. citizens.¹⁶⁹ Evidence supports the Obama Administration's conclusion that al-Awlaki posed a significant threat to Americans.¹⁷⁰ Al-Awlaki had shifted from divulging propaganda to Western sympathizers of Al Qaeda to playing an active role in at least one plot against the United States.¹⁷¹ U.S. officials linked al-Awlaki to Abdulmutallab, the Nigerian who attempted to destroy a Detroit-bound passenger jet by detonating explosives.¹⁷² Had Abdulmutallab been successful in detonating the explosives, 278 passengers would have almost certainly died.¹⁷³ The United States acted out of necessity in protecting its citizens from further attacks at al-Awlaki's behest; thus, the use of force outweighed its costs.¹⁷⁴

2. October 14, 2011 JSOC Strike

Accepting Yemeni officials' characterizations of al-Banna—the target of the October 14, 2011 strike—as “one of the most dangerous operatives” in AQAP, the United States partially satisfied *jus in bello*'s requirement of discrimination by targeting a combatant.¹⁷⁵ Beyond this cursory conclusion, however,

168. See DiMiglio, *supra* note 19, at 130 (describing aim of micro-proportionality); Gardam, *supra* note 21, at 399 (requiring proportionality between amount of force and objective).

169. See DiMiglio, *supra* note 19, at 130 (balancing amount of force and objective); Gardam, *supra* note 21, at 399 (noting requirement of proportionality); Fordham, *supra* note 109 (reporting United States' use of lethal force against al-Awlaki and Khan). In a secret legal memorandum, the United States justified the strike against al-Awlaki based on the threat he posed to other U.S. citizens. See Savage, *supra* note 84.

170. See *infra* notes 171-173 and accompanying text (analyzing evidence suggesting al-Awlaki posed significant threat).

171. See Designation of Anwar al-Aulaqi Pursuant to Executive Order 13224 and the Global Terrorism Sanctions Regulations, 75 Fed. Reg. 43,233, 43,234 (July 23, 2010) (alleging al-Awlaki's leadership role in AQAP); Shane, *supra* note 10 (reporting al-Awlaki's shift from encouragement to participation in plot).

172. See Al-Aulaqi v. Obama, 727 F. Supp. 2d 1, 10 (D.D.C. 2010) (detailing al-Awlaki's ties to Abdulmutallab); Shane, *supra* note 10 (linking al-Awlaki to Abdulmutallab); see also O'Connor & Schmitt, *supra* note 100 (examining Abdulmutallab's conduct while aboard Detroit-bound plane).

173. See O'Connor & Schmitt, *supra* note 100.

174. See DiMiglio, *supra* note 19, at 130 (requiring legal objective to outweigh cost); Savage, *supra* note 84 (providing justifications for targeting al-Awlaki).

175. See Additional Geneva Protocol II, *supra* note 45, art. 13, paras. 1-2 (prohibiting attack on civilians); DiMiglio, *supra* note 19, at 130 (explaining discrimination of targets as *jus in bello* principle); O'Connell, *supra* note 39, at 853 (allowing combatant to engage other combatant); Dore, *supra* note 30, at 264 (outlining combatant's ability to engage); Finn & Miller, *supra* note 12 (internal quotation marks omitted) (describing al-Banna's position in AQAP and quoting Yemeni officials); Whitlock, *supra* note 123 (reporting identification of al-Banna as target of attack). Attacking al-Banna would comply with IHL because he was a member of an organization with which the United States engaged in its noninternational armed conflict pursuant to the AUMF. See Hamdan v. Rumsfeld, 548 U.S. 557, 630-31 (2006) (stating Al Qaeda as party to noninternational armed conflict with United States), *superseded by statute*, Military Commissions Act of 2006, Pub. L. No. 109-366, 120 Stat. 2600; Dore, *supra* note 30, at 264 (allowing targeting of combatants); *supra* notes 153-155 and accompanying text (finding AQAP as party to noninternational armed conflict against United States through connections to Al Qaeda).

evaluation of the JSOC strike is difficult because of the lack of credible information surrounding the incident.¹⁷⁶ From the information that can be gleaned from media reports, the strike may have violated *jus in bello* requirements—consequently violating IHL—because officials likely conducted the strike negligently.¹⁷⁷ Most important in reaching this conclusion is the U.S. officials’ reliance on faulty intelligence that placed al-Banna at the targeted location.¹⁷⁸ Additionally, U.S. officials confirmed they had no knowledge of Abdulrahman’s presence at the time of the strike.¹⁷⁹ When taken together, these points suggest negligence in carrying out the strike, thereby violating *jus in bello* and IHL.¹⁸⁰

Putting aside the issue of negligence, the strike may still have violated *jus in bello* requirements, namely micro-proportionality.¹⁸¹ At least one account of the JSOC strike suggests that the majority of the dead were “young people,” including sixteen-year-old Abdulrahman and his seventeen-year-old cousin.¹⁸² Had al-Banna been present, evidence supports the finding that the United States maintained a significant objective in eliminating him because officials regarded him as one of the most dangerous members of AQAP.¹⁸³ Notwithstanding the significance of this objective, it likely does not outweigh the cost of multiple young people, presumably teenagers, as collateral damage, especially where JSOC is to ensure that children are not killed in airstrikes.¹⁸⁴

176. See Finn & Miller, *supra* note 12 (reporting Yemeni officials made incorrect statement of al-Banna’s death); Mazzetti et al., *supra* note 7 (reporting al-Banna as not present in October 14th strike); Whitlock, *supra* note 123 (noting lack of definitive public statement on Abdulrahman’s death).

177. See Gardam, *supra* note 21, at 407 (stating negligent conduct of attack itself as violation of *jus in bello* proportionality); *infra* notes 178-180 and accompanying text (discussing potentially negligent conduct on behalf of officials conducting October 2011 strike). Determining an attack to be indiscriminate and in violation of the rule of proportionality can prove difficult because the rule is often deferential to the military actor. See Gardam, *supra* note 21, at 407 (noting rule of proportionality’s “considerable degree of latitude”).

178. See Mazzetti et al., *supra* note 7 (reporting incorrect intelligence regarding al-Banna’s location during October 2011 strike).

179. See Whitlock, *supra* note 123.

180. See Gardam, *supra* note 21, at 407 (explaining negligence in attack as violation of *jus in bello* proportionality); Mazzetti et al., *supra* note 7 (noting al-Banna not among dead in October 2011 strike as consequence of faulty intelligence); Whitlock, *supra* note 123 (stating U.S. official’s recognition of lack of knowledge regarding Abdulrahman’s location during October 2011 strike).

181. See DiMiglio, *supra* note 19, at 130 (outlining aspects of micro-proportionality); Gardam, *supra* note 21, at 399 (promoting proportionality in use of force and objective).

182. See Finn & Miller, *supra* note 12 (reporting accounts of those present during airstrike).

183. See *id.* (labeling al-Banna “as one of the ‘most dangerous operatives’”); cf. DOJ WHITE PAPER, *supra* note 80, at 6 (arguing protection of U.S. citizens from imminent threat may require use of justified lethal force); Savage, *supra* note 84 (reporting secret memorandum’s legal justifications in targeting combatant include posing significant threat to U.S. citizens).

184. See DiMiglio, *supra* note 19, at 130 (requiring proportionality between legitimate objective and cost accomplishing objective); Finn & Miller, *supra* note 12 (reporting those potentially present during airstrike and official policy to ensure safety of children).

C. Legality of Drone Strikes Under Domestic Constitutional Law

The analysis of whether the aforementioned strikes were lawful must include domestic law because it is part of the bundle of laws that noninternational conflict invokes.¹⁸⁵ Constitutional protections, including both Fourth Amendment protections against unreasonable seizures and Fifth Amendment protections against the deprivation “of life, liberty or property, without due process of law,” shelter U.S. citizens from certain governmental action.¹⁸⁶ These protections typically reach citizens wherever they are located, unless application is infeasible.¹⁸⁷

1. Al-Awlaki’s Potential Constitutional Protections

The circumstances surrounding al-Awlaki’s death suggest that the application of constitutional protections was infeasible.¹⁸⁸ First, al-Awlaki was hiding in Yemen, a territory far from the United States, and containing terrorist organizations very much opposed to the United States.¹⁸⁹ In *Al-Aulaqi v. Obama*, the court held that al-Awlaki should come out of hiding and appear before a U.S. court if he wished to invoke his constitutional protections.¹⁹⁰ Second, the practical necessities of the situation required the United States to prevent al-Awlaki from precipitating any further attacks against U.S. citizens.¹⁹¹ Having already failed once in killing al-Awlaki, the circumstances required action when the United States became aware of his location again.¹⁹² Third, there were no clear alternatives to using force due to al-Awlaki’s location and refusal to surrender to U.S. officials.¹⁹³

a. Fifth Amendment Procedural Due Process Protections

Assuming *arguendo* that it was feasible to apply the U.S. Constitution to al-

185. See Vogel, *supra* note 5, at 110-11.

186. See U.S. CONST. amend. IV; *id.* amend. V.

187. See *Reid v. Covert*, 354 U.S. 1, 74-75 (1957) (explaining when Bill of Rights might not apply outside of United States); *McKelvey*, *supra* note 53, at 1369 (detailing reach of Bill of Rights outside United States).

188. See *infra* notes 189-193 and accompanying text (assessing constitutional reach in regard to al-Awlaki’s presence in Yemen).

189. See *Mazzetti et al.*, *supra* note 8 (reporting al-Awlaki’s hiding in Yemen frustrated U.S. and Yemeni officials for over two years).

190. See *Al-Aulaqi v. Obama*, 727 F. Supp. 2d 1, 17-21 (D.D.C. 2010) (ruling al-Awlaki’s hiding from U.S. officials did not allow his father to establish standing).

191. See Designation of Anwar al-Aulaqi Pursuant to Executive Order 13224 and the Global Terrorism Sanctions Regulations, 75 Fed. Reg. 43,233, 43,234 (July 23, 2010) (alleging al-Awlaki’s leadership and decision-making role in AQAP); *Shane*, *supra* note 10 (reporting al-Awlaki’s dangerous role in AQAP, shifting from encouragement to participation in attacks).

192. See *Mazzetti et al.*, *supra* note 8 (outlining failed May 2011 drone strike on al-Awlaki).

193. See *id.* (noting al-Awlaki’s hiding in Yemen extended over two years). In a secret memorandum, U.S. officials determined Yemeni authorities “were unable or unwilling to stop [al-Awlaki].” *Savage*, *supra* note 84.

Awlaki in Yemen, *Mathews v. Eldridge* applies a similar balancing test to determine what process is due.¹⁹⁴ This analysis considers the private interest at stake, the risk of erroneous deprivation through the procedures used, and the government's interest.¹⁹⁵ Substantial interests lay on both sides, pitting al-Awlaki's life against the United States' need to shield its citizens from harm.¹⁹⁶ Deprivation of liberty was absolute as the U.S. force was lethal, and short shrift could not be paid to al-Awlaki's privilege of U.S. citizenship.¹⁹⁷ However, the Supreme Court has previously decided that use of force, including lethal force, to protect innocent citizens is appropriate under certain circumstances.¹⁹⁸ These decisions lend credence to the conclusion that the United States could target al-Awlaki because he presented an ongoing threat to the safety of U.S. citizens, despite his status as a U.S. citizen.¹⁹⁹

b. Fourth Amendment Protections

Continuing under the assumption that the U.S. Constitution could feasibly reach al-Awlaki in Yemen, he was also entitled to the Fourth Amendment's protection against unreasonable seizures.²⁰⁰ U.S. officials could only use

194. See *Mathews v. Eldridge*, 424 U.S. 319, 335 (1976). Before using force, the Obama Administration requires the following: a high-level official determination that the individual poses an imminent threat to the United States, a determination and continued monitoring of the feasibility of capture, and consistency with law-of-war principles. See DOJ WHITE PAPER, *supra* note 80, at 6.

195. See *Mathews*, 424 U.S. at 335 (enumerating subjects to balance in analyzing procedural due process).

196. See *Hamdi v. Rumsfeld*, 542 U.S. 507, 531 (2004) (plurality opinion) (declaring "weighty and sensitive governmental interests" in preventing combat against United States); DOJ WHITE PAPER, *supra* note 80, at 6 (stating "weighty" interests on both sides); Mazzetti et al., *supra* note 8 (noting U.S. officials use of lethal force); Savage, *supra* note 84 (reporting legal memorandum outlined significant threat al-Awlaki posed to United States).

197. See *Hamdi*, 542 U.S. at 532 (noting Supreme Court's requirement of putting weight in citizenship); Mazzetti et al., *supra* note 8 (detailing United States' resolve to use lethal force).

198. See *Scott v. Harris*, 550 U.S. 372, 383-84 (2007) (allowing officer to use deadly force to prevent imminent harm to public); *Tennessee v. Garner*, 471 U.S. 1, 11-12 (1985) (permitting use of deadly force where probable cause suggests suspect poses threat of physical harm); see also *Hamdi*, 542 U.S. at 532 (allowing necessary means to prevent enemy combatant from returning to battlefield); DOJ WHITE PAPER, *supra* note 80, at 6 (quoting *Hamdi* decision in support of use of lethal force); DiMeglio, *supra* note 19, at 130 (describing civilians as innocent of war). As the DOJ White Paper suggests, one could infer from the Supreme Court's language in *Hamdi* that the AUMF authorizes the President to use lethal force to prevent combatants from attacking the United States, when the power to detain combatants was a "fundamental and accepted . . . incident to war." See *Hamdi*, 542 U.S. at 518 (describing power to detain as "necessary and appropriate force"); DOJ WHITE PAPER, *supra* note 80, at 6 (expanding *Hamdi* Court's acknowledgment of power to detain to power to use lethal force).

199. See *supra* notes 99-100 and accompanying text (describing al-Awlaki's active involvement in terrorism plot as AQAP leader); see also *Scott*, 550 U.S. at 383-84 (allowing deadly force to prevent imminent harm to public); *Garner*, 471 U.S. at 11-12 (permitting deadly force in cases of threat of physical harm); Savage, *supra* note 84 (reporting justification for targeted killing because al-Awlaki posed significant threat to U.S. citizens).

200. See U.S. CONST. amend. IV (stating "right of the people to be secure in their person . . . against unreasonable . . . seizures"); *Graham v. Connor*, 490 U.S. 386, 388 (1989) (requiring Fourth Amendment analysis for claims arising out of seizure of target).

deadly force to seize al-Awlaki if under an objective-reasonableness standard they believed he posed a threat of imminent and serious physical harm.²⁰¹ Under two of the three reasonableness factors, the United States was entitled to use deadly force: al-Awlaki engaged in a serious crime, i.e., a plot to kill U.S. citizens; and he continually evaded capture.²⁰² Under the final reasonableness factor—immediacy or imminence—the Obama Administration significantly departed from domestic law.²⁰³

As defined by the Obama Administration, imminence does not require an attack to take place in the immediate future, but rather rests upon the window of opportunity to strike the combatant, the potential for limiting civilian collateral damage, and the potential to head-off attacks on U.S. citizens.²⁰⁴ These factors demonstrate the reality of a “war on terror,” and the Obama Administration’s attempt to comply with IHL.²⁰⁵ Furthermore, the Obama Administration has adopted this framework under the United States’ right to self-defense and the Administration’s obligation arising under the AUMF to defend U.S. citizens from further attacks.²⁰⁶ Thus, President Obama, as Commander-in-Chief, is entitled to an expanded reading of imminence when pursuing operational leaders of Al Qaeda, and as such, the strike on al-Awlaki did not violate his Fourth Amendment rights.²⁰⁷

201. See *supra* notes 76-77 and accompanying text (setting forth framework for analyzing violations of Fourth Amendment).

202. See *Graham*, 490 U.S. at 396 (enumerating factors for reasonableness assessment); Mazzetti et al., *supra* note 8 (examining prolonged attempt to target al-Awlaki); *supra* notes 99-100 and accompanying text (describing al-Awlaki’s active involvement in terrorism plot as AQAP leader).

203. See *Graham*, 490 U.S. at 396 (including “immediate threat to the safety of . . . others” among reasonableness factors); DOJ WHITE PAPER, *supra* note 80, at 7 (defining imminence in context of terrorism); Nourse, *supra* note 79, at 1242 (defining imminence in self-defense context).

204. See DOJ WHITE PAPER, *supra* note 80, at 7 (taking factored approach to imminence). *But see* Nourse, *supra* note 79, at 1242 (describing imminence as immediate or instantaneous).

205. See DOJ WHITE PAPER, *supra* note 80, at 7 (examining difficulty in applying traditional form of imminence in war on terror); DiMeglio, *supra* note 19, at 129 (outlining *jus in bello* requirements of discrimination and micro-proportionality). The DOJ White Paper explains that requiring the United States to refrain from acting until preparations for the attack are complete leaves the United States with inadequate time to defend itself. See DOJ WHITE PAPER, *supra* note 80, at 7. Additionally, Al Qaeda members are not easily found, and the window of opportunity for engaging them is relatively short. See *id.* Limiting collateral damage comports with *jus in bello*’s requirement that an attack discriminate between civilians and combatants. See DiMeglio, *supra* note 19, at 130.

206. See U.N. Charter art. 51 (setting forth inherent right to self-defense); Authorization for Use of Military Force, Pub. L. No. 107-40, 115 Stat. 224 (2001) (authorizing use of force pursuant to self-defense against those responsible for 9/11 attacks). The AUMF explicitly sets forth the United States’ need to defend itself against “unusual and extraordinary threat[s].” Authorization for Use of Military Force pmb1.; see O’BIEN, *supra* note 20, at 21 (considering self-defense axiomatic).

207. See Chiesa & Greenawalt, *supra* note 79, 1430 (arguing private right to self-defense more restrictive than governmental right to self-defense). Just as a police officer “may sometimes use more force than private citizens would be allowed to employ pursuant to the law of self-defense and defense of others,” the military ought to be allowed to use more force than police officers in the defense of the United States. See *id.*; see also DOJ WHITE PAPER, *supra* note 80, at 7 (noting catastrophic consequences of successful terror attack).

2. Khan's Potential Constitutional Protections

The feasibility assessment of Khan's expectation to constitutional protection turns on the same facts as al-Awlaki's assessment.²⁰⁸ Like al-Awlaki, Khan was positioned in Yemen—hostile ground located a great distance from the United States.²⁰⁹ The practical necessities of the situation centered on eliminating al-Awlaki, a terrorist who presented a significant threat to U.S. citizens.²¹⁰ Additionally, the window for eliminating al-Awlaki was very small; the CIA had only two opportunities in a five-month period.²¹¹ Finally, no clear alternatives to using force existed because al-Awlaki was hiding in Yemen.²¹² Insofar as Khan maintained close quarters with al-Awlaki, he most likely limited the feasibility of the U.S. Constitution's application to him.²¹³

a. Fifth Amendment Procedural Due Process Protections

Assuming arguendo that the Constitution did feasibly reach Khan, the *Mathews v. Eldridge* analysis might differ with respect to him.²¹⁴ On its face, the competing interests—Khan's life versus the United States' need to eliminate al-Awlaki, a terrorist threat to U.S. citizens—are similar for both al-Awlaki and Khan.²¹⁵ Other than publishing a magazine that advised how to wage jihad, however, there is little evidence that Khan organized or materially supported any terrorist plots against the United States.²¹⁶ According to the Supreme Court's test in *Mathews*, the United States' interests in eliminating a

208. See *infra* notes 209-212 and accompanying text (analyzing applicability of constitutional protections to Khan); see also *supra* notes 189-193 (discussing feasibility of applying constitutional protections to al-Awlaki).

209. See Brachman & Levine, *supra* note 98, at 38 (detailing Khan's move to Yemen in 2009 to join AQAP).

210. See Designation of Anwar al-Aulaqi Pursuant to Executive Order 13224 and the Global Terrorism Sanctions Regulations, 75 Fed. Reg. 43,233, 43,234 (July 23, 2010) (alleging al-Awlaki's leadership and decision-making role in AQAP); Shane, *supra* note 10 (reporting al-Awlaki's dangerous role as leader of AQAP and participation in plot against United States).

211. See Mazzetti et al., *supra* note 8 (outlining two-year hunt for al-Awlaki and failed drone strike).

212. See *id.* (outlining al-Awlaki's two-year hiding in Yemen); Savage, *supra* note 84 (reporting secret memorandum's conclusion of Yemeni authorities' inability or unwillingness to stop al-Awlaki).

213. See *supra* notes 209-212 and accompanying text.

214. See *infra* notes 215-219 and accompanying text (assessing due process balancing test in light of Khan's circumstances); see also *Mathews v. Eldridge*, 424 U.S. 319, 335 (1976) (presenting procedural due process balancing test).

215. See *Hamdi v. Rumsfeld*, 542 U.S. 507, 531 (2004) (plurality opinion) (indicating "weighty and sensitive governmental interests" in preventing combat against United States); DOJ WHITE PAPER, *supra* note 80, at 6 (finding "weighty" interests on both sides); Mazzetti et al., *supra* note 8 (reporting use of lethal force against Khan); Savage, *supra* note 84 (describing legal memorandum outlining significant threat al-Awlaki posed to Americans).

216. See Brown & Severson, *supra* note 115 (reporting creation of Khan's magazine); Fordham, *supra* note 109 (examining general content of Khan's magazine and FBI's failure to shut down Khan's U.S. blog); Mazzetti et al., *supra* note 7 (reporting Khan's absence from kill lists because little evidence tying Khan to specific plot).

terrorist threat and protecting its citizens could very well include protecting Khan.²¹⁷ Nevertheless, it is likely that Khan's mere affiliation with AQAP weakens this argument because the government's interest in defending *innocent* U.S. civilians is paramount.²¹⁸ The congressional passage of the AUMF further weakens Khan's case because it authorized the Executive to engage groups, such as AQAP, who have coordinated with Al Qaeda.²¹⁹

b. Fifth Amendment Substantive Due Process Protections

Proceeding under the assumption that the U.S. Constitution feasibly reached Khan in Yemen, he was entitled to the substantive due process protection of the right to life because he was a collateral death in the September 2011 drone strike.²²⁰ If the United States' action in carrying out the drone strike shocked the conscience, then the United States would have violated Khan's substantive due process right to life.²²¹ There is no evidence, however, demonstrating that CIA officials conducted the September 2011 strike recklessly, let alone so egregiously that it shocked the conscience.²²² CIA officials were not aware that Khan was traveling with al-Awlaki when they conducted the strike; thus, the officials had no intention of hurting Khan and did not violate his substantive due process right to life.²²³

217. See *Mathews*, 424 U.S. at 335 (setting out government-interest prong of procedural due process balancing test).

218. See O'BRIEN, *supra* note 20, at 21 (considering self-defense axiomatic); Brachman & Levine, *supra* note 98, at 38 (detailing Khan's affiliations with AQAP); DiMeglio, *supra* note 19, at 130 (describing civilians as innocent of causing war).

219. See Authorization for Use of Military Force, Pub. L. No. 107-40, § 2(a), 115 Stat. 224, 224 (2001) (permitting Executive's use of force in response to 9/11 attacks); *Al-Aulaqi v. Obama*, 727 F. Supp. 2d 1, 10 (D.D.C. 2010) (acknowledging al-Awlaki's ties to Abdulmutallab); Designation of Anwar al-Aulaqi Pursuant to Executive Order 13224 and the Global Terrorism Sanctions Regulations, 75 Fed. Reg. 43,233, 43,234 (July 23, 2010) (stating al-Awlaki's leadership role in AQAP); Brown & Severson, *supra* note 115 (reporting AQAP's outreach to Al Qaeda members through creation of *Inspire* magazine); Fordham, *supra* note 109 (noting AQAP members' effectiveness as "propagandists and recruiters"); O'Connor & Schmitt, *supra* note 100 (reporting Abdulmutallab's attempt to ignite explosives on Detroit-bound plane); Shane, *supra* note 10 (linking al-Awlaki to Abdulmutallab).

220. See U.S. CONST. amend. V (stating "[n]o person shall . . . be deprived of life, liberty, or property, without due process of law"); *Warfield v. City of Chi.*, 565 F. Supp. 2d 948, 964 (N.D. Ill. 2008) (requiring substantive due process where individual not object of officer's intent to seize); *Savage*, *supra* note 84 (reporting Khan's death as collateral damage).

221. See *Cnty. of Sacramento v. Lewis*, 523 U.S. 833, 840, 846 (1998) (setting forth right to life and shocks-the-conscience test); *Rochin v. California*, 342 U.S. 165, 172 (1952) (originating shocks the conscience language).

222. See *Warfield*, 565 F. Supp. 2d at 964 (stating recklessness falls short of shocks-the-conscience standard). Demonstrating that conduct shocks the conscience is an extremely difficult burden to prove, and plaintiffs are typically unsuccessful unless they can show that a law enforcement officer intended to harm a bystander or shot inhumanely into a crowd. See *Rucker v. Harford Cnty.*, 946 F.2d 278, 282 (4th Cir. 1991).

223. See Fordham, *supra* note 109 (reporting CIA officials not aware of Khan's presence with al-Awlaki); Mazzetti et al., *supra* note 8 (stating drone strike killed al-Awlaki, Khan, and other AQAP actors in remote area); Shane, *supra* note 10 (explaining danger of al-Awlaki in connection to terror plots).

3. Abdulrahman's Potential Constitutional Protections

The circumstances surrounding Abdulrahman's death suggest that an application of constitutional protections was feasible.²²⁴ Although, Abdulrahman was in Yemen, a long distance from the United States, there is no evidence that he had any ties to AQAP other than his father.²²⁵ While it is unclear if al-Banna presented an imminent threat or if capturing him was feasible, practical necessities did not dictate the United States' resolve to the strike in light of the fact that al-Banna was not at the targeted location.²²⁶ Because U.S. officials were unaware of al-Banna's absence and Abdulrahman's presence in the targeted zone, the evidence suggests that alternatives may have been available to the military in carrying out the strike, insofar as the process used to identify targets and civilians.²²⁷ The existence of a potential alternative necessitates an inference that the U.S. Constitution did reach Abdulrahman, and as such, the *Mathews v. Eldridge* balancing test must determine what process was due to Abdulrahman.²²⁸

a. Fifth Amendment Procedural Due Process Protections

The private and public interests at stake are both critical; the former involves Abdulrahman's life and the latter involves the government's need to protect its citizens from harm.²²⁹ The risk of erroneous deprivation, however, tips the scale in favor of Abdulrahman.²³⁰ U.S. officials had no knowledge of Abdulrahman's presence or al-Banna's absence, suggesting their procedure in acquiring targets was inadequate.²³¹ The procedure ought to at least involve a

224. See *infra* notes 225-228 and accompanying text (examining reach of U.S. Constitution to Abdulrahman in Yemen); see also *Reid v. Covert*, 354 U.S. 1, 5-6 (1957) (holding Constitution applicable inside or outside United States); McKelvey, *supra* note 53, at 1369 (describing Constitution's reach outside United States).

225. See Mazzetti et al., *supra* note 7 (reporting Abdulrahman's location in Yemen, but lack of terrorism connections).

226. See Finn & Miller, *supra* note 12 (characterizing al-Banna's role in AQAP); Mazzetti et al., *supra* note 7 (reporting al-Banna's absence from targeted zone).

227. See Mazzetti et al., *supra* note 7 (stating al-Banna's absence from targeted zone); Whitlock, *supra* note 123 (stating U.S. officials unaware of Abdulrahman's presence). The U.S. official characterized Abdulrahman's presence as "in the wrong place at the wrong time," however, failing to identify a teenager's presence and the target's absence before executing an attack is indicative of an error in carrying out procedures. See Mazzetti et al., *supra* note 7 (noting poor intelligence in attempted strike on al-Banna); Whitlock, *supra* note 123 (reporting U.S. official labeling Abdulrahman as unidentified bystander).

228. See *Reid*, 354 U.S. at 74-75 (requiring assessment of possible alternatives in determining U.S. Constitution's reach abroad); see also *Mathews v. Eldridge*, 424 U.S. 319, 335 (1976) (introducing procedural due process balancing test).

229. See *Hamdi v. Rumsfeld*, 542 U.S. 507, 531 (2004) (plurality opinion) (recognizing "weighty and sensitive governmental interests" in preventing combat against United States); DOJ WHITE PAPER, *supra* note 80, at 6 (declaring "weighty" interests on both sides); Finn & Miller, *supra* note 12 (reporting strike as lethal force against Abdulrahman).

230. See *Mathews*, 424 U.S. at 335 (presenting erroneous deprivation of interest as one balancing factor).

231. See Mazzetti et al., *supra* note 7 (reporting al-Banna's absence from targeted zone); Whitlock, *supra*

more adequate assessment of targets and collaterals to prevent erroneous deprivation of life.²³² Therefore, the United States likely violated Abdulrahman's procedural due process rights when it carried out the October 14, 2011 strike.²³³

b. Fifth Amendment Substantive Due Process Protections

Because Abdulrahman was a collateral death in the October 2011 strike, he was entitled to substantive due process protection of his right to life.²³⁴ Whether U.S. officials violated his right to life is determined by an assessment of whether their conduct shocked the conscience—that is, whether the officials intended to harm a particular bystander or inhumanely fired into a crowd at close range.²³⁵ U.S. officials presumably did not use adequate means to assess the individuals in the area of the strike because they were not aware of the absence of al-Banna—the target of the strike—or the presence of Abdulrahman, suggesting negligence or even recklessness in their conduct.²³⁶ Even if the officials' conduct amounted to recklessness, however, they did not intend to harm a bystander and their actions cannot be analogized to inhumanely shooting into a crowd.²³⁷ Thus, officials did not violate Abdulrahman's substantive due process right to life.²³⁸

IV. CONCLUSION

Undoubtedly, drone warfare has played an effective role in the war on terrorism under the Obama Administration. By carrying out covert attacks, the military is able to weaken terrorist organizations without subjecting military personnel to harm. In essence, drone warfare presents a low-risk, high-reward

note 123 (acknowledging U.S. officials unaware of Abdulrahman's presence).

232. See *Mathews*, 424 U.S. at 335 (contemplating "additional or substitute procedural safeguards" where current safeguards inadequate).

233. See *supra* notes 229-232 and accompanying text (applying *Mathews* balancing test).

234. See *Warfield v. City of Chi.*, 565 F. Supp. 2d 948, 963-64 (N.D. Ill. 2008) (requiring bystander claims to come under substantive due process rather than Fourth Amendment).

235. *Cnty. of Sacramento v. Lewis*, 523 U.S. 833, 840, 846 (1998) (articulating right to life and shocks-the-conscience test); *Rochin v. California*, 342 U.S. 165, 172 (1952) (originating shocks-the-conscience language); *Rucker v. Harford Cnty.*, 946 F.2d 278, 282 (4th Cir. 1991) (setting forth two examples of behavior meeting shocks-the-conscience standard).

236. See *Mazzetti et al.*, *supra* note 7 (noting al-Banna's absence from October 2011 strike); Whitlock, *supra* note 123 (detailing failure to recognize Abdulrahman's presence in October 2011 strike).

237. See *Mazzetti et al.*, *supra* note 7 (discussing officials' belief of al-Banna's presence based on faulty intelligence); see also Finn & Miller, *supra* note 12 (reporting Yemeni officials' incorrect belief of al-Banna's death in October 2011 strike). Because officials believed they had a valid target and IHL permits some collateral damage, their conduct was not analogous to inhumanely firing into a crowd. See Gardam, *supra* note 21, at 398 & n.39 (stating some collateral damage acceptable in military action); *Mazzetti et al.*, *supra* note 7 (reporting officials' incorrect belief of al-Banna's presence).

238. See *supra* notes 235-237 and accompanying text (examining potential violation of Abdulrahman's substantive due process right to life).

means of protecting the United States and its citizens. Whatever the benefits, it is imperative that the Obama Administration ensures military personnel carry out *each* drone strike in accordance with international and domestic law. This requires careful identification and assessment of all combatants and civilians in the zone of attack before military personnel pull the trigger. President Obama should also follow through with his publicly-stated openness toward involving Congress in more clearly defining the rules of drone warfare.

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