

# THE LEGALITY OF THE UNITED STATES' USE OF TARGETED KILLINGS IN THE WAR AGAINST TERROR

## I. INTRODUCTION

Following the attacks on 9/11, the United States has been fighting a “war on terrorism.” To most people, that war involves fighting against al Qaeda and other terrorist organizations in Afghanistan, Iraq, and Pakistan. Quietly flying under the radar, however, is the emergence of active terrorist cells in Yemen and several other Middle-Eastern countries. Those seeking to wage jihad against the Western world have begun to assemble in Yemen, a country known as a safe haven for terrorists since the end of the Afghan war against the Soviet Union in the 1980s.<sup>1</sup> With two wars currently being conducted, the U.S. has made it clear that it does not intend to wage a third war in Yemen, nor would Yemen welcome such action by the U.S.<sup>2</sup> Instead, the U.S. will assist the Yemeni military by training and equipping Yemeni troops.<sup>3</sup> Additionally, the U.S. Joint Special Operations Command (JSOC) has been working in conjunction with the Yemeni government to eliminate high-profile terror suspects via “targeted killings.”<sup>4</sup> Included in the list of “capture or kill” terror suspects are Americans whom U.S. officials claim have joined al Qaeda.<sup>5</sup>

This Note will analyze the legality of the United States’ use of “targeted killings” of both U.S. and non-U.S. citizens in Yemen and other nation-states. First, this Note will address the issues arising when the U.S. conducts a targeted killing of a non-U.S. citizen. This analysis includes a discussion of the role of self-defense, suspect classification, government accountability, and the effects of Executive Order 12,333, which bans assassinations carried out by the United States.<sup>6</sup> Second, this Note will investigate the lawfulness of targeted killings against U.S. citizens abroad and will discuss constitutional issues implicated by this practice. Additionally, this Note assesses several ways the U.S. may be able to lawfully carry out these targeted killings.

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1. Eric Schmitt & Robert F. Worth, *U.S. Widens Terror War to Yemen, a Qaeda Bastion*, N.Y. TIMES, Dec. 27, 2009, [http://www.nytimes.com/2009/12/28/world/middleeast/28yemen.html?\\_r=1](http://www.nytimes.com/2009/12/28/world/middleeast/28yemen.html?_r=1).

2. Jim Garamone, *Mullen Outlines U.S. Military Role in Yemen*, AM. FORCES PRESS SERVS., Jan. 8, 2010, <http://www.defense.gov/News/NewsArticle.aspx?ID=57430>.

3. *Id.*

4. Dana Priest, *U.S. Military Teams, Intelligence Deeply Involved in Aiding Yemen on Strikes*, WASH. POST, Jan. 27, 2010, at A1.

5. *Id.*

6. Exec. Order No. 12,333, 46 Fed. Reg. 59,941, 59,952 (Dec. 4, 1980).

For the purpose of this Note, “targeted killing” will be defined as an “extra-judicial, premeditated killing by a state of a specifically identified person not in its custody.”<sup>7</sup> The actors analyzed in this Note are those actively engaged in plotting future attacks against U.S. interests. They are non-state actors who are not merely advocating violence, but directly participate in the planning or execution of a terrorist act. Additionally, “targeted killing” is not strictly limited to the use of Predator drones to eliminate suspected terrorists. Previous targeted killings in Yemen have consisted of CIA operated Predator drones, but may also include covert, tactical military operations, or the hiring of private contractors. While this Note only addresses targeted killings, it is not meant to suggest that targeted killings are the most effective way to combat terrorist threats abroad.

## II. BACKGROUND

A small, Middle Eastern country, Yemen’s role in the Western world’s “fight against terror” is largely unknown. Security experts warn that ignoring Yemen could lead to a failed state where terrorists are able to recruit and train.<sup>8</sup> In fact, a close look at Yemen would lead an individual not schooled in political science or international relations to realize the potential threat Yemen could pose. A weak central government, constant violence, widespread poverty, and a thirty-five percent unemployment rate allows radical Islamic institutions a healthy recruiting base for young and uneducated males.<sup>9</sup> Further evidence of Yemen’s potential role in future terror attacks is that Yemenis account for the largest single national group currently being held in Guantanamo Bay.<sup>10</sup>

Yemen first made front-page news in the United States after al Qaeda suicide bombers attacked the U.S.S. Cole, a naval ship docked in a Yemeni port, killing several American soldiers.<sup>11</sup> Since that incident,

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7. Richard Murphy & Afsheen John Radsan, *Due Process and Targeted Killing of Terrorists*, 31 CARDOZO L. REV. 405 (2009).

8. See, e.g., Elham Manea, *Is Yemen the Next Failed State?*, GUARDIAN.CO.UK (Dec. 29, 2009), available at <http://www.guardian.co.uk/commentisfree/2009/dec/29/yemen-terror-failed-state>.

9. Corinne Graff, *What You Should Know About Yemen*, BROOKINGS INST. (Jan. 8, 2010), available at [http://www.brookings.edu/opinions/2010/0108\\_yemen\\_graff.aspx](http://www.brookings.edu/opinions/2010/0108_yemen_graff.aspx).

10. John R. Cook, *U.S. Administration Encounters Difficulties in Effort to End Guantanamo Bay Detentions*, 103 AM. J. INT’L. L. 575, 578 (2009).

11. John F. Burns, *The Warship Explosion: The Overview; Blast Kills Sailors on U.S. Ship in Yemen*, N.Y. TIMES, Oct. 13, 2000, <http://www.nytimes.com/2000/10/13/world/the-warship-explosion-the-overview-blast-kills-sailors-on-us-ship-in-yemen.html>.

the Fort Hood shooter, Major Nidal Hasan, has also been linked to a Yemeni-based Islamic cleric.<sup>12</sup> In addition, investigations into the failed Christmas Day bombing of a Detroit-bound flight unveiled that the suspect received his terrorist training while in Yemen.<sup>13</sup> Finally, terrorism specialists are concerned that a U.S.-born cleric believed to have taken refuge in Yemen has joined the ranks of al Qaeda and could be the next Osama bin Laden.<sup>14</sup>

### III. TARGETED KILLINGS OF NON-U.S. CITIZENS IN YEMEN

The known use of targeted killings against suspected terrorist leaders in Yemen dates back to 2002.<sup>15</sup> That year, a Predator drone flying in a remote area of Yemen fired upon a car, killing all six passengers.<sup>16</sup> Among those passengers killed were suspected al Qaeda leaders, including an American citizen.<sup>17</sup> While no U.S. official formally acknowledged that the U.S. was behind the attack, it is well known that the CIA conducted the operation.<sup>18</sup> The practice of targeted killings implicates a potential legal conundrum, which may have to be addressed by future U.S. administrations conducting targeted killings abroad: is this an “extra-judicial execution,” or a “legitimate means of defence?”<sup>19</sup> To resolve this issue, many questions must first be settled. First, are targeted killings of suspected terrorists a legitimate means of self-defense under international law? Second, how do we classify these suspected terrorists? Third, how does current U.S. law deal with this matter?

#### *A. Targeted Killings: A Legitimate Means of Self-Defense?*

Utilized by the United States and Israel, the use of targeted killings to eliminate terror suspects has come under intense scrutiny by many

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12. Evan Perez & Keith Johnson, *Hanson, Radical Cleric Had Contact*, WALL ST. J., Nov. 10, 2009, at A7, available at <http://online.wsj.com/article/SB125778227582138829.html>.

13. Heather Murdock, *Radical Yemeni Cleric The New Bin Laden?*, WASH. TIMES, Apr. 13, 2010, <http://www.washingtontimes.com/news/2010/apr13/radical-yemeni-cleric-the-new-bin-laden/>.

14. *Id.*

15. David Kretzmer, *Targeted Killing of Suspected Terrorists: Extra-Judicial Executions or Legitimate Means of Defense?*, 16 EUR. J. INT'L L. 171, 171 (2005).

16. *Id.*

17. Kimberly Dozier, *CIA May Send Predator Drones Into Yemen*, HUFFINGTON POST, Aug. 25, 2010, [http://www.huffingtonpost.com/2010/08/25/cia-yemen-predator-drones\\_n\\_694981.html](http://www.huffingtonpost.com/2010/08/25/cia-yemen-predator-drones_n_694981.html).

18. Kretzmer, *supra* note 15, at 171.

19. *Id.*

international law experts.<sup>20</sup> One reason for the criticism has been that the Israeli practice of targeted killings has often resulted in the murder of innocent civilians.<sup>21</sup> Critics also claim that targeted killings are simply a means of “extra-judicial executions.”<sup>22</sup>

Nevertheless, some support for the use of targeted killings does exist in the legal community. For example, proponents of the practice argue that the “killings [are] legitimate acts of war carried out as part of the state’s inherent right to self-defence.”<sup>23</sup> This Note argues that there are circumstances in which a state may lawfully utilize the practice of targeted killings against suspected terrorists.

To begin, it is worth noting that this Note will deal with targeted killings more so as a means of preemptive self-defense than anticipatory self-defense the difference being that anticipatory self-defense is less controversial since it is only employed when there is an *imminent* threat of safety.<sup>24</sup> The targeted killing of suspected terrorists in Yemen will more than likely be conducted when U.S. officials receive an intelligence report citing the known location of a high-value suspect.<sup>25</sup> While certain terror suspects are a threat to U.S. interests, the threat presented, for example, by the group of six al Qaeda members who were the subject of the targeted killing in 2002,<sup>26</sup> was not imminent.<sup>27</sup>

The use of preemptive self-defense is not without controversy. Preemptive self-defense may be defined as,

[A] claim to entitlement to use unilaterally, without prior international authorization, high levels of violence to arrest an incipient development that is not yet operational or directly threatening, but that, if permitted to mature, could be seen by the

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20. See, e.g., *id.* at 173-74.

21. *Id.* at 172, 175.

22. *Id.* at 171.

23. *Id.* at 173.

24. W. Michael Reisman & Andrea Armstrong, *The Past and Future of the Claim of Preemptive Self-Defense*, 100 AM J. INT’L L. 525, 526 (2006).

25. President Obama, for instance, has stated that the U.S. will make targeted killings in Pakistan when armed with “actionable intelligence about high-value terrorist targets . . .” Kenneth Anderson, *Targeted Killings*, DEFINING IDEAS (May, 11, 2009), available at <http://www.hoover.org/publications/defining-ideas/article/5281>.

26. See Kretzmer, *supra* note 15, at 171.

27. “Imminent” is defined as “ready to take place; especially: hanging threateningly over one’s head[.]” MERRIAM-WEBSTER, <http://www.merriam-webster.com/dictionary/imminent> (last visited Nov. 5, 2011).

potential preemptor as susceptible to neutralization only at a higher and possibly unacceptable cost to itself.<sup>28</sup>

The United States has employed what can be viewed as preemptive self-defense dating back to before World War I.<sup>29</sup> However, what an individual state may consider a valid exercise of preemptive self-defense, the international community may view as a violation of international law. For example, Israel deemed its use of force against Iraqi nuclear facilities in 1981 a means of self-defense.<sup>30</sup> Israel stated, “[t]he atomic bombs which that reactor was capable of producing whether from enriched uranium or from plutonium, would be of the Hiroshima size. Thus, a mortal danger to the people of Israel progressively arose.”<sup>31</sup> Nevertheless, the United Nations (UN) Security Council disagreed, condemning the attack.<sup>32</sup> This example poses the exact issue which surrounds the preemptive self-defense debate, which is essentially: when does a state or non-state action rise to a level rendering a preemptive strike lawful? International law scholars will endlessly debate over the moment at which a potential terrorist activity justifies a preemptive attack. This Note argues that preemptive self-defense is lawful before imminency, but only after government officials conclude that a failure to act will leave a nation-state or its citizens the subject of an attack in the near future.

Included in the preemptive self-defense analysis is the need to ensure near certainty that the recipient of a targeted killing is the actual offender. The killing of an innocent person believed to be a terror suspect could result in a diplomatic crisis or public outcry. For example, recent Israeli blunders in the targeted killing practice have resulted in questioning the usefulness of the action as compared to its negative consequences.<sup>33</sup> Mistakes made by Israeli Mossad agents in Norway, Canada, and Jordan have dealt serious blows to Israeli support for targeted killings.<sup>34</sup>

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28. Reisman & Armstrong, *supra* note 24, at 526.

29. *Id.* at 527.

30. 1981: *Israel Bombs Baghdad Nuclear Reactor*, BBC NEWS, [http://news.bbc.co.uk/onthisday/hi/dates/stories/june/7/newsid\\_3014000/3014623.stm](http://news.bbc.co.uk/onthisday/hi/dates/stories/june/7/newsid_3014000/3014623.stm) (last visited Nov. 5, 2011).

31. *Id.*

32. Reisman, *supra* note 24, at 537.

33. Laura Blumenfeld, *In Israel, a Divisive Struggle Over Targeted Killing*, WASH. POST, (Aug. 27, 2006), available at <http://www.washingtonpost.com/wp-dyn/content/article/2006/08/26/AR2006082600917.html>.

34. Gal Luft, *The Logic of Israel's Targeted Killings*, MIDDLE E. Q. (2003), available at <http://www.meforum.org/515/the-logic-of-israels-targeted-killing>.

United Nations Charter Article 51 gives member-states the option to use force as a means of defense when faced with an armed attack.<sup>35</sup> The provision was enacted with the purpose of allowing states to defend themselves when attacked *by other states*.<sup>36</sup> This narrow reading of Article 51 has since been updated by the United Nations Security Council due to the 9/11 attacks. United Nations Security Council Resolutions 1368 and 1373 (2001) declare that the right of individual or collective self-defense does not merely extend to defend against attacks from other member-states, but also from armed attacks by non-state actors, such as an international terrorist organization.<sup>37</sup> Additionally, a "United Nations High-Level Panel on Threats, Challenges and Change" realized that Article 51's language and original intent may need to shift in order to meet the growing threat of terrorism and attacks by non-state actors.<sup>38</sup> Nevertheless, the United Nations has typically resisted a member state's effort to unilaterally use force against another state in the absence of formal permission.<sup>39</sup> However, "the more common formulation appears to be a right to use force in a preemptive fashion against non-state entities employing what have come to be called 'terrorist' methods."<sup>40</sup>

A useful starting point for analyzing the lawfulness of preemptive self-defense is assessing whether international law recognizes an inherent right to life. Several international treaties such as the International Convention on Civil and Political Rights,<sup>41</sup> the American Convention on Human Rights,<sup>42</sup> and the African Charter on Human and Peoples' Rights,<sup>43</sup> all prohibit the *arbitrary* taking of a human life.<sup>44</sup> David Kretzmer correctly believes that a state may use force to respond to an armed attack by terrorists, therefore making the killing not arbitrary, but

35. U.N. Charter art. 51, available at [http://www.nato.int/cps/en/natolive/official\\_texts\\_16937.htm](http://www.nato.int/cps/en/natolive/official_texts_16937.htm).

36. Reisman, *supra* note 24, at 533-34.

37. S.C. Res. 1368, ¶¶ 1, 5, U.N. Doc S/RES/1368 (Sept. 12, 2001). See also S.C. Res. 1373, U.N. Doc. S/RES/1373 (Sept. 28, 2001).

38. Reisman, *supra* note 24, at 532.

39. John C. Yoo, *Force Rules: UN Reform and Intervention*, 6 CHI. J. INT'L L. 641, 641 (2006).

40. Reisman, *supra* note 24, at 547.

41. International Covenant on Civil and Political Rights, adopted Dec. 16, 1966, 999 U.N.T.S. 171, available at <http://www.hrweb.org/legal/cpr.html>.

42. American Convention on Human Rights, Nov. 22 1969, 1144 U.N.T.S. 123, available at <http://www1.umn.edu/humanrts/oasinstr/zoas3con.htm>.

43. African [Banjul] Charter on Human and Peoples' Rights, June 27, 1981, 1520 U.N.T.S. 217, available at [http://www.achpr.org/english/\\_info/charter\\_en.html](http://www.achpr.org/english/_info/charter_en.html).

44. Kretzmer, *supra* note 15, at 177.

lawful.<sup>45</sup> However, a state must demonstrate the existence of two conditions—necessity and proportionality—in order for its response to be justifiable.<sup>46</sup> When these conditions are met, a state conducts a lawful and non-arbitrary killing of a suspected terrorist.

For the United States to claim that the targeted killing of a suspected terrorist is lawful, it must first prove necessity.<sup>47</sup> It is best to analyze necessity under Professor Kretzmer's two-part necessity test.<sup>48</sup> First, "[i]s the use of force absolutely required, or could other measures be employed to protect the threatened person?" Second, "[a]ssuming that no other measures are available, is it absolutely necessary to use *lethal* force, or could some lesser degree of force be employed?"<sup>49</sup>

U.S. use of targeted killings against many of the suspected terrorists in Yemen and similar states would meet the necessity requirement under this two-part test. Yemen is a failing state and its government has demonstrated that it is unable secure its entire territory.<sup>50</sup> Therefore, the Yemeni government's ability to capture, imprison and try terrorists located within its borders is highly suspect. Additional attempts by the U.S. government to help Yemen capture these terrorists have also proven ineffective.<sup>51</sup> Remote, targeted killings are therefore the most effective and logical means of protecting the "threatened person." Critics might argue that the targeted killings will be ineffective, as new terror leaders emerge after the capture or killing of another. However, this must not deter the U.S. in its mission to eliminate current and real threats to its security.

Next, it is necessary to determine the proportionality of the response to the threat. It is true that the Israeli experiences with targeted killings have resulted in the loss of innocent civilian lives.<sup>52</sup> However, Yemen may give the U.S. an opportunity to produce a proportional response with a minimized risk of civilian death. Most terror suspects are located

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45. *Id.* at 181.

46. *Id.* at 187.

47. *Id.*

48. *Id.* at 178.

49. *Id.*

50. Christopher Boucek, *Yemen's Deteriorating Security, Economy, Could Fuel Terrorism*, WASH. POST, Jan 2, 2010, [www.washingtonpost.com/wp-dyn/content/graphic/2010/01/02/GR2010010201243.html](http://www.washingtonpost.com/wp-dyn/content/graphic/2010/01/02/GR2010010201243.html).

51. See, e.g., Hamza Hendawi, *U.S. Terror War in Yemen Frustrated by Politics*, MSNBC.COM, (Oct. 17, 2010), [http://www.msnbc.msn.com/id/39708280/ns/world\\_news-mideast/n\\_africa/t/us-terror-war-yemen-frustrated-politics/](http://www.msnbc.msn.com/id/39708280/ns/world_news-mideast/n_africa/t/us-terror-war-yemen-frustrated-politics/).

52. Kretzmer, *supra* note 15, at 171.

in desolate and uninhabited regions in Yemen.<sup>53</sup> Unlike the often crowded areas of the West Bank, Yemen allows for a greater opportunity to conduct targeted killings without the presence of civilians. Also, for targeted killing to be proportional, Predator drones or covert military operations must employ small and tactical activities to minimize risk to those civilians.

Therefore, under Kretzmer's analysis of the legality of preemptive self-defense, targeted killing of suspected terrorists will most likely be lawful. However, there are significant caveats to this analysis. First, in order to establish necessity, there must be some measure of certainty in intelligence gathering.<sup>54</sup> While there is a certain level of uncertainty in any intelligence report, legal scholars seem primarily concerned with the executive branch's perceived authority to kill any individual it deems to be a threat.<sup>55</sup> The exact certainty of intelligence required to conduct a targeted killing is beyond the scope of this Note. Nevertheless, this factor must be taken into account. A second and more narrowed version of this point centers on how to classify these targets and how their classification impacts our legal analysis.

#### *B. Classification of Suspected Terrorists*

To effectively analyze whether or not the targeted killing of suspected terrorists is lawful, one must determine which international law model to apply. One approach is the "human rights" model, which allows states to kill an individual not in its possession if he causes "a threat of death or serious harm" to others.<sup>56</sup> This view is more in line with a law enforcement approach.<sup>57</sup> Alternatively, the "international humanitarian law" (IHL) model, which is more pertinent to armed conflicts, gives states the authority to kill any individual who actively engages in hostilities.<sup>58</sup>

Kretzmer posits that suspected terrorists do not fit comfortably within either of these models,<sup>59</sup> and proposes that a "hybrid" of the two models would allow for a more modern application of the type of threats

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53. Alistair Harris & Michael Page, *Al Qa'ida in Yemen: Situation Update and Recommendations for Policy Makers*, THE ROYAL UNITED SERVS. INST., <http://www.rusi.org/analysis/commentary/ref:C4B475DF54843E> (last visited Nov. 5, 2011).

54. See Kretzmer, *supra* note 15, at 203.

55. See *id.*

56. Murphy, *supra* note 7, at 408.

57. *Id.*

58. *Id.* at 408-09.

59. Kretzmer, *supra* note 15, at 175.



terrorists pose.<sup>60</sup> The difficulty with the previous two models is that it is unrealistic to identify terrorists as “civilians” and therefore to afford them higher levels of international protection. But, it is also impractical to label them as traditional combatants who are given virtually no protections so long as they are engaged in hostilities.<sup>61</sup> Given these difficulties, international law must evolve in light of non-state terrorist organizations and determine what role these new actors play. Without clearer standards and laws to apply to this new breed of terrorist, nation-states will ultimately frame their interpretation of the laws to conform to the ultimate goal of killing a suspected terrorist. The question then arises, if clear standards are established, how will they be enforced?

### *C. Government Accountability*

While it is difficult to specifically classify terror suspects in Yemen under either of these two models, international law scholars seem hesitant to give the executive branch carte blanche approval for killings otherwise allowable under an IHL model.<sup>62</sup> Instead, an argument exists that the U.S. should approve a due process type model for approving targeted killings.<sup>63</sup> Recent U.S. Supreme Court cases such as *Hamdi v. Rumsfeld*<sup>64</sup> and *Boumediene v. Bush*<sup>65</sup> illustrate how the judiciary has taken a more active role in checking executive authority to conduct foreign operations during wartime.<sup>66</sup> To curb potential abuses, Professors Murphy and Radsan would require, “executive authorities [to] conduct independent, impartial, post-hoc review of the legality of any targeted killing by the CIA” with the review being “as public as national security permits.”<sup>67</sup>

Murphy and Radsan correctly conclude that the executive branch cannot enjoy unrestrained orders of targeted killings,<sup>68</sup> but their approach goes too far in its proposals. Practically speaking, the authors suggest that the U.S. conduct open and transparent investigations into covert military operations. Targeted killings necessarily require some of the highest levels of classified intelligence and operations information. In the event that these operations are the subject of judicial review, executive

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60. *Id.*

61. *Id.* at 212.

62. See Murphy, *supra* note 7, at 408-09.

63. *Id.* at 409.

64. 542 U.S. 507 (2004).

65. 553 U.S. 723 (2008).

66. Murphy, *supra* note 7, at 409.

67. *Id.* at 411.

68. See *id.* at 405.

officials would most certainly claim that the “state secrets” doctrine exempts them from disclosing much of this information. Detailed analysis of the implications of the “state secrets” doctrine follows below.<sup>69</sup>

If the ultimate goal is to ensure that the executive branch does not conduct unrestricted targeted killings of suspected terrorists, a more realistic review is required. Alternative methods for executive review are beyond the scope of this note. However, the reality is that if the executive branch is to be held accountable, a system must be created where government officials are able to disclose necessary information without compromising national security. A review requiring officials to disclose too much information would result in a viable “state secrets” defense, disabling the pursuit of greater transparency. Alternatively, a judicial review process serving as a “rubberstamp” approval will be an ineffective check on executive orders of targeted killings. The most effective solution lies somewhere in the middle of these extremes.

#### *D. Are Targeted Killings Assassinations?*

##### *1. Executive Order 12333*

Executive Order (E.O.) 12333, signed by President Reagan, provides that, “[n]o person employed by or acting on behalf of the United States Government shall engage in, or conspire to engage in, assassination.”<sup>70</sup> E.O. 12333 also prohibits members of the intelligence community from participating in, or requesting that a person participate in any activity forbidden by the order.<sup>71</sup> Because E.O. 12333 does not define “assassination,” much of the debate regarding the order centers on its definition and scope.<sup>72</sup>

A narrow reading of E.O. 12333 would seem to allow for the targeted killing of suspected terrorists. One interpretation of the order, which was first created by President Ford and subsequently followed by his successors,<sup>73</sup> is that it was intended to prohibit the killing of foreign

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69. See *infra* Part IV(A)(2).

70. Exec. Order. No. 12,333, 46 Fed. Reg. 59941, 59952 (Dec. 4, 1981). This Order remains in force today.

71. *Id.*

72. See, e.g., Elizabeth B. Bazan, *Assassination Ban and E.O. 12333: A Brief Summary*, CONG. RESEARCH SERV., RS 21037, 1-2 (updated Jan. 4, 2002), available at <http://www.fas.org/irp/crs/RS21037.pdf>.

73. *Id.* at 1 (“E.O. 12333 [was] the latest in a series of three executive orders which included assassination bans. The first, Executive Order 11905, 41 Fed. Reg. 7703, 7733 (President Gerald Ford, 2/19/76), was part of an executive order issued by President Ford

officials or heads of state.<sup>74</sup> A congressional investigation into alleged abuses of the intelligence community condemned assassinations of foreign leaders as a tool of American foreign policy.<sup>75</sup> However, an alternative interpretation is that E.O. 12333 prohibits the killing of *any* individual for political purposes, not just foreign leaders.<sup>76</sup>

The attacks on 9/11 and subsequent terror attempts directed at the United States and its interests abroad may put targeted killings of suspected terrorists outside the scope of E.O. 12333. Following a review of previous Executive Orders banning assassinations, President George W. Bush concluded “that executive orders banning assassination do not prevent the president from lawfully singling out a terrorist for death by covert action.”<sup>77</sup> A Congressional Research Service argues that the targeted killing of terrorists may be lawful under Article 51 of the United Nations Charter.<sup>78</sup> Analysis under this article renders targeted killings lawful if they are exercised as part of a state’s “inherent right of self-defense.”<sup>79</sup> Therefore, although military responses to armed attacks against U.S. interests may be justifiable and outside the scope of E.O. 12333, they must comport with the requirements of Article 51.<sup>80</sup>

E.O. 12333, as it relates to “assassinations” may also be unenforceable in a court of law. To be lawful, an E.O. must originate from a congressional delegation of authority or mandate.<sup>81</sup> Additionally, E.O. 12333 expressly prohibits “a private right of action” to be adjudicated pursuant to the order.<sup>82</sup> Therefore, even though E.O. 12333 may in theory limit the military, or any other agency, from using targeted killings as a method of assassination, the order still may not prohibit the practice from occurring as a legal matter.

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in response to concerns raised in the 1970’s with respect to alleged abuses by the U.S. intelligence community.”).

74. *Id.*

75. *Id.* at 1-2. These condemnations were the result of a U.S. Senate investigation chaired by Senator Frank Church. The Senate committee headed by Church investigated allegations of assassination plots targeting foreign leaders by the U.S. intelligence community. *Id.*

76. *Id.*

77. Barton Gellman, *CIA Weighs “Targeted Killing” Missions*, WASH. POST., Oct. 28, 2001, at A1, available at <http://www.washingtonpost.com/ac2/wp-dyn1A63203-2001Oct27?language=printer>.

78. Bazan, *supra* note 72, at 3.

79. *Id.* (quoting U.N. Charter art. 51).

80. *Id.*

81. See Daniel L. Pines, *The Central Intelligence Agency’s “Family Jewels”: Legal Then? Legal Now?*, 84 IND. L.J. 637, 654 (2009).

82. *Id.*

If it is ultimately determined that the targeted killing of suspected terrorists is an “assassination” and banned by E.O. 12333, the Obama administration may repeal the order. Additionally, certain legislative actions indicate that Congress has given the President authority to conduct targeted killings against suspected terrorists. For example, Congress has authorized the President to

[U]se all necessary and appropriate force against those nations, organizations, or persons he determines planned, authorized, committed, or aided the terrorist attacks that occurred on September 11, 2001 or harbored such organizations or persons *in order to prevent any future acts of international terrorism against the United States by such nations, organizations or persons.*<sup>83</sup>

By reading this congressional joint resolution as authorizing the President to use any means available to prevent a future terrorist attack against the United States, the resolution may be sufficient to give the President authority to conduct assassinations that otherwise would be prohibited by the ban.<sup>84</sup>

## 2. *Infringing on a State's Territorial Sovereignty*

An additional issue which may arise in the context of targeted killings is whether a state violates international law by infringing upon another state's territorial sovereignty. The United States has been working in conjunction with the Yemeni government to conduct the targeted killing operations.<sup>85</sup> Therefore, it appears the U.S. is not violating any Yemeni territorial sovereignty claims by carrying out the targeted killings. Additional targeted killings in Pakistan have led to questions regarding the legality of an attack that was not approved by the government of the target state.<sup>86</sup> However, one analyst commented that there “was not a question in [his] mind” that the Pakistani president had advanced knowledge of the attacks.<sup>87</sup> To date, the targeted killings conducted by the United States have been publicly criticized by the Pakistani government. However, it is widely assumed to privately

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83. S.J. Res. 23, 107th Cong. (2001) (enacted) (emphasis added).

84. Bazan, *supra* note 72, at 6.

85. Gabriella Blum & Phillip Heymann, *Law and Policy of Targeted Killing*, 1 HARV. NAT'L SEC. J. 145, 150 (2010).

86. Eben Kaplan, *Targeted Killings*, COUNCIL ON FOREIGN RELATIONS, <http://www.cfr.org/publication/9627/> (last updated Mar. 2, 2006).

87. *Id.*

support the attacks and help provide intelligence.<sup>88</sup> However, should the U.S. begin to conduct targeted killings without approval, further international law issues may arise.

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

On April 6, 2010, the Obama administration approved the targeted killing of U.S.-born Muslim imam Anwar al-Awlaki, who the administration believes is in Yemen.<sup>89</sup> This authorization may be the first time that the U.S. government has approved the killing of an American citizen abroad.<sup>90</sup> Anwar al-Awlaki gained considerable notoriety after he was linked to several terrorist activities in the U.S., such as the Fort Hood shooting and the attempted bombing of a Detroit-bound flight on December 25, 2009.<sup>91</sup> Al-Awlaki's relationship with those suspected of conducting these attacks has led officials to believe that he is no longer simply inciting anti-American rhetoric, but is "directly participating" in the attacks.<sup>92</sup>

##### *A. How Does the Constitution Address Targeted Killings Against Americans?*

###### *1. Constitutional Implications*

The authorization to target and kill an American citizen abroad, without due process, should immediately raise red flags among legal scholars. The Fifth Amendment of the U.S. Constitution declares that no person shall "be deprived of life, liberty, or property, without due process of law . . . ."<sup>93</sup> A textual reading of the Fifth Amendment no doubt prohibits the execution of an individual who has not had a criminal matter adjudicated and a conviction rendered. An American citizen living abroad and acting treacherously is not exempted from constitutional protection. As the U.S. Supreme Court stated in *Reid v. Covert*,

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88. *Critics Blast U.S. Silence Over Drone Strikes*, WASH. POST (Jan. 29, 2010), available at <http://www.washingtontimes.com/news/2010/jan/29/critics-blast-us-silence-over-drone-strikes/?page=1>

89. Scott Shane, *U.S. Approves Targeted Killing of American Cleric*, N.Y. TIMES (Apr. 6, 2010), available at <http://www.nytimes.com/2010/04/07/world/middleeast/07yemen.html>.

90. *Id.*

91. *Id.*

92. *Id.*

93. U.S. CONST. amend. V.

"The United States is entirely a creature of the Constitution . . . . When the Government reaches out to punish *a citizen* who is abroad, the shield which the Bill of Rights and other parts of the Constitution provide to protect his life and liberty should not be stripped away just because he happens to be in another land."<sup>94</sup>

Intelligence officials have declared that they will not seek judicial permission to eliminate a potential threat against the U.S., even if that target is an American citizen.<sup>95</sup> Testifying before the U.S. House of Representatives, director of national intelligence Dennis C. Blair stated, "[w]e take direct actions against terrorists in the intelligence community" and that "[i]f we think that direct action will involve killing an American, we get specific permission to do that."<sup>96</sup> This interesting comment poses a question that may be addressed in the near future: who gives this permission and what are the potential legal ramifications?

## 2. *Liability for Those Involved?*

Both state and federal law criminalize murder. Surely then a crime is committed if a government official orders the extrajudicial killing of an American citizen. In the event a government official would be charged with murder for that killing, immunity claims would be unavailing. By claiming immunity, the official essentially argues that he was acting within his official capacity when conducting the targeted killing. The Supreme Court has declared that executive officials may be able to claim that "absolute immunity" attaches to actions that are absolutely necessary to perform their job.<sup>97</sup> However, there are exceptions, as the Supreme Court indicated:

For aides entrusted with discretionary authority in such sensitive areas as national security or foreign policy, absolute immunity might well be justified to protect the unhesitating performance of functions vital to the national interest. But a "special functions" rationale does not warrant blanket recognition of absolute immunity for all Presidential aides in the performance of all their duties. This conclusion too follows from our decision in *Butz*, which establishes that an executive official's claim to absolute immunity must be justified by reference to the public interest in

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94. 354 U.S. 1, 5-6 (1957) (emphasis added) (footnote omitted).

95. Shane, *supra* note 89.

96. *Id.*

97. See Harlow v. Fitzgerald, 457 U.S. 800, 810-11 (1982).

the special functions of his office, not the mere fact of high station.<sup>98</sup>

Further, the Court declared that any official asserting this defense bears the burden of proving that his actions mandate an exception to his otherwise unlawful conduct.<sup>99</sup> While a court may empathize with an official's attempt at protecting the United States by conducting a targeted killing, it is unlikely that a court would relieve an individual of liability for a clear constitutional and federal law violation such as murder.

Even though government officials may be held liable for executing American citizens abroad, any attempt to advance a criminal or civil case will likely fail. Any decision to conduct a covert operation to kill a suspected terrorist is made at high levels of the military or executive branch, and is subject to the highest levels of security. Executive branch officials have had tremendous success in court proceedings by withholding information in the interest of national security.<sup>100</sup>

The "state secrets doctrine" can be invoked by the government upon satisfying two conditions. "First, evidence is privileged pursuant to the state secrets doctrine if, under all the circumstances of the case, there is a reasonable danger that its disclosure will expose military (or diplomatic or intelligence) matters which, in the interest of national security, should not be divulged."<sup>101</sup> Second, "a proceeding in which the state secrets privilege is successfully interposed must be dismissed if the circumstances make clear that privileged information will be so central to the litigation that any attempt to proceed will threaten that information's disclosure."<sup>102</sup> By successfully invoking the state secrets doctrine, the government would not be compelled to hand over information crucial in determining liability. The covert and secretive manner of any operation that involves the targeted killing of an individual would certainly meet the two-part test laid out by the *El-Masri* court.

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98. *Id.* at 812 (citing *Butz v. Economou*, 438 U.S. 478 (1978)) (footnote omitted).

99. *Id.* at 813.

100. *See, e.g., Berman v. Cent. Intelligence Agency*, 501 F.3d 1136 (9th Cir. 2007). *See also* Anderson Evan Thomas, *Remaining Covered by the "Near Blanket" of Deference: Berman v. Central Intelligence Agency and the CIA's Continual Use of Exemption 3 to Deny FOIA Requests*, 28 *MISS. C. L. REV.* 497 (2009).

101. *El-Masri v. United States*, 479 F.3d 296, 307-08 (4th Cir. 2007).

102. *Id.* at 308.

### 3. *Cruel and Unusual Punishment? Eighth Amendment Implications*

American citizens enjoy constitutional protection while abroad, even if they are suspected of terrorist activities against U.S. interests.<sup>103</sup> But what if the United States gave al-Awalki or other suspected terrorists adequate due process? Could U.S. courts then determine, as a consequence of that receipt of due process, that these suspected terrorists could be the lawful targets of a covert military operation? A strong case could be made that the execution of these American citizens would still violate the U.S. Constitution's Eighth Amendment protection against cruel and unusual punishment.<sup>104</sup>

Currently, the U.S. is utilizing Predator drones operated by the military and the Central Intelligence Agency to find and eliminate suspected terrorists.<sup>105</sup> This was the kind of operation conducted in Yemen in 2002 that killed a U.S. citizen who was traveling with other al Qaeda members.<sup>106</sup> The current threat in Yemen will most likely be addressed best by the continued use of these drones or covert military operations.

However, the Supreme Court has stated that, "it is a precept of justice that punishment for a crime should be graduated and proportioned to [the] offense."<sup>107</sup> The difficulty in analyzing whether or not the targeted killing of an American citizen by a Predator drone, covert military operation, or any similar method, is that there is no bright-line rule for determining what constitutes "cruel and unusual" punishment within the meaning of the Eighth Amendment. This Note does not analyze whether targeted killing violates the Eighth Amendment, but merely suggests that this is an issue that the legal community should analyze further.

#### *B. Legal Alternatives for Achieving Same Result?*

##### *1. Stripping Suspected Terrorists of U.S. Citizenship*

Reports have recently surfaced suggesting that Pentagon officials have contemplated stripping citizenship from U.S.-born suspected

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103. See *infra* Part IV(A)(2).

104. U.S. CONST. amend. VIII.

105. Kretzmer, *supra* note 15, at 171.

106. Dozier, *supra* note 17.

107. *Weems v. United States*, 217 U.S. 349, 367 (1910).



terrorists such as al-Awalki.<sup>108</sup> By switching the legal analysis from the targeted killing of American citizens to the targeted killing of non-citizen suspected terrorists, it would be far easier for government officials to justify their actions to the public or a court. While government officials seem conflicted as to whether the U.S. may strip citizenship from American citizens, 8 U.S.C. § 1481 suggests there may be a way. This provision states:

A person who is a national of the United States whether by birth or naturalization, shall lose his nationality by voluntarily performing any of the following acts with the intention of relinquishing United States nationality.

...

(3) [E]ntering, or serving in, the armed forces of a foreign state if ... such armed forces are engaged in hostilities against the United States ... or

...

(7) [C]ommitting any act of treason against, or attempting by force to overthrow, or bearing arms against, the United States, violating or conspiring to violate any of the provisions of section 2383 of Title 18, or willfully performing any act in violation of section 2385 of Title 18, or violating section 2384 of Title 18 by engaging in a conspiracy to overthrow, put down, or to destroy by force the Government of the United States, or to levy war against them, if and when he is convicted thereof by a court martial or by a court of competent jurisdiction.<sup>109</sup>

As written, 8 U.S.C. § 1481 may not allow the U.S. to strip al-Awalki or other similarly situated terrorists of their American citizenship. To begin, terrorists are not in the “armed forces of a foreign state.”<sup>110</sup> This provision was written against the backdrop of several military conflicts with foreign states, such as Cuba, Germany, and

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108. Steve Clemons, *Stripping US Citizenship from Terrorists?*, THE WASH. NOTE (Feb. 10, 2010), available at [http://www.thewashingtonnote.com/archives/2010/02/stripping\\_us\\_ci/](http://www.thewashingtonnote.com/archives/2010/02/stripping_us_ci/).

109. 8 U.S.C. § 1481(a)(3), (7) (2006).

110. *Id.* § 1481(a)(3).

Japan.<sup>111</sup> However, Congress is authorized to identify which acts should constitute a sufficient basis for expatriation of an American citizen.<sup>112</sup> Therefore, Congress may be able to amend 8 U.S.C. § 1481 to include terrorists who take up arms against the United States.

Second, any attempt to depatriate an American citizen for treasonous acts would have to result from a conviction in a court of competent jurisdiction.<sup>113</sup> Because it is highly unlikely that American citizens who are on the "capture or kill" list will ever be taken into custody and tried, a trial *in absentia* would have to be conducted. However, the Federal Rules of Criminal Procedure do not permit a "trial *in absentia* of a defendant who is not present at the beginning of a trial."<sup>114</sup>

If an American citizen is successfully depatriated, the analysis would then switch to whether or not the specific targeted killing is lawful, not whether it is legal to carry out the targeted killing of an American citizen. However, given the United States' position that trials *in absentia* are only to be conducted in a very limited number of circumstances, this option would seem to be taken off the table. For the U.S. to strip U.S.-born terrorists of their citizenship before a targeted killing could take place, the American judicial system would need to allow for this specific class of terrorists to be considered members of foreign armed forces, and have trials conducted *in absentia*.

## 2. *A Killing Court?*

In 1978, the Foreign Intelligence Surveillance Act (FISA),<sup>115</sup> created a Foreign Intelligence Surveillance Court (FISC) to approve government agency requests to obtain highly sensitive intelligence.<sup>116</sup> The FISC reviews government allegations towards its target and a FISC judge issues an *ex parte* order granting the request.<sup>117</sup> FISA requests are typically made because of the potential for high "media coverage and

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111. See generally, *United States ex rel. Marks v. Esperdy*, 315 F.2d 673 (2nd Cir. 1963); *Nishikawa v. Dulles*, 235 F.2d 135 (9th Cir. 1956); *Bauer v. Clark*, 161 F.2d 397 (7th Cir. 1947).

112. *Ex Parte Ng Fung Sing*, 6 F.2d 670 (W.D. Wash. 1925).

113. 18 U.S.C. § 2381.

114. *Crosby v. United States*, 506 U.S. 255, 262 (1993).

115. Foreign Intelligence Surveillance Act of 1978, Pub. L. 95-511, 92 Stat. 1783.

116. U.S. DEP'T OF JUSTICE, LEGAL AUTHORITIES SUPPORTING THE ACTIVITIES OF THE NATIONAL SECURITY AGENCY DESCRIBED BY THE PRESIDENT 18 (2006), available at <http://www.justice.gov/opa/whitepaperonnsalegalauthorities.pdf>.

117. Louis A. Chiarella & Michael A. Newton, "So Judge, How Do I Get That FISA Warrant?": The Policy and Procedure For Conducting Electronic Surveillance, ARMY LAW, Oct. 1997, at 31. It is important to note that at the time this article was written, not a single FISA request had ever been denied by the FISC.

damage to national security.”<sup>118</sup> The FISC currently consists of eleven judges, each selected by the Chief Justice of the United States Supreme Court.<sup>119</sup> FISC decisions are almost never made public.<sup>120</sup>

Because of the FISC’s ability to handle highly sensitive materials, a variation of this court could be used to conduct *ex parte* proceedings against targets of selected killing by the U.S. Government. By allowing a specially trained judge to review government documents and intelligence, some oversight of executive branch decisions to conduct targeted killings would be created. This would alleviate some critics’ concerns about the lack of due process provided to targeted suspected terrorists. However, the critics may also argue that the secrecy of the proceedings, the fact that they are conducted *ex parte*, and the relatively small number of cases which are actually denied, function as a virtual “rubberstamp” for those seeking approval for targeted killings. Additionally, courts may be reluctant to grant a “license to kill.” A court’s granting of an order to kill a suspected terrorist is a far cry from the current FISC’s orders to gather intelligence.

### 3. *Hiring of Private Contractors*

The “war against terrorism” has allowed for the emergence of a highly specialized and elite group of individuals to conduct operations from logistical support to diplomatic security. For example, Blackwater Security, now known as Xe Services, has taken a prominent role in the U.S. wars in Iraq and Afghanistan by protecting State Department personnel and conducting covert actions for the Central Intelligence Agency (CIA).<sup>121</sup> The primary reason for the increasingly common use of private security firms is the ability to cut costs.<sup>122</sup> Additionally, privatization can help minimize the political risk associated with ordering troops to conduct high-risk military operations that could result in casualties.<sup>123</sup>

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118. *Id.* at 33.

119. SUSAN WELCH, ET AL., UNDERSTANDING AMERICAN GOVERNMENT: THE ESSENTIALS 322 (2009).

120. See Lance Davis, Note, *The Foreign Intelligence Surveillance Court’s May 17 Opinion: Maintaining a Reasonable Balance Between National Security and Privacy Interests*, 34 MCGEORGE L. REV. 713, 714-16 (2003).

121. James Risen, *Interference Seen in Blackwater Inquiry*, N.Y. TIMES, Mar. 2, 2010, <http://www.nytimes.com/2010/03/03/world/middleeast/03blackwater.html>.

122. Laura A. Dickinson, *Public Law Values in a Privatized World*, 31 YALE J. INT’L L. 383, 395 (2006).

123. *Id.* at 395-96.

However, what if private security firms were hired by the U.S. government to carry out targeted killings of suspected terrorists in countries such as Yemen? There is certainly an appeal to this type of action. As Professor Dickinson asserts, while certain state military actions may be in violation of state law, private contractors may "fall through the cracks of current international law."<sup>124</sup> For example, Dickinson's analysis of Sierra Leone's decision to employ a private security firm to kill rebel forces may demonstrate the firm's exemption under international law.<sup>125</sup> The private contractor's order to "kill everybody," which could have included unidentified civilians, would most likely be considered a war crime if ordered by an individual in the government's chain of command.<sup>126</sup> However, it is unclear under international law whether the private security firm's actions were considered war crimes.<sup>127</sup>

The use of private contractors would certainly have great appeal to the U.S. government if it was concerned that the ordering of targeted killings would violate international law. By delegating the covert action to a security firm, the U.S. would be able to insulate itself and deny any liability resulting from a targeted killing. However, the U.S. government could run into a significant roadblock on the domestic front. The issue would turn primarily on whether or not the targeted killing of a suspected terrorist is an "assassination." If the answer is yes, then E.O. 12333 would prohibit any intelligence service from delegating the "assassination" duties to a private firm.<sup>128</sup> If the targeted killing is not an "assassination," then the legality of the U.S. delegation of the action falls more into a gray area.

There may be additional concerns for the United States' employment of private contractors to conduct targeted killings. Since the U.S. began employing private security firms for operations associated with the "war against terror," highly-publicized acts by contractors have caused some to be hesitant of the ill effects of these procedures. For example, Blackwater Security is currently being investigated for the murder of seventeen Iraqi civilians.<sup>129</sup> Also, the abuses committed by translators and interrogators at Abu Ghraib prison in Iraq have led many to believe that the lack of a chain of command or legal loop-holes governing these

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124. *Id.* at 398.

125. *Id.* at 392, 397.

126. *Id.* at 397.

127. *Id.*

128. Exec. Order. No. 12,333, 46 Fed. Reg. 59941, 59952 (Dec. 4, 1981).

129. Risen, *supra* note 121.

firms' actions can open up the door for these types of abuses.<sup>130</sup> While it is unclear whether these acts are illegal under domestic or international law, the negative publicity the U.S. government has received may be enough to strongly question whether the employment of private security firms is the correct approach.

## V. CONCLUSION

Recent attacks on U.S. interests, traceable to Yemen, signify a growing threat that must be met in order to prevent future attacks on innocent civilians. The difficulty with combating the growing threat in Yemen is that it is wholly unrealistic for the U.S. to conduct a third war in a region where there is no domestic or international support.<sup>131</sup> Furthermore, giving assistance to the Yemeni government to protect itself and eradicate the threat has proven unfruitful. The growing al Qaeda threat within the country is not a top priority for the current Yemeni president. He faces domestic threats and attacks, high unemployment, high poverty levels and a country that is almost certain to eventually be classified a "failing state."<sup>132</sup> Even if the Yemeni government were to make al Qaeda its top priority beginning today, it will take several years if not longer for Yemen to be able to handle these threats. It is also unrealistic to assume that the international community, including the United States, is willing to let a state known for recruiting and training terrorists to continue unabated. Therefore, the use of targeted killing of suspected terrorists is a useful alternative to full-scale military invasion.

The legal community's hesitation to applaud the United States' use of targeted killings in Yemen is understandable. There are growing concerns that the executive branch is operating under a veil of secrecy where arbitrary decisions to kill suspected terrorists can be made. International law has clearly established that the arbitrary killing of individuals violates numerous norms and human rights principles.<sup>133</sup> However, international law has yet to develop to the point where clear classifications of terrorists exist and appropriate methods for dealing with the threats they pose are established. The topic of targeted killings

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130. See, e.g., Laura A. Dickinson, *Military Lawyers, Private Contractors, and the Problem of International Law Compliance*, 42 N.Y.U. J. INT'L L & POL. 355, 355-59 (2010).

131. Garamone, *supra* note 2.

132. Manea, *supra* note 8; Graff, *supra* note 9.

133. See Kretzmer, *supra* note 15, at 177 for a discussion of the many international treaties that prohibit the arbitrary taking of life.

will remain a large question mark in the legal community until these standards are set.

The United States government must enact policies that lend transparency to the process of targeted killings without compromising national security. This is perhaps the largest obstacle the practice of targeted killings will face, both domestically and internationally. Currently, the U.S. judicial system is not the appropriate forum for deciding the legality of targeted killings of U.S. and non-U.S. citizens. The executive branch's enjoyment of a "state secrets" defense, preventing the divulgence of necessary evidence, will surely prevent any real attempt at judicial review of targeted killings. Instead, the executive branch and intelligence agencies may alleviate harsh criticisms of the practice if it develops its own process for reviewing and explaining the use of targeted killings.

Finally, the U.S. government would most certainly violate numerous constitutional provisions if it were to actively engage in the execution of U.S. citizens abroad without due process. The practical difficulty with analyzing this scenario is that the U.S. government is faced with a real conundrum. What should be the government's first priority: protecting its innocent civilians from terrorist attacks or guaranteeing constitutional protections no matter what the result? The reality is that U.S.-born terrorists operating in Yemen, such as al-Awalki, are very unlikely to be apprehended and charged with a crime. However, the threat these individuals pose is very real, very grave, and requires a response. While this Note does not offer a precise solution to this problem, the U.S. government must make a clear and public determination. Otherwise, the executive branch operates in a legal dead-zone, potentially allowing for the abuses and lawlessness that many legal scholars feel is a real possibility.

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