U.S. Army (Jason Sweeney)

TARGETED KILLING, THE LAW, AND TERRORISTS

FEELING SAFE?

By MARK DAVID MAXWELL

In a 2004 *New Yorker* article, Malcolm Gladwell explored the unprecedented spike in the number of sport utility vehicles (SUVs) on American roadways.[1] The popularity of SUVs is based, in part, on the perception that they are safer for the consumer than traditional sedan automobiles. Gladwell skillfully dissected this perception and demonstrated, with the help of some compelling safety statistics, that SUVs are much more dangerous for both their drivers and passengers than traditional sedans. He maintained that in the automotive world, a strange and contorted phenomenon has taken place: "*feeling* safe has become more important than actually *being* safe."[2] This automotive phenomenon, although seemingly illogical given the safety statistics, is grounded on a false premise: automobile consumers believe that a bigger vehicle will mitigate their risk of injury. This seductive premise, however, ignores the reality of what causes injury: driving on the roadways. Gladwell concluded that "[the] feeling of safety isn't the solution; it's the problem."[3]

In the wake of the attacks by al Qaeda on September 11, 2001, an analogous phenomenon of feeling safe has occurred in a recent U.S. national security policy: America's explicit use of targeted killings to eliminate terrorists, under the legal doctrines of self-defense and the law of war. Legal scholars define *targeted killing* as the use of lethal force by a state[4] or its agents with the intent, premeditation, and deliberation to kill

Colonel Mark David Maxwell, USA, is a Judge Advocate with the U.S. Army.

individually selected persons who are not in the physical custody of those targeting them.[5] In layman's terms, targeted killing is used by the United States to eliminate individuals it views as a threat.[6] Targeted killings, for better or for worse, have become "a defining doctrine of American strategic policy."[7] Although many U.S. Presidents have reserved the right to use targeted killings in unique circumstances, making this option a formal part of American foreign policy incurs risks that, unless adroitly controlled and defined in concert with Congress, could drive our practices in the use of force in a direction that is not wise for the long-term health of the rule of law.

President Ford did not want legislation that would impinge upon his unilateral ability as Commander in Chief to decide on the measures that were necessary for national security

This article traces the history of targeted killing from a U.S. perspective. It next explains how terrorism has traditionally been handled as a domestic law enforcement action within the United States and why this departure in policy to handle terrorists like al Qaeda under the law of war—that is, declaring war against a terrorist organization—is novel. While this policy is not an ill-conceived course of action given the global nature of al Qaeda, there are practical limitations on *how* this war against terrorism can be conducted under the orders of the President. Within the authority to target individuals who are terrorists, there are two facets of Presidential power that the United States must grapple with: first, how narrow and tailored the President's authority should be when ordering a targeted killing under the rubric of self-defense; and second, whether the President must adhere to concepts within the law of war, specifically the targeting of individuals who do not don a uniform. The gatekeeper of these Presidential powers and the prevention of their overreach is Congress. The Constitution demands nothing less, but thus far, Congress's silence is deafening.

History of Targeted Killing

During the Cold War, the United States used covert operations to target certain political leaders with deadly force.[8] These covert operations, such as assassination plots against Fidel Castro of Cuba and Ngo Dinh Diem of South Vietnam, came to light in the waning days of the Richard Nixon administration in 1974. In response to the public outrage at this tactic, the Senate created a select committee in 1975, chaired by Senator Frank Church of Idaho, to "Study Government Operations with Respect to Intelligence Activities."[9] This committee, which took the name of its chairman, harshly condemned such targeting, which is referred to in the report as *assassination*: "We condemn assassination and reject it as an instrument of American policy."[10]

In response to the Church Committee's findings, President Gerald R. Ford issued an Executive order in 1976 prohibiting assassinations: "No employee of the United States Government shall engage in, or conspire to engage in political assassination."[11] The order, which is still in force today as Executive Order 12333, "was issued primarily to preempt pending congressional legislation banning political

President Obama discusses mission against bin Laden with National Security Advisor in White House Situation Room

White House (Pete Souza)

assassination."[12] President Ford did not want legislation that would impinge upon his unilateral ability as Commander in Chief to decide on the measures that were necessary for national security.[13] In the end, no legislation on assassinations was passed; national security remained under the President's purview. Congress did mandate, however, that the President submit findings to select Members of Congress before a covert operation commences or in a timely fashion afterward.[14] This requirement remains to this day.

Targeted killings have again come to center stage with the Barack Obama administration's extraordinary step of acknowledging the targeting of the radical Muslim cleric

like the soldier who acts under the authority of self-defense, if one acts reasonably based on the nature of the threat, the action is justified and legal

Anwar al-Awlaki, a U.S. citizen who lived in Yemen and was a member of an Islamic terrorist organization, al Qaeda in the Arabian Peninsula.[15] Al-Awlaki played a significant role in an attack conducted by Umar Farouk Abdulmutallab, the Nigerian Muslim who attempted to blow up a Northwest Airlines flight bound for Detroit on Christmas Day 2009.[16] According to U.S. officials, al-Awlaki was no longer merely encouraging terrorist activities against the United States; he was "acting for or on behalf of al-Qaeda in the Arabian Peninsula . . . and providing financial, material or technological support for . . . acts of terrorism."[17] Al-Awlaki's involvement in these activities, according to the United States, made him a belligerent and therefore a legitimate target.

The context of the fierce debates in the 1970s is different from the al-Awlaki debate. The targeted killing of an individual for a political purpose, as investigated by the Church Committee, was the use of lethal force during *peacetime,* not during an armed conflict. During armed conflict, the use of targeted killing is quite expansive.[18] But in peacetime, the use of *any* lethal force is highly governed and limited by both domestic law and international legal norms. The presumption is that, in peacetime, all use of force by the state, especially lethal force, must be necessary.

U.S.-born radical cleric Anwar al-Awlaki was killed in airstrike in Yemen

Al-Malahem Media

The Law Enforcement Paradigm

Before 9/11, the United States treated terrorists under the law enforcement paradigm—that is, as suspected criminals.[19] This meant that a terrorist was protected from lethal force so long as his or her conduct did not require the state to respond to a threat or the indication of one. The law enforcement paradigm assumes that the preference is not to use lethal force but rather to arrest the terrorist and then to investigate and try him before a court of law.[20] The presumption during peacetime is that the use of lethal force by a state is not justified unless necessary. Necessity assumes that "only the amount of force required to meet the threat and restore the status quo ante may be employed against [the] source of the threat, thereby limiting the force that may be lawfully applied by the state actor."[21] The taking of life in peacetime is only justified "when lesser means for reducing the threat were ineffective."[22]

Under both domestic and international law, the civilian population has the right to be free from arbitrary deprivation of life. Geoff Corn makes this point by highlighting that a law enforcement officer could *not* use deadly force "against suspected criminals based solely on a determination an individual was a member of a criminal group."[23] Under the law enforcement paradigm, "a country cannot target any individual in its own territory unless there is no other way to avert a great danger."[24] It is the individual's *conduct* at the time of the threat that gives the state the right to respond with lethal force.

The state's responding force must be *reasonable* given the situation known at the time. This reasonableness standard is a "commonsense evaluation of what an objectively reasonable officer might have done in the same circumstances."[25] The U.S. Supreme Court has opined that this reasonableness is subjective: "[t]he calculus of reasonableness must embody allowances for the fact that police officers often are forced to make split-second judgments . . . about the amount of force that is necessary in a particular situation."[26]

The law enforcement paradigm attempts to "minimize the use of lethal force to the extent feasible in the circumstances."[27] This approach is the starting point for many commentators when discussing targeted killing: "It may be legal for law enforcement personnel to shoot to kill based on the imminence of the threat, but the goal of the operation, from its inception, should not be to kill."[28] The presumption is that intentional killing by the state is unlawful unless it is necessary for self-defense or defense of others.[29] Like the soldier who acts under the authority of self-defense, if one acts reasonably based on the nature of the threat, the action is justified and legal.

What the law enforcement paradigm never contemplates is a terrorist who works outside the state and cannot be arrested.

These terrorists hide in areas of the world where law enforcement is weak or nonexistent. The terrorists behind 9/11 were lethal and lived in ungovernable areas; these factors compelled the United States to rethink its law enforcement paradigm.

The Law of War Paradigm

The damage wrought by the 9/11 terrorists gave President George W. Bush the political capital to ask Congress for authorization to go to war with these architects of terror, namely al Qaeda. Seven days later, Congress gave the President the Authorization for the Use of Military Force (AUMF) against those "nations, organizations, or persons [the President] determines planned, authorized, committed, or aided the terrorist attacks that occurred on September 11, 2001, or harbored such organizations or persons, in order to prevent any future acts of international terrorism against the United States by such nations, organizations, or persons."[30]

under the law of war, a soldier who kills an enemy has immunity for these precapture or warlike acts

For the first time in modern U.S. history, the country was engaged in an armed conflict with members of an organization, al Qaeda, versus a state. The legal justification to use force, which includes targeted killings, against al Qaeda, the Taliban, and associated forces is twofold: self-defense and the law of war.[31]

In armed conflict, the rules governing when an individual can be killed are starkly different than in peacetime. The law enforcement paradigm does not apply in armed conflict. Rather, designated terrorists may be targeted and killed because of their *status* as enemy belligerents. That status is determined solely by the President under the AUMF. Unlike the law enforcement paradigm, the law of war requires neither a certain conduct nor an analysis of the reasonable amount of force to engage belligerents. In armed conflict, it is wholly permissible to inflict "death on enemy personnel irrespective of the actual risk they present."[32] Killing enemy belligerents is legal unless specifically prohibited—for example, enemy personnel out of combat like the wounded, the sick, or the shipwrecked.[33] Armed conflict also negates the law enforcement presumption that lethal force against an individual is justified only when necessary. If an individual is an enemy, then "soldiers are not constrained by the law of war from applying the full range of lawful weapons."[34] Now the soldier is told by the state that an enemy is hostile and he may engage that individual without any consideration of the threat currently posed. The enemy is declared hostile; the enemy is now targetable.

Communist-related literature, including photograph of Cuban president Fidel Castro, seized by U.S. military during Operation *Urgent Fury*, Grenada, 1983

U.S. Air Force (Mike Oreen)

Anticipatory Self-defense

This paradigm shift is novel for the United States. The President's authority to order targeted killings is clear under domestic law; it stems from the AUMF. Legal ambiguity of the U.S. authority to order targeted killings emerges, however, when it is required to interpret international legal norms like self-defense and the law of war. The United States has been a historic champion of these international norms, but now they are hampering its desires to target and kill terrorists.

Skeptics of targeted killing admit that "[t]he decision to target specific individuals with lethal force after September 11 was neither unprecedented nor surprising."[35] Mary Ellen O'Connell has conceded, for example, that targeted killing against enemy combatants in Afghanistan is not an issue because "[t]he United States is currently engaged in an armed conflict" there.[36] But when the United States targets individuals outside a zone of conflict, as it did with al-Awlaki in Yemen,[37] it runs into turbulence because a state of war does not exist between the United States and Yemen.[38] A formidable fault line that is emerging between the Obama administration's position and many academics, international organizations,[39] and even some foreign governments[40] is *where* these targeted killings can be conducted.[41]

According to the U.S. critics, if armed conflict between the states is not present at a location, then the law of war is never triggered, and the state reverts to a peacetime paradigm. In other words, the targeted individual cannot be killed merely because of his or her *status* as an enemy, since there is no armed conflict. Instead, the United States, as in peacetime, must look to the threat the individual possesses at the time of the targeting. There is a profound shift of the burden upon the state: the presumption now is that the targeted killing must be necessary. When, for example, the United States targeted and killed six al Qaeda members in Yemen in 2002, the international reaction was extremely negative: the strike constituted "a clear case of extrajudicial killing."[42]

The Obama administration, like its predecessor, disagrees. Its legal justification for targeted killings outside a current zone of armed conflict is anticipatory self-defense. The administration cites the inherent *and* unilateral right every nation has to engage in anticipatory self-defense. This right is codified in the United Nations charter[43] and is also part of the U.S. interpretation of customary international law stemming from the *Caroline* case in 1837. A British warship entered U.S. territory and destroyed an American steamboat, the *Caroline*. In response, U.S. Secretary of State Daniel Webster articulated the lasting acid test for anticipatory self-defense: "[N]ecessity of self defense [must be] instant, overwhelming, leaving no choice of means and no moment for deliberation . . . [and] the necessity of self defense, must be limited by that necessity and kept clearly within it."[44]

A state can act under the guise of anticipatory self-defense. This truism, however, leaves domestic policymakers to struggle with two critical quandaries: first, the factual predicate required by the state to invoke anticipatory self-defense, on the one hand; and second, the protections the state's soldiers possess when they act under this authority, on the other. As to the first issue, there is simply no guidance from Congress to the President; the threshold for triggering anticipatory self-defense is ad hoc. As to the second issue, under the law of war, a soldier who kills an enemy has immunity for these precapture or warlike acts.[45] This "combatant immunity"

attaches only when the law of war has been triggered. Does combatant immunity attach when the stated legal authority is self-defense? There is no clear answer.

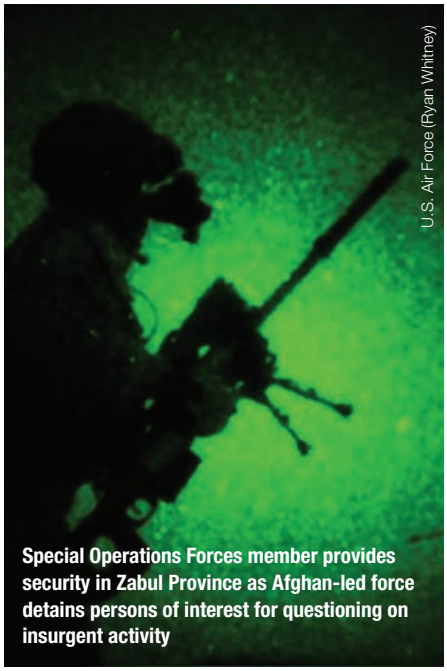
The administration is blurring the contours of the right of the *state* to act in Yemen under self-defense and the law of war protections afforded its *soldiers* when so acting. Therefore, what protections do U.S. Airmen enjoy when operating the drone that killed an individual in Yemen, Somalia, or Libya? If they are indicted by a Spanish court for murder, what is the defense? Under the law of war, it is combatant immunity. But if the law of war is not triggered because the killing occurred outside the zone of armed conflict, the policy could expose Airmen to prosecution for murder.

In order to alleviate both of these quandaries, Congress must step in with legislative guidance. Congress has the constitutional obligation to fund and oversee military operations.[46] The goal of congressional action must not be to thwart the President from protecting the United States from the dangers of a very hostile world. As the debates of the Church Committee demonstrated, however, the President's unfettered authority in the realm of national security is a cause for concern. Clarification is required because the AUMF gave the President a blank check to use targeted killing under domestic law, but it never set parameters on the President's authority when international legal norms intersect and potentially conflict with measures stemming from domestic law.

although the United States has moved away from the terminology unlawful combatant, *the net effect remains the same: it is a third status that is targetable and given fewer protections than the law enforcement paradigm would provide*

Targeting Terrorists

The tension created by this intersection—international norms on one side and domestic law on the other—is framed not only by the self-defense debate, but also by the law of war. The blank-check nature of AUMF has created a profound legal issue for



U.S. Air Force (Ryan Whitney)

Special Operations Forces member provides security in Zabul Province as Afghan-led force detains persons of interest for questioning on insurgent activity

the United States: since the war is against nonstate actors, when can an individual not in uniform be lawfully targeted under the law of war? In response to this issue and the modern-day impossibility of combating terrorism under a law enforcement paradigm, the Bush administration attempted to create a third law of war status beyond civilians (those the state must not target under the law of war) and combatants (those the state can lawfully target under the law of war): *unlawful combatants*. This status melds two concepts together: first, unlawful combatants, like traditional combatants, can be targeted with lethal force as an enemy with no proportionality requirement to resort to lesser means; and second, unlawful combatants, unlike traditional combatants, are not given combatant immunity if captured for their warlike acts before being apprehended.[47] Terrorists are combatants that are "unlawful" because "they do not differentiate themselves from the civilian population, and they do not obey the laws of war."[48] Yet when targeting the "unlawful combatant" like a traditional combatant, the state must still adhere to the bedrock principles embedded in the law of war, which are distinction, military necessity,[49] and preventing unnecessary suffering.[50]

The term *unlawful combatant* first gained currency in the 1942 Supreme Court case of *Ex parte Quirin*.[51] During World War II, President Roosevelt created a military commission to try eight German soldier saboteurs who illegally entered the United States by submarine, shed their military uniforms, and conspired to commit acts of sabotage and espionage and to use explosives on targets within the United States.[52] The U.S. Supreme Court upheld President Roosevelt's actions and a majority of the saboteurs were put to death.[53] In the Court's Opinion, the delineation between lawful and unlawful combatants is made clear:

By universal agreement and practice the law of war draws a distinction between the armed forces and the peaceful populations of belligerent nations and also between those who are lawful and unlawful combatants. Lawful combatants are subject to capture and detention as prisoners of war by opposing military force. Unlawful combatants are subject to capture and detention, but in addition they are subject to trial and punishment by military tribunals for acts which render their belligerency unlawful.[54]

In the aftermath of 9/11, the Bush administration categorized al Qaeda, Taliban, and associated terrorist members as unlawful combatants.[55] This categorization received much criticism, regardless of the Supreme Court's pronouncements, because a "third" status under international law had not yet developed.[56] Although the United States has moved away from the terminology *unlawful combatant*, in favor of *unprivileged belligerent*, the net effect remains the same: it is a third status that is targetable and given fewer protections than the law enforcement paradigm would provide.[57]

The status of unlawful combatant was also advanced by the government of Israel in arguments before its supreme court. The Israeli court, however, did not add this status to the other two—combatant and civilian. Unlawful combatancy has not gained international currency: "[i]t does not appear to us that we were presented with data sufficient to allow us to say, at the present time, that such a third category has been recognized in customary international law."[58] Israel did not foreclose the prospect that this status would gain acceptance in the international community, but ultimate recognition of a third status was deferred.

The Obama administration, like its predecessor, does not agree. Instead, certain terrorists are treated as unlawful combatants or unprivileged belligerents who can be

targeted based on their status. This approach, however, has been robustly criticized for transforming all terrorists into combatants with little or no protections. Does another status exist?

Third Category for Status and Geographical Locations

After 9/11, the complexion of warfare changed in two profound ways: the belligerents who are nonstate actors look like civilians, and they are located worldwide. A gap developed between what the law is and what the law should be. One international law court acknowledged that their fight against terrorism required a "new reality," and therefore the law "must take on a dynamic interpretation."[59] For the first time, the United States, the leading military power in the world, was involved in this novel type of warfare.[60] It was not an armed conflict involving another state, nor was it an armed conflict involving only belligerents within the affected state's borders. The belligerent actors in this armed conflict were nonstate actors outside a zone of armed conflict. And the reality is that this unique type of armed conflict is growing.[61]

This reality of conflict with nonstate actors was the leading catalyst for the International Committee of the Red Cross (ICRC) to convene. The result was the Interpretive Guidance on the Direct Participation in Hostilities, adopted by the ICRC in 2009. The guidance attempted to tackle the legal contours of whether individuals who do not don a uniform, but take a direct part in hostilities, can be targeted.

The guidance provides a roadmap for advancing the position that a status of individuals exists in armed conflict that is separate and distinct from both combatants and civilians. The trend to treat everyone in this special type of armed conflict as civilians—some of whom are uninvolved with the conflict and others who are taking a direct part—is simply rejected by the guidance.[62]

By treating everyone in these types of armed conflict as civilians, the principle of distinction between warriors and civilians becomes weakened, if not irrelevant. This led the ICRC to posit that "*organized armed groups* constitute the armed forces of a non-State party to the conflict and consist only of individuals whose continuous function is to take a direct part in hostilities."[63] The ICRC guidance acknowledges the historic ambiguity of how to treat nonstate actors who are an organized armed group: "While it is generally recognized that members of State armed forces in non-international armed conflict do not qualify as civilians, treaty law, State practice, and international jurisprudence have not unequivocally settled whether the same applies to members of organized armed groups (i.e. the armed forces of non-State parties to an armed conflict)."[64]

Given this ambiguity, the guidance does not lump all actors in an armed conflict within the category of civilians even though "it might be tempting to conclude that membership in such groups is simply a continuous form of civilian direct participation in hostilities."[65] This would "create parties to non-international armed conflicts whose entire armed forces remain part of the civilian population."[66] Instead, the guidance boldly concludes that "[a]s the wording and logic of Article 3 G[eneva] C[onventions] I–IV *and* Additional Protocol II reveals, civilians, armed forces, and organized armed groups of the parties to the conflict are mutually exclusive categories also in non-international armed conflict." A status—members of an organized armed group—is crystallized.

The guidance narrowly defines what constitutes a member of any organized armed group: the term "refers exclusively to the armed or military wing of a non-State party: its armed forces in a functional sense."[67] This armed wing can be targeted like the armed forces of a state in an armed conflict because the armed wing's purpose is to conduct hostilities.[68] The crux of distinguishing whether an individual is a member of an organized armed group or a civilian is whether the person performs a continuous combat function.[69]

Therefore, two requirements—membership in a group and the conduct of that group—must be met before an individual can be considered a member of an organized armed group and thereby be targeted because of his or her status. First, the individual must be a member of an organized group because the "[c]ontinuous combat function requires lasting integration into an organized armed group."[70] Second, the organized group must be conducting hostilities. If these two requirements are met, a belligerent nonstate actor can be targeted without regard to current or future conduct. Therefore, under this two-part analysis: "[a]n individual recruited, trained, and equipped by such a group to continuously and directly participate in hostilities on its behalf can be considered to assume a continuous combat function even before he or she first carries out a hostile act."[71]

Like a member of an armed force (a soldier), the member of the armed group is part of a structure whose aim is to inflict violence upon the state. A soldier might never take a direct part in hostilities, but he holds the status of someone who can be targeted because of his membership in an organization whose function is to perform hostilities. The test for status must be the *threat* posed by the group and the member's course of conduct that allows that threat to persist. This

Servicemembers watch President Obama's address on May 2, 2011, about killing of Osama bin Laden by Navy SEALs in Abbottabad, Pakistan

U.S. Air Force (Stephen Schester)

danger-centric approach is echoed by the Commentary to the Second Protocol: "Those who belong to armed forces or armed groups may be attacked at any time. If a civilian participates directly in hostilities, it is clear that he will not enjoy any protection against attacks for as long as his participation lasts. Thereafter, *as he no longer presents any danger for the adversary*, he may not be attacked; moreover, in case of doubt regarding the status of an individual, he is presumed to be a civilian."[72]

two requirements—membership in a group and the conduct of that group—must be met before an individual can be considered a member of an organized armed group and thereby targeted because of his or her status

Nonstate actors can be targeted only if membership in the organized armed group can be positively established by the state through a pattern of conduct demonstrating a military function.[73] This logic would make it analogous to the soldier: the soldier is a danger and presents a threat continuously because of his status.

Once a state demonstrates membership in an organized armed group, the members can be presumed to be a continuous danger. Because this danger is worldwide, the state can now act in areas outside the traditional zones of conflict. It is the individual's conduct over time—regardless of location—that gives him the status. Once the status attaches, the member of the organized armed group can be targeted.

Enter Congress

The weakness of this theory is that it is not codified in U.S. law; it is merely the extrapolation of international theorists and organizations. The only entity under the Constitution that can frame and settle Presidential power regarding the enforcement of international norms is Congress. As the check on executive power, Congress must amend the AUMF to give the executive a statutory roadmap that articulates when force is appropriate and under what circumstances the President can use targeted killing. This would be the needed endorsement from Congress, the other political branch of government, to clarify the U.S. position on its use of force regarding targeted killing. For example, it would spell out the limits of American lethality once an individual takes the status of being a member of an organized group. Additionally, statutory clarification will give other states a roadmap for the contours of what constitutes anticipatory self-defense and the proper conduct of the military under the law of war.

Congress should also require that the President brief it on the decision matrix of articulated guidelines before a targeted killing mission is ordered. As Kenneth Anderson notes, "[t]he point about briefings to Congress is partly to allow it to exercise its democratic role as the people's representative."[74]

The desire to feel safe is understandable. The consumers who buy SUVs are not buying them to be less safe. Likewise, the champions of targeted killings want the feeling of safety achieved by the elimination of those who would do the United States harm. But allowing the President to order targeted killing without congressional limits means the President can manipulate force in the name of national security without tethering it to the law advanced by international norms. The potential consequence of such unilateral executive action is that it gives other states, such as North Korea and Iran, the customary precedent to do the same. Targeted killing might be required in certain circumstances, but if the guidelines are debated and understood, the decision can be executed with the full faith of the people's representative, Congress. When the decision is made without Congress, the result might make the United States feel safer, but the process eschews what gives a state its greatest safety: the rule of law. **JFQ**

NOTES

[1] Malcolm Gladwell, "Big and Bad: How the S.U.V. Ran Over Automotive Safety," *The New Yorker*, January 12, 2004, 28–32.

[2] Ibid., 30 (emphasis added).

[3] Ibid., 32.

[4] *State* is a technical and legal term meaning a land mass recognized by the United Nations Charter as a member state.

[5] Philip Alston, "Report of the Special Rapporteur on Extrajudicial, Summary or Arbitrary Executions," Report for the Human Rights Council (A/HRC/14/24/Add. 6), May 28, 2010, 3. See Mils Melzer, *Targeted Killing in International Law* (Oxford, UK: Oxford University Press, 2009), 5: "the use of lethal force attributable to a subject of international law with the intent, premeditation and deliberation to kill individually selected persons who are not in the physical custody of those targeting them."

[6] Eben Kaplan, "Targeted Killings," Background Paper for the Council on Foreign Relations, March 2, 2006, 1.

[7] Samuel R. Berger, "The Bush Administration's National Security Strategy: A Limited View of Leadership," testimony before the House Armed Services Committee, Washington, DC, November 19, 2003, 2.

[8] Tyler Harder, "Time to Repeal the Assassination Ban of Executive Order 12333: A Small Step in Clarifying Current Law," *Military Law Review* 172 (Summer 2002), 12.

[9] U.S. Senate, Report No. 94–465, "Alleged Assassination Plots Involving Foreign Leaders" (Washington, DC: U.S. Government Printing Office, November 1975), 282.

[10] Matthew J. Machon, "Targeted Killing as an Element of U.S. Foreign Policy in the War on Terror," School of Advanced Military Studies, Fort Leavenworth, KS, 18.

[11] Executive Order 11905 (February 18, 1976).

[12] Machon, 20. The word "political" has been removed from the Executive order and now there is simply a ban on assassinations.

[13] Nathan Canastaro, "American Law and Policy on Assassinations of Foreign Leaders: The Practicality of Maintaining the Status Quo," *Boston College International and Comparative Review* 26 (Winter 2003), 11–13.

[14] The Hughes-Ryan Amendment of 1974, Pub. L. No. 93–559, Sec. 32, 88 Stat. 1804 (1974).

[15] Scott Shane, "U.S. Approves Targeted Killing of American Cleric," *The New York Times*, April 6, 2010, 6A; Shaykh Anwar al-Awlaki, "The New Mardin Declaration: An Attempt at Justifying the New World," *Inspire*, issue 2 (Fall 2010), 3; Declaration of Professor Bernard Haykel, *Nasser Al-Aulaqi v. Obama*, No. 10-cv-01469 (JDB), U.S. District Court for the District of Columbia (October 7, 2010), 3.

[16] Opposition to Plaintiff's Motion for Preliminary Injunction and Memorandum in Support of Defendants' Motion to Dismiss, *Nasser Al-Aulaqi v. Obama*, Civ. A. No. 10-cv-01469, U.S. District Court for the District of Columbia, filed September 24, 2010, 8 (quoting the director of the National Counterterrorism Center, Michael Leiter, before the Senate Homeland Security and Government Affairs Committee on September 22, 2010).

[17] Designation of Anwar Al-Aulaqi as a Specially Designated Global Terrorist, pursuant to Executive Order 13224 and the Global Terrorism Sanctions Regulations, 31 C.F.R. Part 594, 75 Federal Register 43233, 43234 (July 23, 2010).

[18] W. Hays Parks, "Memorandum on Executive Order 12333 and Assassination," 8 (on file with author).

[19] Greg Travalio and John Altenburg, "Terrorism, State Responsibility, and the Use of Military

Force," *Chicago Journal of International Law* 4 (Spring 2003), 109.

[20] Judgment, Public Committee Against Torture in *Israel v. Israel*, HCJ 769/02 (December 11, 2005), ISrSC, at para. 22.

[21] Geoffrey S. Corn, "Mixing Apples and Hand Grenades: The Logical Limit of Applying Human Rights Norms to Armed Conflict," *Journal of International Humanitarian Legal Studies* 1 (2010), 85.

[22] Ibid., 78.

[23] Ibid., 77.

[24] Gabriella Blum and Philip Heymann, *Law and Policy of Targeted Killing, Laws, Outlaws, and Terrorists: Lesson from the War on Terrorism* (Boston: MIT Press, 2010), 10.

[25] Thomas D. Petrowski, "Use-of-Force Policies and Training: A Reasoned Approach," *F.B.I. Law Enforcement Bulletin* 71, no. 10 (October 2002), 26.

[26] *Graham v. Conner*, 490 U.S. 386, 396–397 (1989).

[27] Alston, 23.

[28] Ibid., 5.

[29] Ibid., 11. Alston states that a "State killing is legal only if it is required to protect life (making lethal force *proportionate*) and there is no other means, such as capture or non-lethal incapacitation, of preventing that threat to life (making lethal force *necessary*)."

[30] Authorization for the Use of Military Force, Pub. L. 107–40, 115 Stat. 224 (2001), sec. 2(a).

[31] The Obama administration has addressed this justification in two forums: filings in Federal court in the case of *Al-Aulaqi v. Obama*, Civ. A. No. 10-cv-01469 (December 7, 2010) and the statements of administration officials (Harold Koh, Legal Advisor to the Department of State, "The Obama Administration and International Law," keynote speech at the annual meeting of the American Society of International Law, March 24, 2010).

[32] Corn, "Mixing Apples and Hand Grenades," 73.

[33] Convention for the Amelioration of the Condition of Wounded, Sick, and Shipwrecked Members of the Armed Forces at Sea, August 12, 1949, 6 U.S.T. 3217, 75 U.N.T.S. 85.

[34] W. Hays Parks, "Direct Participation in Hostilities Study: No Mandate, No Expertise, and Legally Incorrect," *New York University Journal of International Law and Politics* 45 (Spring 2010), 780.

[35] William C. Banks, testimony before the Subcommittee on National Security and Foreign Affairs, Committee on Oversight and Government Reform, U.S. House of Representatives, April 28, 2010.

[36] Mary Ellen O'Connell, testimony before the Subcommittee on National Security and Foreign Affairs, Committee on Oversight and Government Reform, U.S. House of Representatives, April 28, 2010.

[37] Shane, 6A.

[38] According to O'Connell, "Armed Conflict depends on the satisfaction of two essential minimum criteria, namely: i. the existence of organized armed groups; ii. engaged in fighting of some intensity." Declaration of Prof. Mary Ellen O'Connell for the case of *Al-Aulaqi v. Obama*, No. 10-cv-01469 (JDB), U.S. District Court for the District of Columbia (October 8, 2010), 6.

[39] International Committee of the Red Cross, Interpretive Guidance on the Notion of Direct Participation in Hostilities under International Humanitarian Law, June 2009 (prepared by Nils Melzer).

[40] European Convention for the Protection of Human Rights and Fundamental Freedoms, Protocol No. 2, 9ETS No. 44, enacted on May 6, 1963. Also, the Israel Supreme Court has been critical of targeted killing.

[41] Other skeptics of targeted killings, like Nils Melzer, fear that "an extremely permissive targeting regime [is] prone to an unacceptable degree of error and arbitrariness." Nils Melzer, "Military Necessity and Humanity: A Response to Four Critiques of the ICRC's Interpretive Guidance on the Notion of Direct Participation in Hostilities," *New York University Journal of International Law and Policy* 42 (Spring 2010), 913.

[42] United Nations Commission on Human Rights, UN Doc. E/CN.4/003/3, paras. 37–39 (2003).

[43] UN Charter, Art. 51.

[44] Webster's test ingeniously balances necessity (the need for security: "the necessity of self defense") with proportionality (the appropriate amount of responsive force: "must be limited by that necessity and kept clearly within it"). Dale Stephens, "Rules of Engagement and the Concept of Unit Self Defense," *Naval Law Review* 45 (1998), 137. In 1837, the British Government claimed that the steamboat was being used by Canadian rebels to expel the British from Canada. The U.S. Government protested Britain's action, and an exchange of diplomatic letters between the two governments resulted.

[45] Geoffrey S. Corn and Michael L. Smidt, "To Be or Not to Be, That is the Question: Contemporary Military Operations and the Status of Captured Personnel," *The Army Lawyer* (June 1999), 9–15.

[46] U.S. Constitution, Art. I, Sec. 8, Clauses 12–15. See Samuel P. Huntington, *The Soldier and the State: The Theory and Politics of Civil-Military Relations* (Cambridge, MA: Belknap Press, 1957), 400–427.

[47] U.S. Department of Defense, Manual for Military Commissions Sec. 6(a)(13)(d)(2009).

[48] Targeted Killing Case, para. 27.

[49] U.S. Department of the Army Field Manual, 27–10, *The Law of Land Warfare* 4 (June 18, 1956) (C6, July 15, 1976): "those measures not prohibited by international law which are indispensable for securing the complete submission of the enemy as soon as possible."

[50] Protocol I, art. 51(b)(6) ("an attack which may be expected to cause incidental loss of civilian life, injury to civilians . . . which would be excessive in relation to the concrete and direct military advantage anticipated"). This is referred to as proportionality as well, but the author does not use the term in this paper because it might confuse the reader. The author instead uses the term *unnecessary suffering* because it is the proportionality of force that must be considered vis-à-vis civilians.

[51] *Ex parte Quirin*, 317 U.S. 1 (1942).

[52] Glenn Sulmasy, *The National Security Court System: A Natural Evolution of Justice in an Age of Terror* (Oxford, UK: Oxford University Press 2009), 56–58.

[53] *Ex parte Quirin*, 45–46.

[54] Ibid., 30–31.

[55] Norman G. Printer, Jr., "The Use of Force Against Non-State Actors under International Law: An Analysis of the U.S. Predator Strike in Yemen," *UCLA Journal of International Law and Foreign Affairs* 8 (Fall 2003), 363–369.

[56] Antonio Cassese, *International Law* (Oxford, UK: Oxford University Press, 2005), 409; Derek Jinks, "The Declining Significance of POW Status," *Harvard International Law Journal* 45 (2004), 438.

[57] U.S. Department of Defense, Manual for Military Commissions Sec. 6(a)(13)(d)(2009).

[58] Targeted Killing Case, para. 28.

[59] Ibid.

[60] Laura M. Olson, "Guantanamo Habeas Review: Are the D.C. District Court's Decisions Consistent with IHL Internment Standards?" *Case Western Reserve Journal of International Law* 22 (2010), 212.

[61] *Hamdan v. Rumsfeld*, 548 U.S. 557, 628–631 (2006).

[62] Geoffrey S. Corn, "Two Sides of the Combatant COIN: Untangling DPH from Belligerent Status in Non-International Armed Conflict" (forthcoming and unpublished manuscript on file with author), 1.

[63] ICRC Guidance, 1002.

[64] Ibid.

[65] Ibid.

[66] Ibid., 1002–1003.

[67] Ibid.

[68] Corn, "Two Sides of the Combatant COIN," 8.

[69] ICRC Guidance, 1007.

[70] Ibid.

[71] Ibid.

[72] Commentary to Protocol II, para. 4789.

[73] Kenneth Watkins, "Opportunity Lost: Organized Armed Groups and the ICRC Direct Participation in Hostilities Interpretative Guidance," *New York University Journal of International Law and Politics* 42 (Spring 2010), 692.

[74] Kenneth Anderson, "Targeted Killing in U.S. Counterterrorism Strategy and Law," A Working Paper of the Series of Counterterrorism and American Statutory Law, a joint project of the Brookings Institution, the Georgetown University Law Center, and the Hoover Institute (May 11, 2009), 35.