Discounting the Fourth Amendment: Implications at Home with Targeted Killings Abroad

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I. INTRODUCTION

The targeted drone killing of Anwar al-Awlaki,[1] the man said to be affiliated with Al-Qaeda in the Arabian Peninsula (AQAP), has engendered a spirited debate in political and legal realms.[2] Prior to Awlaki's death, most Americans observed reticent media reports of drone strikes.[3] In 2010, in Pakistan alone, there were an estimated 607 to 993 militant deaths from U.S. drone strikes.[4] The case of Anwar al-Awlaki proved provocative because of its dissimilarity from nearly all other al-Qaeda, AQAP, or Taliban targeted killings. Awlaki was targeted and killed as a United States citizen.

Anwar al-Awlaki was born in New Mexico in 1971 while his Yemeni father was studying agricultural economics.[5] Awlaki lived in the United States until age seven after which he relocated to Yemen with his family.[6]

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[1] The transliteration "Anwar al-Awlaki" from Arabic will be used for this article though some sources use "Anwar al-Aulaqi."

[2] *See generally* Richard Cohen, *Who signed Anwar al-Awlaki's death warrant?*, WASH. POST, Oct. 10, 2011, http://www.washingtonpost.com/opinions/who-signed-anwar-al-awlakis-death-warrant/2011/10/10/gIQAOnb3aL_story.html; Jim Lobe, *Awlaki's Killing Sparks Propaganda Battle*, ASIA TIMES, Oct. 4, 2011, http://www.atimes.com/atimes/Middle_East/MJ04Ak02.html; Charlie Savage, *U.S. Law May Allow Killings, Holder Says*, N.Y. TIMES, Mar. 5, 2012, http://www.nytimes.com/2012/03/06/us/politics/holder-explains-threat-that-would-call-for-killing-without-trial.html?_r=1; Joe Deaux, *Ron Paul Slams Obama for 'Assassinating' Al Qaeda's Awlaki*, THE STREET (Sept. 30, 2011), http://www.thestreet.com/print/story/11263899.html; Brad Knickerbocker, *Anwar al-Awlaki: Is killing US-born terror suspects legal?*, THE CHRISTIAN SCIENCE MONITOR (Oct. 1, 2011), http://www.csmonitor/com/USA/2011/1001/Anwar-al-Awlaki-Is-killing-US-born-terror-suspects-legal.

[3] John Yoo, *Assassination or Targeted Killings After 9/11*, 56 N.Y.L. SCH. L. REV. 57, 62 (2012). That few protested the summary killing of an American citizen by remote control until 2010, when civil liberties groups filed a lawsuit on behalf of al-Awlaki. *Id*.

[4] *The Year of the Drone: An Analysis of U.S. Drone Strikes in Pakistan, 2004-2012*, NEW AMERICA FOUNDATION, http://www.counterterrorism.newamerica.net/drones (last visited July 24, 2012); Bill Roggio & Alexander Mayer, *Charting the data for US airstrikes in Pakistan, 2004-2012*, THE LONG WAR JOURNAL, http://www.longwarjournal.org/pakistan-strikes.php (last visited July 29, 2012).

[5] *Obituary:Anwaral-Awlaki*, BBC NEWS (Sept. 30, 2011), http://www.bbc.co.uk/news/world-middle-east-11658920.

[6] *Id*.

In Yemen he would assiduously study Islam in his teenage years.[7] Awlaki returned to the United States to attend both Colorado State University and San Diego State, becoming very involved in local mosques and Islamic societies.[8] Moving back to Yemen in 2004, he gained prominence in AQAP, largely due to his ability to produce galvanizing sermons in English over the Internet.[9] These sermons advocated violence against America and promoted Islamic militancy.[10]

The crux of the dispute surrounding the drone attack was whether the targeted killing of Awlaki could be justified under the U.S. Constitution.[11] *The New York Times* reported, in anticipation of the controversy, that lawyers in the Department of Justice's Office of Legal Counsel (OLC) had carefully crafted a secret memorandum of law, rationalizing the targeted killing well ahead of the drone mission.[12]

Similar to the George W. Bush Administration's excoriated "torture memo,"[13] the decision to target Awlaki for death was made exclusively within the executive branch.[14] The Obama Administration's justification for not releasing the memo to the public was simply to say that the operation to kill Awlaki technically remains an ongoing covert operation.[15] The Freedom of Information Act (FOIA) exempts classified information for national defense or foreign policy.[16]

Many of the basic principles upon which the OLC memo rests were

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[7] *Id*.

[8] *Id*.

[9] *See id*.; Tim Lister & Paul Cruickshank, *Anwar al-Awlaki: al Qaeda's rock star no more*, CNN (Sept. 30. 2011), http://www.cnn.com/2011/09/30/world/meast/analysis-anwar-al-awlaki/index.html.

[10] Lister, *supra* note 9.

[11] U.S. CONST. amend. V.

[12] Editorial, *Justifying the Killing of an American*, N.Y. TIMES, Oct. 11, 2011, http://www.nytimes.com/2011/10/12/opinion/justifying-the-killing-of-an-american.html. Shortly after completing this note, NBC News obtained a 16-page unsigned and undated Department of Justice "white paper" which contends the lawfulness of targeting United States citizens for death. The document asserts that if "an informed, high-level official" decided that a U.S. citizen posed an imminent threat of violent attack against the United States, and capture was not feasible, the targeting is legal. The document is not "the secret memorandum" justifying the killing of Anwar al-Awlaki that is referred to in the note, but is the most detailed analysis the Obama administration has yet to release about the lawfulness of targeting U.S. citizens. Most importantly the document confirms the belief mentioned in this note that the Department of Justice was prepared to defend the targeted killings of U.S. citizens abroad with Fourth Amendment cases such as *Tennessee v*. *Garner*, though it makes no assertions "of what would constitute reasonable use of lethal force for purposes of domestic law enforcement operations." Thus, the document leaves open the possibility of the use of domestic targeted killing, making the argument in this note all the more important – judicial process, in a FISA-type court, should be required before a U.S. citizen can lawfully be targeted for death, setting a precedent for future domestic cases, and preserving liberty at home.

[13] Cassandra Burke Robertson, *Beyond the Torture Memos: Perceptual Filters, Cultural Commitments, and Partisan Identity*, 42 CASE W. RES. J. INT'L L., 389, 390 (2009).

[14] *See* Cohen, *supra* note 2.

[15] Charlie Savage, *Secret U.S. Memo Made Legal Case to Kill a Citizen*, N.Y. TIMES, Oct. 8, 2011, http://www.nytimes.com/2011/10/09/world/middleeast/secret-us-memo-made-legal-case-to-kill-a-citizen.html.

[16] U.S. DEP 'T OF STATE, Info. Access Guide 4 (2012).

surmised by those intimate with the case of Awlaki[17] and were largely confirmed by U.S. Attorney General Eric Holder in a speech addressed to Northwestern University School of Law, which briefly addressed the issue.[18] Attorney General Holder set forth a framework in which a U.S. citizen, actively engaged in planning to kill U.S. citizens and a senior operational leader of al-Qaeda or associated forces, can be lawfully targeted for death.[19] Holder did not name Awlaki specifically in regards to the three-part test but mentioned him earlier in the speech as being involved in terrorist activities, specifically the 2009 Christmas Day Bombing attempt.[20]

The case of al-Awlaki introduced several critical questions about targeted killing, many of which were raised by Senator Ron Wyden of Oregon.[21] They remain largely unanswered by Holder's speech: how much evidence does the President need to decide that a particular American is part of a terrorist group?; does the President have to provide an individual American the opportunity to surrender before using lethal force against him or her?; is the President's authority to kill Americans based on authorization from Congress or his own authority as Commander-in-Chief?; can the President order intelligence agencies to kill an American who is inside the United States?[22]

The potential to extend targeted killing beyond the war on terror, and within the borders of the United States, may not be the unfettered speculation of conspiracy theorists. The U.S. Department of Homeland Security has already provided drone surveillance to assist a local police department in North Dakota.[23] The Denver Post reported that "Randy McDaniel, chief deputy with the Montgomery County Sheriff's Office, told the Associated Press earlier this year his office had no plans to arm [a] drone, but he left open the possibility the agency might decide to adapt [a] drone to fire tear gas canisters and rubber bullets."[24] While limited to only a handful of police departments, there is growing interest within U.S. law

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[17] *See* Cohen, *supra* note 2.

[18] Att'y Gen. Eric Holder, Address at Northwestern University School of Law (Mar. 5, 2012) (transcript *available at* http://www.justice.gov/iso/opa/ag/speeches/2012/ag-speech-1203051.html); Benjamin Wittes, *On Due Process and Targeting Citizens*, LAWFARE (Nov. 5, 2011), http://www.lawfareblog.com/2011/10/on-due-process-and-targeting-citizens/.

[19] Holder, *supra* note 18.

[20] *Id*.

[21] Charles Pope, *Sen. Ron Wyden Demands Obama Administration Provide Legal Justification for Targeting U.S. Citizens in War on Terror*, THE OREGONIAN, Feb. 8, 2012, http://www.oregonlive.com/politics/index.ssf/2012/02/post_56.html.

[22] *Id*.

[23] Brian Bennett, *Police employ Predator drone spy planes on home front*, L.A. TIMES, Dec. 10, 2011, http://articles.latimes.com/2011/dec/10/nation/la-na-drone-arrest-20111211. The intelligence gathered by the drone was used in making an arrest. *Id*.

[24] Joan Lowy, *Drones at home raise fear if surveillance society*, DENVER POST, June 19, 2012, http://www.denverpost.com/nationworld/ci_20888156/talk-drones-patrolling-us-skies-spawns-anxiety.

enforcement.[25] How far will it go?

The focus of this Note is less on the test Eric Holder gave in his Northwestern Speech, and more about the road the Attorney General may be prepared to follow. The Attorney General's test is tailored to Awlaki, *intra vires*, under the broad authority given to the President by Congress to use necessary and appropriate force against al-Qaeda, the Taliban, and associated forces in the largely ambiguous War on Terror.[26]

The reportage by press insiders asserts that among other issues, the secret memo addressed and discounted the Fourth Amendment protection against unreasonable seizures[27] -- an argument for a situation in which Awlaki, or another citizen, fell outside the AUMF. The memo reportedly cited *Scott v. Harris* along with the 1985 Supreme Court case *Tennessee v. Garner*, which held that police officers may use force to stop a fleeing suspect if "necessary to prevent…escape and the officer has probable cause to believe that the suspect poses a significant threat of death or serious physical injury to the officer or others."[28] If this is true, the OLC memo certainly brings targeted killing to a context that is much closer to home.

The "memorandum reportedly argues, the United States could kill Al-Awlaki because his alleged support for terrorism posed an 'imminent' risk to Americans."[29] If drones have a large presence in the future of the United States, the term "imminent risk" will become extremely significant.

The framework provided by Attorney General Holder at Northwestern is an important starting point to understand the context of this situation and the Fourth Amendment issues it has raised. The Holder three-part test justifies the use of deadly force against Anwar al-Awlaki without judicial process under U.S. and International Law *under the authority of the AUMF*.[30] Section II is helpful in the analysis of "imminent threat" *outside the AUMF*, and under the Fourth Amendment, which follows in Section III. Part IV discusses the relevance of two Supreme Court cases, *Scott* and *Garner*, within the context of the situation posed by Anwar al-Awlaki. Part V of this Note explores the OLC, its ties to the executive branch, and potential reforms to the OLC that will enhance transparency.

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[25] Kevin Johnson, *Police chiefs urge limits on use of drones*, USA TODAY, Sep. 6, 2012, http://www.usatoday.com/news/nation/story/2012-09-06/cop-drones/57639048/1.

[26] Holder, *supra* note 18.

[27] *See* Savage, *supra* note 2.

[28] Tennessee v. Garner, 471 U.S. 1, 3 (1985).

[29] Justin Waddell & Edward Mitchell, *Professor's DOJ Assassination Memo Sparks Debate*, GEO. L. WEEKLY, Oct. 18, 2011, http://www.gulawweekly.org/news/2011/10/18/professors-doj-assassination-memo-sparks-debate.html.

[30] *See* Holder, *supra* note 18.

II. THE HOLDER THREE-PART TEST

A. Part One: After a Thorough and Careful Review, It is Found that the Individual Poses an Imminent Threat of Violent Attack Against the U.S.

The starting point of the test begins with the source of authority from which Holder has generated his framework. In order to fall within the scope of the Holder three part test a U.S. citizen must be a senior operational leader in al-Qaeda or an associated force.[31] Essentially, the U.S. citizen must not only be an enemy combatant but also in a position of high command.[32] The U.S. government concluded that Anwar al-Awlaki was an enemy combatant.[33] Specifically, he was labeled a senior operational leader of AQAP, actively working with Al-Qaeda to attack U.S. interests or its citizens.[34]

The argument opined by the executive branch is that al-Awlaki can be targeted in exactly the same way the United States targeted Admiral Isoroku Yamamoto (the mastermind of Pearl Harbor) and Osama Bin Laden.[35] Simply put, enemy combatants, even those who are U.S. citizens, have no constitutional rights while fighting in the field and may legally be targeted for death.[36]

The United States Supreme Court, in *Hamdi v. Rumsfeld*,[37] tackled the question of whether the president has the authority to detain those U.S. citizens deemed to be enemy combatants.[38] A plurality ruled that the president does have this power; due process rights are not immediately afforded to enemy combatants captured in the field because their lawful capture is a "fundamental incident of waging war."[39] Once detained, however, the U.S. citizen being held as an enemy combatant should receive an opportunity to contest his status.

The *Hamdi* court found that there is "no reason to doubt that courts faced with these sensitive matters will pay proper heed both to the matters of national security that might arise in an individual case and to the constitutional limitations safeguarding essential liberties that remain

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[31] *Id*.

[32] *Id*. Holder consistently uses the term "senior operational leader."

[33] *See id*.

[34] *See id*.

[35] Wittes, *supra* note 18; Holder, *supra* note 18.

[36] *Ex parte* Quirin, 317 U.S. 1, 37 (1942) (Citizenship in the United States of an enemy belligerent does not relieve him from the consequences of a belligerency which is unlawful because in violation of the law of war).

[37] Hamdi v. Rumsfeld, 542 U.S. 507, 519 (2004).

[38] *Id* at 510–11. Yaser Hamdi was born in Louisiana in 1980 and moved to Saudi Arabia in his youth. He claimed to have been in Afghanistan doing relief work not fighting the United States. In June of 2002 his father, Esam, filed a habeas petition on his behalf in a U.S. federal district court in Virginia.

[39] *Id*. at 519.

vibrant even in times of security concerns."[40] As with any enemy combatant, the president as commander in chief has the authority to use the military and kill those enemies that are dangerous and unable to safely be captured.[41] This would fit the rationale as a "fundamental incident of waging war" as described by the plurality in *Hamdi*.[42] The "Authorization for the Use of Military Force" (AUMF)[43] authorizes the executive to use "necessary and appropriate force" with enemy combatants.[44] The plurality's decision recognized the broad power given to the president by Congress to combat enemies in the War on Terror.[45]

The White House, the Central Intelligence Agency, and Attorney General Holder maintain that evidence exists that shows Awlaki was a senior operational leader in al-Qaeda and an imminent violent threat to the United States. [46] On the day of Awlaki's death, President Obama stated that:

> [al-Awlaki] directed the failed attempt to blow up an airplane on Christmas day in 2009, he directed the failed attempt to blow up U.S. cargo planes in 2010 and he repeatedly called on individuals in the United States and around the globe to kill innocent men, women, and children to advance a murderous agenda.[47]

Attorney General Holder, discussing the detention and trial of Umar Farouk Abdulmutallab (the "Underwear Bomber"), stated:

> [Abdullmutallab] described in detail how he became inspired to carry out an act of jihad, and how he traveled to Yemen and made contact with Anwar al-Aulaqi (an alternative

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[40] *Id*. at 539.

[41] Jeh Johnson, Gen. Counsel, Dep't of Def., Dean's Lecture at Yale Law School: National Security Law, Lawyers, and Lawyering in the Obama Administration (Feb. 22, 2012). This argument is explicitly made by the executive branch. Jeh Johnson, general counsel for the Department of Defense stated that "belligerents who also happen to be U.S. citizens do not enjoy immunity where non-citizen belligerents are valid military objectives".

[42] *Hamdi*, 542 U.S. at 519.

[43] War Powers Resolution, 50 U.S.C. § 1541 (2006);Authorization for Use of Military Force, Pub. L. No. 107-40, 115 Stat. 224 (2001). The Authorization for Use of Military Force is a Joint Resolution passed on September 14th, 2001, which passed a combined 518 to 1 between both houses in congress (with 12 present members not voting). *Id*.

[44] *Hamdi*, 542 U.S. at 510.

[45] *Id*. at 507.

[46] White House Press Secretary Jay Carney as reported by Jake Tapper, White House Press Conference (Sept. 30, 2011); Holder, *supra* note 18.

[47] President Barack Obama, Remarks by the President at the "Change of Office" Chairman of the Joint Chiefs of Staff Ceremony (Sept. 30, 2011).

> transliteration of "al-Awlaki"), a U.S. citizen and a leader of [AQAP]. Abdulmutallab also detailed the training he received, as well as Aulaqi's specific instructions to wait until the airplane was over the United States before detonating his bomb.[48]

In elaborating on the first part of his test, Holder stated that "an 'imminent threat' incorporates considerations of the relevant window of opportunity to act, the possible harm that missing the window would cause to civilians, and the likelihood of heading off future disastrous attacks against the United States."[49] Holder mentions that al-Qaeda does not behave like a traditional military organization, has the ability to strike with limited or no notice, and continuously plans attacks while hiding from U.S. forces.[50] Holder argues that these are factors that call for the president to act without delay because waiting creates an unacceptable risk that the effort will fail and Americans will die.[51] The uniformed conflicts between nations in recent history have been replaced by asymmetrical combat with non-uniformed fighters whose specific loyalties may be unknown.[52]

When looking at the post-9/11 world and the AUMF,[53] the U.S. Supreme Court takes a hard look at the authority given to the president and the military, especially in the context of U.S. citizens fighting against the United States.[54] The AUMF, because it was enacted to fight an unconventional war on terror where enemy lines and borders are indistinct, confers quite general power and authority to contest terrorism.[55]

B. Part Two: Infeasibility of Capture

Attorney General Holder said, "whether the capture of a U.S. citizen terrorist is feasible is a fact-specific, and potentially time-sensitive, question."[56] Thus, time-sensitivity is an important factor in regard to protecting American lives.[57] It partly depends on whether capture can be accomplished in the time frame available to "prevent an attack without

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[48] Holder, *supra* note 18.
[49] *Id*.
[50] *Id*.
[51] *Id*.
[52] Thomas X. Hammes, *Insurgency: Modern Warfare Evolves into a Fourth Generation*, 214 STRATEGICE FORUM, 1, Jan. 2005, at 1–2, http://www.dtic.mil/cgibin/GetTRDoc?Location=U2&doc=GetTRDoc.pdf&AD=ADA430089.
[53] Authorization for Use of United States Armed Forces, Pub. L. No. 107-40, 115 Stat. 224 (2001).
[54] Hamdi v. Rumsfeld, 542 U.S. 507, 517–19 (2004).
[55] *See generally* Authorization for Use of United States Armed Forces, Pub. L. 107-40.
[56] Holder, *supra* note 18.
[57] *Id*.

undue risk to civilians or to U.S. personnel."[58]

Holder describes cases in which a citizen terrorist hides in remote areas, in places such as caves and safe houses.[59] In those instances, the U.S. government "has the clear authority to defend the United States with lethal force."[60] Essentially, the United States cannot wait for its enemies to resurface from hiding; instead, the fight must be taken to these hiding places.

This argument seems to be in line with the Israeli Supreme Court in *Public Committee Against Torture in Israel v. Government of Israel* ("*PCATI*").[61] The *PCATI* court loosened the legal term, "for such time," allowing the targeting of terrorists who may be laying low and planning or preparing for operations as long as they are still active members of a terrorist organization.[62] This Israeli policy, however, has been condemned by many in the international law field and has been described as an improper expansion of international law.[63] Specifically, former United Nations Secretary General Kofi Annan stated that "this policy [set forth in the *PCATI* decision] is contrary not only to international law, in particular human rights law, but also to general principles of law."[64]

C. Part Three: An Operation Conducted in a Manner Consistent With Applicable Law of War Principles

Justice O'Connor's conclusion in *Hamdi v. Rumsfeld* was rooted in part on an "understanding based on longstanding law-of-war principles."[65] While Congress has granted the president the authority to use necessary force, international law must not be ignored. Can targeted killing be reconciled with the international law of war?

Dr. Howard M. Hensel, professor of Politico-Military Affairs at the U.S.Air Force Air War College, has found that throughout history the killing of an enemy combatant has been perceived as legitimate.[66] Known

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[58] *Id*.
[59] *Id*.
[60] *Id*.
[61] Pub. Comm. Against Torture in Isr. v. Isr., 46 I.L.M. 375, 393 (2007).
[62] Kristen E. Eichensehr, Comment, *On Target? The Israeli Supreme Court and the Expansion of Targeted Killings*, 116 YALE L.J. 1873, 1879 (2007).
[63] Press Release, U.N., Office of the Spokesman for Sec'y-Gen. Kofi Annan, Secretary-General Urges Israeli Government To Cease Targeted Assassinations, (May 7, 2001). Kofi Annan also stated that "it [PCATI] contradicts the spirit, if not the letter, of the ceasefire agreement recently negotiated by Central Intelligence Agency Director George Tenet."
[64] *Id*.
[65] Hamdi v. Rumsfeld, 542 U.S. 507, 521 (2004).
[66] Catherine Lotrionte, *Targeting Regime Leaders During Armed Hostilities: An Effective Way to Achieve Regime Change?*, *in* THE LAW OF ARMED CONFLICT: CONSTRAINTS ON THE CONTEMPORARY USE OF MILITARY FORCE, 21, 26 (Howard M. Hensel ed., 2007).

as "targeted killing," the concept is distinguished in international law from "assassination" which, as Attorney General Holder noted, is an unlawful killing.[67] The laws that prohibit assassination are some of the oldest international laws, developed at a time when empires and monarchies were the predominant form of governments.[68] In an effort championed by Senator Frank Church, the U.S. policy of prohibiting assassination was set forth in Executive Order 12.333.[69] It is not very astounding that, historically, those in authority have taken a hard stance on assassination.[70] Since Julius Caesar's final words, "*et tu, brute*,"[71] political leaders of the Western world have applied precautions.[72]

Assassination is murder, whereas "targeted killing" is a re-definition of assassination as an appropriate or justifiable killing.[73] The legality of "targeted killing" is warranted by characterizing the target as either an

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[67] William C. Banks et. al, *Targeted Killing and Assassination: The U.S. Legal Framework*, 37 U. RICH L. REV. 667, 671 (2003). The authors find that the term "assassination" should be reserved for its colloquial usage, that is, unlawful killing. Whereas "targeted killing" is the premeditated killing of an individual by a government or its agents. *Id;* Holder, *supra* note 18.

[68] Interview by Christopher Hayes with Mike Newton, Vanderbilt Law Professor (May 21, 2010) a*vailable at* http://www.thenation.com/audio/breakdown-can-us-government-assassinate-you. *See also* S. H. CUTTLER, THE LAW OF TREASON AND TREASON TRIALS IN LATER MEDIEVAL FRANCE, 7 (Cambridge Univ. Press 1981). (The Roman law of Lex Quisquis from 397 Anno Domini, which influenced later medieval French law, stressed that the assassination of the emperors' councilors was treason).

[69] Exec. Order No. 12,333, 235 C.F.R. 59941 (Dec. 8, 1981). (Part 2, Section 2.11 states that "no person employed by or acting on behalf of the United States Government shall engage in, or conspire to engage in, assassination.").

[70] Interview by Christopher Hayes with Mike Newton, Vanderbilt Law Professor (May 21, 2010) a*vailable at* http://www.thenation.com/audio/breakdown-can-us-government-assassinate-you (For example, the United States "first attempted to codify customary international law regarding assassination on 24 April 1863, with the promulgation of General Order No. 100, commonly known as the Lieber Code."); General Orders No. 100, Instructions for the Government of Armies of the United States in the Field, Apr. 24, 1863, art. 148, reprinted in 1 THE LAW OF WAR, A DOCUMENTARY HISTORY 158 (L. Friedman ed., 1972) ("Article CXLVIII provided 'The law of war does not allow proclaiming either an individual belonging to the hostile army, or a citizen, or a subject of the hostile government, an outlaw, who may be slain without trial by any captor, any more than the modern law of peace allows such international outlawry; on the contrary, it abhors such outrage. The sternest retaliation should follow the murder committed in consequence of such proclamation, made by whatever authority. Civilized nations look with horror upon offers of rewards for the assassination of enemies as relapses into barbarism.'")

[71] WILLIAM SHAKESPEARE, JULIUS CAESAR 39 (Macmillan and Co. Ltd., 1905)..

[72] Tyler J. Harder, *Time to Repeal the Assassination Ban of Executive Order 12,333: a Small Step in Clarifying Current Law*, 172 MIL. L. REV. 1, 10 (2002) (for example, as Western leaders met to form of the United Nations in 1945, "the member states agreed to the international law contained in the Charter of the United Nations. Article 2(4) of the Charter states: 'All Members shall refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any state, or in any other manner inconsistent with the Purposes of the United Nations. The 'Purposes of the United Nations' include the 'suppression of acts of aggression or other breaches of the peace . . . This prohibition on the use of force has become international law binding on all states. The *murder* of a state leader, wherever it occurred, would have to qualify as the use of force, or an act of aggression or a breach of the peace.'"); U.N. Charter art. 2, para. 4.

[73] Interview by Christopher Hayes with Mike Newton, Vanderbilt Law Professor (May 21, 2010) a*vailable at* http://www.thenation.com/audio/breakdown-can-us-government-assassinate-you.

enemy combatant or a lawfully targeted civilian.[74] The former, a subordinate criterion, defines the target as a civilian (a status which normally would be protected), but who has engaged in activities that support hostilities and bring them to the stage and scope of becoming a lawful target.[75] This categorization "substitute[s] the law of war rubric for the normal default human rights rubric that says assassination is illegal; by that person's participation in hostilities they forfeit their otherwise non-dirigible right to be free from being specifically targeted."[76]

Targeted killing is an adaptation to a new sort of global warfare where men no longer line up in neat formations wearing recognizable uniforms to conduct battle.[77] Warfare today, in what some military strategists characterize as fourth-generation warfare,[78] evolved from the political, social, and economic changes that have occurred since World War II to advantage the unconventional fighter.[79] The civilian-fighter, even if wearing plain clothing and receiving no orders from a hierarchical command structure, is not free from targeted death if he plants bombs, helps organize an ambush, or engages in any other such hostile activity.[80]

Additionally, the notion of targeted killing is "codified in the Hague Convention on the Laws and Customs of War in 1907 and the Geneva Convention of 1949."[81] Utilizing Dr. Hensel's framework, targeted killing, such as that of Admiral Yamamoto in World War II or the killing of Osama Bin Laden during the War on Terror, can be justified under international war if certain guidelines are met.[82] These guidelines give substance to the previous definition of targeted killing. According to "international law and US domestic law,"[83] the president of the United

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[74] *Id*.
[75] *Id*.
[76] *Id*.
[77] *See* Hammes, *supra* note 52, at 6.
[78] *Id*. at 1.
[79] *Id* at 2.
[80] *See* Françoise J. Hampson, *Detention, the 'War on Terror' and International Law, in* THE LAW OF ARMED CONFLICT CONSTRAINTS ON THE CONTEMPORARY USE OF MILITARY FORCE 131, 148 (Howard M. Hensel ed., 2007).
[81] *Id*. at 26; *See* Annex to the Convention (IV) Respecting the Laws and Customs of War on Land, art. 22–28, Oct. 18, 1907, 36 Stat. 2277 (setting out parameters and means of injuring the enemy, sieges, and bombardments); *See also* Convention (IV) relative to the Protection of Civilian Persons in Time of War art. 147, Geneva, Aug. 12, 1949, *available at* http://icrc.org/ihl.nsf/full/380 (setting out grave breaches of the convention for such offenses as inhuman treatment and willful killing of protected persons).
[82] Lotrionte, *supra* note 66, at 27; (while finding that, as a general practice, the lawfulness of targeted killings under IHRL is doubtful … in exceptional cases, when a suspected terrorist is purposefully beyond the reach of law enforcement in States with weak governing capacity, and in the sanctuary of a terrorist safe haven, targeted killings may provide the only feasible remedy to protect its population from the future grave threat to life). *Id*.
[83] *Id*. (Formulating the framework from U.S. and International Law).

States, in executing his constitutional authorities as commander in chief of the U.S. Armed Forces may legally order the killing of a regime leader as part of an armed conflict as long as it is not a "treacherous killing,"[84] an "indiscriminate killing,"[85] and it does not cause "unnecessary pain and suffering."[86]

Attorney General Holder emphasizes the parallels between the Awlaki killing with that of General Yamamoto and Osama bin Laden, declaring that "the same rules apply."[87] Based on the groundwork laid out in the prior two criteria, Holder finds that the "government's use of lethal force in self-defense against a leader of al-Qaeda or an associated force that presents an imminent threat of violent attack would not be unlawful — and therefore would not violate the Executive Order banning assassination or criminal statutes."[88]

The Holder three-part test is tailored to the case of al-Awlaki and benefits from being within the cloud of war.[89] While arguments against the test could certainly be made, the reality is that the AUMF grants vast authority to the president. If the evidence exists, as the executive branch maintains, Holder's test would likely hold up to legal and constitutional claims.[90]

The more concerning argument is the one Holder left out of his Northwestern speech but is reportedly prepared to make is if Awlaki's case falls outside the AUMF.[91] The argument is that while it would be preferable to only target operational leaders affiliated with al-Qaeda, the government could legitimately target and kill *any* U.S. citizen who poses a threat to other U.S. citizens without judicial process. The notion,

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[84] In terms of treachery, it is unlikely Awlaki was unaware of his status on a kill list. His father sought an injunction to remove him from the list. Al-Aulaqi v. Obama, 727 F. Supp. 2d 1, 8 (D.D.C. 2010).

[85] Lotrionte, *supra* note 66, at 27. One may have qualms with the way the U.S. decides targeted killing, *ab intra*, but describing the Awlaki killing as haphazard or indiscriminate would be inconsistent with reported accounts of the strike. Some of the best minds in the Justice Department assiduously worked on the matter, gathered and analyzed intelligence, and prepared a lengthy memorandum of law to justify the drone attack. Cohen, *supra* note 2. It is reasonable to conclude that a constitutional violation committed by the U.S. government does not necessarily suggest a violation of international law.

[86] Lotrionte, *supra* note 66, at 27. While no killing could ever be categorized as painless, there is an argument that a drone strike is the closest thing to it in this day and age. Kristen Sandvik and Kjersti Lohne find, while acknowledging ethical challenges, that the dominant political military rationale for the so called drone wars is the notion that the "drone stare" enables operators to see, strike, and reach everything with "surgical precision" and thus lessening human suffering. *See* Kristen Sandvik & Kjersti Lohne, *Robot Technology and the Drone Stare: seeing or unseeing humanitarian suffering?*, FINNISH INSTITUTE OF INTERNATIONAL AFFAIRS, (Mar. 15, 2012) *available at* http://www.fiia.fi/assets/events/Suffering_Symposium_SESSION_1.pdf.

[87] Holder, *supra* note 18.

[88] *Id*.

[89] *Id*.

[90] *Id*.; *See also,* Obama, *supra* note 47.

[91] Savage, *supra* note 2.

supposedly contained in the memo, derives its legal basis from the U.S. Supreme Court cases in law enforcement.

III. DISCOUNTING THE FOURTH AMENDMENT

Some believe that the United States has little evidence confirming Awlaki was an active member of AQAP and even less proof that he was an operational leader.[92] Therefore, his killing could not be justified under the narrowly tailored Holder three-part test. Furthermore, AQAP and al-Qaeda are not interchangeable. The executive branch labels AQAP as an affiliate of al-Qaeda.[93] There are others who argue Awlaki's location in Yemen push him close to, maybe even outside of, the boundaries of the AUMF.[94]

John O. Brennan's speech at the Wilson Center took a passive stance on Yemen, describing AQAP as al-Qaeda's most active affiliate and that the United States would "continue to support the government of Yemen in its efforts against AQAP."[95] What is clear is that Yemen is not the hot battlefield that is Afghanistan.[96] Geographically, Pakistan, where numerous drone strikes have occurred, at least shares a mountainous border with Afghanistan providing areas to hide.

The reported mention of the Fourth Amendment in the memo[97] indicates a preparedness on the part of the executive branch and the OLC to justify a non-enemy combatant's death without judicial process. In many ways the Holder three-part test and the Fourth Amendment's "imminent threat" exception are compatible. Awlaki would have to be an imminent threat and the U.S. government would likely still have to seek capture and avoid unnecessary collateral deaths. There are instances, described below, when lethal force is justified against U.S. citizens who have not been arrested or given a trial.[98] The concept is accepted practice by U.S. law enforcement agencies and sanctioned by the American judicial

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[92] Greg Miller & Alice Fordham, *Anwar al-Aulaqi gets new designation in death*, WASH. POST, Sept. 30, 2011, http://www.washingtonpost.com/blogs/checkpoint-washington/post/aulaqi-gets-new-designation-in-death/2011/09/30/gIQAsbF69K_blog.html.

[93] John O. Brennan, Assistant to the President for Homeland Sec. & Counterterrorism, Address at the Wilson Center: The efficacy and Ethics of the President's Counterterrorism Strategy (Apr. 30, 2012), *available at* http://www.wilsoncenter.org/event/the-efficacy-and-ethics-us-counterterrorism-strategy.

[94] Bruce Ackerman, *President Obama: Don't go there*, WASH. POST, Apr. 20, 2012, http://www.washingtonpost.com/opinions/expanding-bombings-in-yemen-takes-war-too far/2012/04/20/gIQAq7hUWT_story.html (Professor Ackerman of Yale Law School finds that "the risk of attacks from Yemen may be real. But the 2001 resolution doesn't provide the president with authority to respond to these threats without seeking further congressional consent.").

[95] Brennan, *supra* note 93.

[96] *Id*.

[97] Savage, *supra* note 2.

[98] *See infra* Part III.A–B.

system, even outside the "warfare" context.[99]

However, outside of a warfare context and the broad aegis of the AUMF the alternative argument is sobering. Imagine if this rule had been applied to the case of Morton Sobell, the Soviet spy, or Gus Hall, the violent activist. Both men fled to Mexico and were extradited back to the U.S. in 1950 and 1951 respectively.[100] If the technology were available then, could the United States have swiftly killed these men in drone strikes before their eventual extraditions, finding they posed an "imminent threat?" Could it be applied to anyone dangerous within the United States involved in terrorist activities or would it be enough to simply be considered an imminent threat to the American public?

The imminent threat concept and the case of Awlaki should not be so easily reconciled by the American public without further evidence. The similarities of a remote operated drone taking out a dangerous man hiding in Yemen and an officer ramming the back of a fleeing reckless driver refusing to yield to the police, for instance, are not so readily apparent. Yet analyzing the government's arguments using *Garner* and *Scott* may yield troublesome results for U.S. citizens at home in America, as well as abroad, believing they are beyond attack from drone strikes.

A. Tennessee v. Garner

Tennessee v. Garner,[101] a 1985 Supreme Court case, involved the shooting of a fleeing unarmed burglar who did not yield to a police officer's command to halt.[102] The court noted that the situation involved Fourth Amendment rights against unreasonable seizure, declaring the "intrusiveness of seizure by deadly force is unmatched."[103]

The Court found that the police officer was not justified in shooting Garner.[104] The Court ruled that the use of deadly force to prevent the escape of all felony suspects whatever the circumstances, as was allowed under Tennessee law, is constitutionally unreasonable.[105] The Court, does however, describe circumstances in which deadly force is reasonable by stating "where the officer has probable cause to believe that the suspect poses a threat of serious physical harm, either to the officer or to others, it

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[99] *Id*.

[100] *See A Brief History*, THE FEDERAL BUREAU OF INVESTIGATION, SAN ANTONIO DIVISION, http://www.fbi.gov/sanantonio/about-us/history-1/history.

[101] Tennessee v. Garner, 471 U.S. 1 (1985).Where a Tennessee police officer, Elton Hymon, responding to a "break-in" call, yelled "Police, Halt" at Edward Garner, the break-in suspect. Garner then attempted to flee by climbing over a 6-foot high chain link fence. Officer Hymon shot Garner in the back of the head in order to prevent his escape. *Id*. at 3 – 4.

[102] *Id*. at 4.

[103] *Id*. at 9.

[104] *Id*. at 15.

[105] *Id*. at 5.

is not constitutionally unreasonable to prevent escape by using deadly force."[106]

If Garner had threatened the officer with a weapon or if there was "probable cause to believe that he has committed a crime involving the infliction or threatened infliction of serious physical harm, deadly force may be used if necessary to prevent escape, and if, where feasible, some warning has been given."[107] Since this was not the case, the Court found the officer's actions unreasonable.[108] Weighing heavily on the Court was the admission of the officer that he "saw no sign of a weapon, and, though not certain, was 'reasonably sure' and 'figured' that Garner was unarmed."[109]

Garner considers the interests at stake in cases in which a suspect is killed or seriously injured. On one side, the "average individual has an 'unmatched' interest in his own life, and the individual and society have an interest in the 'judicial determination of guilt and punishment.'"[110] "The use of deadly force is a self-defeating way of apprehending a suspect and so setting the criminal justice mechanism in motion;" if successful, it guarantees that that mechanism will not be set in motion.[111] On the other side, however, there is the "government's interest in effectively enforcing its criminal laws in its favor … [O]n balance, the Court reasoned, where the suspect is 'nonviolent,' the government's interest in effecting the arrest are insufficient to justify killing a suspect."[112]

Garner made clear that an officer must reasonably believe that the use of force is in defense of human life or in defense of any person in immediate danger of serious physical injury. Yet, for years after *Garner*, the guidance given by the court still left police officers, juries, and courts with rather vague direction. Lower courts struggled to find consistent rulings and failed to "develop significantly the law of reasonable seizures."[113]

B. Scott v. Harris

Readdressing the issue of deadly force in a Fourth Amendment context, the Supreme Court, in *Scott v. Harris*,[114] held that a police

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[106] *Garner*, 471 U.S. at 5.
[107] *Id*. at 11–12.
[108] *Id*. at 25.
[109] *Id*. at 3.
[110] Rachel A. Harmon, *When is Police Violence Justified*?, 102 NW. U. L. REV. 1119, 1128 (2008).
[111] *Garner*, 471 U.S. at 10.
[112] Harmon, *supra* note 110.
[113] *Id*. at 1131.
[114] Scott v. Harris, 550 U.S. 372, 374 (2007) (where Georgian Deputy Police Officer Timothy Scott attempted to pull over Victor Harris after Harris was clocked at traveling seventy-three miles per

officer's use of his vehicle's bumper to terminate a high-speed car chase, which rendered Victor Scott a quadriplegic, did not violate the plaintiff's Fourth Amendment rights.[115] The Court limited *Garner* to its facts, stating that *Garner* did not "establish a magical on/off switch that triggers rigid preconditions whenever an officer's actions constitute 'deadly force.'"[116]

Garner was purely an application of the Fourth Amendment's "reasonableness" test to a particular situation, finding it:

> [U]nreasonable to kill a 'young, slight, and unarmed' burglary suspect by shooting him 'in the back of the head' while he was running away on foot and when the officer 'could not reasonably have believed that [the suspect] ... posed any threat,' and 'never attempted to justify his actions on any basis other than the need to prevent an escape.'[117]

The question in *Scott* requires the same analysis as *Garner* – whether the police officer's actions were reasonable. There was no contention in *Scott* that the ramming of the speeder's car was a seizure nor that the use of excessive force in a seizure is analyzed under the Fourth Amendment's objective reasonableness standard.[118] Scalia, writing the opinion for the majority, found that the reasonableness of the use of excessive force by the Supreme Court in *Scott* was based on the immediate risk that the plaintiff presented to others.[119]

The *Scott* court used the test set forth in *United States v*. *Place*, which holds that in "determining the reasonableness of the manner in which a seizure is effected, '[w]e must balance the nature and quality of the intrusion on the individual's Fourth Amendment interests against the importance of the governmental interests alleged to justify the intrusion.'"[120] The officer's actions posed a high probability of serious injury or death but did not pose the same likelihood of death had the officer fired a weapon as in *Garner*.[121]

Culpability is another factor considered by the court.[122] It was the

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hour in a fifty-five mile per hour zone. Harris accelerated upon Scott's activation of police lights and a high-speed chase ensued).

[115] *Id*. at 386.

[116] *Id*. at 382.

[117] *Id*. at 382–83.

[118] *Id*. at 381.

[119] *Id*. at 383–84, 386.

[120] *Scott*, 550 U.S. at 383 (quoting United States v. Place, 462 U.S. 696, 703 (1983)).

[121] *Id*.

[122] *Id*. at 384.

speeding driver who had placed others in danger by driving recklessly, whereas others on the road "were entirely innocent"[123] – they happened to be in the wrong place at the wrong time. Justice Souter noted this fact in the *Scott* oral argument, noting that "*Garner* was not talking about someone who at the time the deadly force was used was himself creating a substantial risk of death or serious bodily harm to others. That's what we are dealing with here [in *Scott*]."[124]

Finally, Scalia refuted the argument that the innocent public could be protected had the officers discontinued their pursuit of the speeder.[125] First, the court was not persuaded that this would be the case, as the speeder could not have known whether or not officers were taking a shortcut or devising a new strategy.[126] Secondly, the court was unwilling to lay down a rule that would encourage reckless driving as a way to avoid the repercussions of pulling over.[127] That is, the court did not want drivers driving excessively fast in the knowledge that police officers are required to discontinue pursuit at certain speeds.[128] Danger on the road, the court reasoned, would rise rather than decline if this argument succeeded.[129]

IV. APPLYING *GARNER* AND *SCOTT*

A. Anwar al-Awlaki

The case of Anwar al-Awlaki is quite unique to the instances set forth in *Scott* and *Garner*, which dealt with the use of force by police officers on fleeing suspects. Several differences are readily apparent. Anwar al-Awlaki was killed by a drone strike in Yemen, not the United States, while allegedly plotting terrorist attacks against the United States.[130] The CIA, not traditional state or local law enforcement, led the drone strike.[131] The targeted killing occurred after the alleged crimes President Obama cited against Awlaki or at least during an investigation and not during a heat of the moment chase after police responded to the scene of a crime.[132]

If, as suggested above, the killing did not fall under the AUMF, reportage indicates that the Attorney General was prepared to use *Garner*

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[123] Harmon, *supra* note 110, at 1134.
[124] Transcript of Oral Argument at 29, Scott v. Harris, 550 U.S. 372 (2007) (No. 05-1631).
[125] *Scott*, 550 U.S. at 385.
[126] *See* Transcript of Oral Argument, *supra* note 125, at 5–6.
[127] *Scott*, 550 U.S. at 385.
[128] *See* Transcript of Oral Argument at 19–20, Scott v. Harris, 550 U.S. 372 (2007) (No. 05-1631).
[129] *Scott*, 550 U.S. at 385.
[130] *See generally* Holder, *supra* note 18.
[131] Mark Mazzetti, et al., *Two-Year Manhunt Led to Killing of Awlaki in Yemen*, N.Y. TIMES, Sept. 30, 2011, http://www.nytimes.com/2011/10/01/world/middleeast/anwar-al-awlaki-is-killed-in-yemen.html?_r=2.
[132] *See generally* Obama, *supra* note 47.

and *Scott* as justification for killing citizens outside of traditional combat.[133] While there are obvious differences between the Awlaki case and *Garner* and *Scott*, when looking deeper, one can see an argument of how the law may fit. It is by no means an easy argument, but one that can be made with possible success. To make the argument, the government must maneuver an initial roadblock.

The first barrier for the government is the U.S. ban on citizens killing other citizens abroad.[134] The argument by the government would be similar to one made with assassination (which also is banned by the United States) in the Holder three-part test. That is, assassination is murder, whereas "targeted killing" is a re-definition of assassination as an appropriate or justifiable killing.[135] The legality of "targeted killing" is justified by characterizing the target as either an enemy combatant or a lawfully targeted civilian.

Here, while not in a combat context, the government would likely argue Awlaki became a lawfully targeted civilian because of the potentially imminent threat he posed to the United States. To extend Professor Newton's analysis on targeted killing here, an imminent threat would be a subordinate criterion to the illegal murder of U.S nationals. Defining the target (Awlaki) as a civilian (who normally would be protected), but who has engaged in activities that are an immediate threat to U.S. citizens, brings him to the stage and scope of becoming a lawful target.[136] At this point, targeted killing would no longer be within the ambit of illegal murder.

1. *Intrusion Against Awlaki*

The intrusiveness of seizure by deadly force is unmatched. Echoing Scalia's opinion in *Scott*, one must first ask whether the actions of the government in killing a U.S. citizen by drone strike was reasonable. In determining reasonableness, one must then consider the intrusiveness to the individual of which deadly force was applied. "The individual and society have an interest in the 'judicial determination of guilt and punishment.'"[137] "The use of deadly force is a self-defeating way of apprehending a suspect and so setting the criminal justice mechanism in

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[133] *Id*.

[134] 18 U.S.C. § 1119 (2006). ("A person who, being a national of the United States, kills or attempts to kill a national of the United States while such national is outside the United States but within the jurisdiction of another country shall be punished as provided under sections 1111, 1112, and 1113" […] (22) The term "national of the United States" means (A) a citizen of the United States, or (B) a person who, though not a citizen of the United States, owes permanent allegiance to the United States).

[135] Interview by Christopher Hayes with Mike Newton, Vanderbilt Law Professor (May 21, 2010) a*vailable at* http://www.thenation.com/audio/breakdown-can-us-government-assassinate-you.

[136] *Id*.

[137] Harmon, *supra* note 110, at 1128.

motion. If successful, it guarantees that that mechanism will not be set in motion."[138] Therefore, while it is acknowledged that deadly force may be used, if necessary, it must not be the first response.

This idea of the importance society has in justice is a similar notion in the Holder three-part test, requiring that a finding must be made that capture was not reasonably feasible without loss of innocent bystanders adds support to the necessity of Fourth Amendment reasonableness.[139] This would not be only in regard to soldiers or CIA operatives on the ground but also to the innocent in the vicinity of a target.

Some reportage found that the military and the CIA made several attempts to capture al-Awlaki but his support network and constant movement made it difficult.[140] However, the seriousness or truthfulness of these capture attempts are of some debate.[141] Many "ordinary" Yemenis believe that their government could have easily captured al-Awlaki but chose not to for political reasons.[142] Yemeni security forces, trained by American Special Forces, the New York Times reports, "appear to have pursued Mr. Awlaki for almost two years in a hunt that was often hindered by the shifting allegiances of Yemen's tribes and the deep unpopularity of Mr. Saleh's government."[143] It will not be easy to determine the extent of the efforts made by the government to capture Awlaki until more information is released.

The pure difficulty of capture, though, cannot be an excuse for targeted killing when dealing with U.S. citizens. The ground operation to kill Osama Bin Laden seemed to show that, while costlier and riskier, the military possessed the ability to capture or kill targets without drone attacks.[144] Was the drone strike a desperate response by the government to an imminently dangerous terrorist on the run or a move of convenience?

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[138] Tennessee v. Garner, 471 U.S. 1, 10 (1984).

[139] *See supra* Part IV.

[140] *See* Mark Mazzetti, et al., *C.I.A. Strike Kills U.S.-Born Militant In A Car In Yemen,* N.Y. TIMES, Sept. 30, 2011, http://www.nytimes.com/2011/10/01/world/middleeast/anwar-al-awlaki-is-killed-in-yemen.html?pagewanted=all.

[141] *Id*.

[142] *Id*.

[143] *Id*. (Anwar al-Awlaki was killed while moving by car between Marib and Jawf Provinces in northern Yemen. This area known for having an al-Qaeda ties and beyond the reach central government control).

[144] *Timeline: Osama Bin Laden Operation*, CNN WORLD (Mar. 2, 2011), http://articles.cnn.com/2011-05-02/world/bin.laden.raid.timeline_1_bin-raid-defense official?_s=PM:WORLD (The Osama Bin Laden operation, as with the drone attack on Awlaki in Yemen, occurred in Pakistan, a country not in the main battle zones of Iraq and Afghanistan); Professor Michael Ramsden notes that the deployment of SEALs was the preferred strategy in the bin Laden operation, compared to drones in the Al-Awlkai attempt. While the legality of the bin Laden operation will mainly turn on whether he attempted to surrender, the drone strikes in the Al-Awlaki attempt arguably raise deeper problems concerning the practice of targeted killings without any prior attempt to arrest the suspected terrorist. Michael Ramsden, *Targeted Killings and International Human Rights Law: The Case of Anwar Al-Awlaki*, 16 J. CONFLICT & SECURITY L. 385, 386 (2011).

The importance of a ground mission in capturing or killing Bin Laden was directly proportional to his importance as the leader of al-Qaeda.[145] President Obama stated that:

> I directed Leon Panetta, the director of the CIA, to make the killing or capture of bin Laden the top priority of our war against al Qaeda … [that] for over two decades, bin Laden has been al Qaeda's leader and symbol, and has continued to plot attacks against our country and our friends and allies. The death of bin Laden marks the most significant achievement to date in our nation's effort to defeat al Qaeda.[146]

It is no doubt a difficult decision to put troops in harm's way in order to capture a dangerous person, but should there not also be a similar priority for U.S. citizens? From the facts in *Scott*, it can be said at least that by bumping the rear of Scott's vehicle,[147] innocent life was put at risk, especially the engaging officer's, and possibly other proximate motor vehicle occupants on the roadway. Justice Scalia mentioned this notion in the *Scott* oral argument as a check on the police in their use of deadly force:

> [I]t doesn't seem to me that we have to adopt a rule that will, that will discourage police officers. There's enough disincentive to engage in this kind of activity in the fact that the police officer may hurt himself. It's pretty risky to conduct this kind of a maneuver, don't--you think? I wouldn't have done it if I was Scott […] I would have let the guy go. Driving 90 miles an hour and comes up, approaches that car, that car swerved. Scott could have been killed, couldn't he?[148]

This disincentive is absent in drone strikes. The operator, while possibly suffering from stress or fatigue, has no worries that he will hurt himself operating a drone from some remote location.

Finally, the *Garner* court found (and the *Scott* court reiterated) that, if possible, some warning should be given to the suspect before the use of

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[145] *See* President Barack Obama, Remarks on Osama Bin Laden, The White House (May 1, 2011) (transcript available at http://www.whitehouse.gov/blog/2011/05/02/osama-bin-laden-dead).

[146] *Id*.

[147] Scott v. Harris, 550 U.S. 372, 383–84 (2007).

[148] Transcript of Oral Argument, *supra* note 125, at 44.

deadly force.[149] While no official charges were placed upon al-Awlaki, he "made it clear that he [had] no intention of making himself available for criminal prosecution in U.S. courts … that he [would] 'never surrender' to the United States, and that if the Americans want [him], they [could] come look for [him]."[150] The government's position, applying *Garner* and *Scott*, would be that Awlaki had no intention of turning himself in or making capture easy, all the while continuing his quotidian jihadist activities. The argument is that Awlaki had every reason to know he was targeted for capture, and eventually death, by the U.S. government. It should be noted, however, that no official charges were made against Awlaki. More information from the government relating to any warning given to Awlaki would be helpful.

2. *The Government's Interest*

Whether or not an unreasonable seizure against Awlaki under the Fourth Amendment occurred rests on the premise of the potential ongoing danger Anwar al-Awlaki posed. Much of the evidence cited by the U.S. government against Anwar al-Awlaki, such as the 2009 Christmas Day Bombing[151] may support an argument that al-Awlaki was an ongoing threat to the United States.

The government has a strong point in arguing the gravity of Awlaki's alleged crimes. The alleged crimes of *Graham* and *Scott* were relatively minor (burglary and speeding),[152] whereas the alleged crimes of Awlaki were of the gravest seriousness (causing and abetting terrorism).[153] There was never a dangerous situation in *Garner* and while *Scott* turned into a dangerous high-speed chase, the original alleged crime was not. Awlaki's alleged crimes were serious and dangerous in addition to the threat he continued to pose in flight.[154]

The *Garner* court clearly found, and what *Scott* implicitly upheld, is that "the use of deadly force to prevent the escape of all felony suspects whatever the circumstances, is constitutionally unreasonable."[155] This rule considers the broad range of felonies that exist today. Felonies are no longer limited to the most serious crimes as they once were.[156] Thus, the rule takes into consideration the fact that because not all felonies are alike, to allow for lethal force regardless of the circumstances in minor felonies is harsh. Yet, neither the *Garner* Court nor the *Scott* court suggests that there

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[149] *Scott*, 550 U.S. at 382; Tennessee v. Garner, 471 U.S. 1, 11–12 (1984).
[150] *See* Al-Aulaqi v. Obama, 727 F. Supp. 2d 1, 10–11 (D.D.C. 2010).
[151] Obama, *supra* note 47.
[152] *Scott*, 550 U.S. at 374; *Garner*, 471 U.S. at 3.
[153] Obama, *supra* note 47.
[154] That is, if he was fleeing capture as reports claim. *Al-Aulaqi*, 727 F. Supp. 2d at 10.
[155] *Garner*, 471 U.S. at 11.
[156] *See id*. at 14.

are no crimes that could allow for lethal force regardless of the circumstances.[157] It is only that felonies, as a broad category, cannot allow deadly force.

Extreme Islamic terrorism, by its nature, is a violent crime with many documented cases of recidivism.[158] Again, while felonies as a category do not rise to the level of warranting deadly force for fleeing suspects, a crime like terrorism, especially in this day and age, may. After all, if his alleged crimes are true, Awlaki is not an unarmed teenage burglar, but the orchestrator of plots that took the lives of many innocent Americans.[159]

Moving beyond the nature of the alleged crime committed, a court would also likely give more leeway to law enforcement in the use of deadly force with fleeing terrorists. Justice Scalia in the oral argument of *Scott* stated that if Garner [the teenage burglar] was "shooting his way out of the house and endangering other people" an officer would not have to let him go.[160] This may be an obvious observation, but it is an important one. Burglary, by itself is not necessarily violent, but adding a weapon to the situation changes the scenario, justifying the use of lethal force on a fleeing suspect.

The OLC reportedly also discounted the need to prove that Awlaki was actively plotting terrorist activity.[161] One might imagine that what had warranted the use of lethal force might be limited in time. Being involved in terrorism at one time would likely not warrant a lifetime on the U.S. kill list. Yet, the government might argue that while terrorists are not necessarily *actively planning* attacks at all times, they are *prepared* to attack at all times. Therefore the time for use of deadly force could be expanded within a reasonable time period. The OLC's memo reportedly argues that imminent risks "could include those by an enemy leader who is in the business of attacking the United States whenever possible, even if he is not in the midst of launching an attack at the precise moment he is located."[162]

Assuming a court did not carve out an exception for terrorism, as discussed above, for Awlaki's death to be justified as an imminent threat, the government would likely have to produce evidence of continued terrorist affiliation (assuming that it would not bring Awlaki back into

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[157] *See id*. at 21; *Scott*, 550 U.S. at 386.

[158] The Government reported that in 2010, in total, 598 detainees had been "transferred out of U.S. custody at Guantanamo. 1 out of every 4, or 25 percent, of these former detainees is now considered a confirmed or suspected recidivist by the U.S. government." Thomas Joscelyn, *Gitmo Recidivism Rate Soars*, THE WEEKLY STANDARD (Dec. 7, 2010, 4:12 PM), http://www.weeklystandard.com/blogs/gitmo-recidivism-rate-soars_521965.html.

[159] *See generally* Obama, *supra* note 47.

[160] Transcript of Oral Argument, *supra* note 124, at 34.

[161] *See* Savage, *supra* note 2.

[162] Savage, *supra* note 15.

AUMF territory). The government would need information that proves the target is still actively involved in terrorist pursuits. Beyond a reasonable time period, the government would likely have to make capture a priority and cease drone strikes.

In considering the application of deadly force, while Awlaki may have posed an immediate risk to the public, was a drone strike the right force to be used? The case of Awlaki falls closer to *Garner* in terms of force used. When the police officer in *Garner* shot at the fleeing unarmed suspect, there was a high likelihood of serious injury or death.[163] If an injury short of death occurred, the suspect probably would have been detained after he was brought to the hospital.[164] Stopping the fleeing suspect was the intention of the officer.[165] In *Scott,* the officer used excessive force but it was something short of what was used in *Garner*.[166] Scalia, writing for the Court, notes that it "is equally clear that Scott's actions posed a high likelihood of serious injury or death to respondent—though not the near certainty of death posed by, say, shooting a fleeing felon in the back of the head, or pulling alongside a fleeing motorist's car and shooting the motorist."[167]

The targeted killing of Awlaki would lead to near certain death. The drone attack had the complete intention of lethal force. *Garner* and *Scott* both provide some insight for what force can be used and when, but not much; they are very much limited to their facts. The drone strike on Awlaki was not like *Scott* in the sense that the use of force in *Scott* left room, albeit minimal, for the apprehension of the suspect alive. The drone strike is more similar to *Garner*, but even in that instance, the officer would have apprehended the suspect alive when prevented from flight. This is completely absent in the CIA drone strike. If Awlaki were critically injured there would be no officer to apprehend him, the strike would have failed with another strike likely ordered to finish the job.

The *Scott* rule, however, is one of balance. A suspect's intrusion must be weighed against the government's interests. While the force used in the strike killing Awlaki was certainly stronger than the force used in *Garner* and *Scott*, the nature of the crime may make it reasonable. After all, the pursuit of Scott was reasonable because a fleeing reckless driver is more dangerous than a fleeing unarmed teenage burglar. A court might be willing to allow for greater force than what was used in *Scott* because of the alleged crime of terrorism. Here, the government's interests are of the highest level.

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[163] *See* Tennessee v. Garner, 471 U.S. 1, 4 (1985).
[164] *See id*.
[165] *See id*. at 3–4.
[166] *See* Scott v. Harris, 550 U.S. 372, 384 (2007).
[167] *Id*.(citation omitted).

Ultimately, following the line of reasoning developed by *Garner* and *Scott*, the reasonableness of a drone strike will depend on evidence. If Awlaki posed a significant ongoing threat to innocent life the government has a strong argument for the use of deadly force. Terrorism is one of the worst crimes a person can commit under U.S. law. Additionally, Awlaki was responsible for putting innocent lives in danger. These arguments favor the government. The other side of the argument is that the drone strike would ensure near certain death. While the Supreme Court has sanctioned the ramming of a suspect's bumper, this action is not comparable to a drone strike.[168] Also, *Scott* and *Garner* deal with chases in the heat of the moment.[169] While the Court may be willing to allow the use of deadly force within a reasonable time period, it has not discussed the issue of extending the time period and there is no indication the court would be willing to do so.[170] Finally, the government has no deterrent from using force. In *Scott* the officer put himself in harm's way,[171] which is completely absent in the drone strike killing Awlaki. Weighing these arguments against each other, the government would likely prevail, even without the AUMF, using *Garner* and *Scott*. The seriousness of terrorism as a crime tips the scale.

B. Bringing it All Back Home

If *Garner* and *Scott* validated the drone strike on Awlaki, what are the implications for domestic cases? The attacks of September 11th ushered in a new era for the United States, where its main threat was no longer from communism as it had been for the latter part of the 20th century – the United States now has found itself in a fight against extremist Islamic terrorism. It is also the era of the drone. The preparedness of the government to justify targeted killings under *Garner* and *Scott* brings what was once a distant fight in Middle East much closer to home.

There is a real argument, as discussed above, justifying the death of Awlaki under *Garner* and *Scott*. While the government must be allowed the necessary power to combat terrorism, it must not be used to allow for killings of convenience. Expanding the scope of what constitutes an imminent threat in order to allow for expediency could become a concern, especially if applied in the United States. If police departments eventually gain use of armed drones, there needs to be clear rules of when deadly force can be used. Drones would provide police with the ability to almost always have the capability to kill a fleeing suspect.

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[168] *Id*. at 381.
[169] *Id*. at 374–75.; Tennessee v. Garner, 471 U.S. 1, 3–4 (1985).
[170] *See generally Scott*, 550 U.S.; *Garner*, 471 U.S. at 20.
[171] Transcript of Oral Argument, *supra* note 124, at 3.

Drone technology is new but not necessarily incompatible with *Garner* and *Scott*. Absent new executive or legislative action restricting the use of drones, a court would likely require a judicial finding of probable cause before a drone strike could be used at home (and possibly in future cases similar to that of Awlaki). To allow the government the unchecked power to use drones at home would arguably go too far. A court would stand on the certainty of death a drone strike entails (more like an execution than "the use of deadly force") and the lack of deterrence for law enforcement to require the judicial finding of probable cause. If the government could strike down any suspected terrorist in the United States from a remotely operated drone, the U.S. system of justice could become self-defeating – targeted killing might become the preferred method of justice over the risk of trial.

In addition, there is nothing to clearly prevent the Supreme Court, constitutionally speaking, from allowing drone strikes in the United States. The Court could find strikes like the one against Awlaki to be constitutional in the U.S. for the same reasons mentioned earlier in this section.[172] If a drone strike within the United States involving a terrorist were to be upheld, the question would then become, where is the line? Would a drone strike also be justified with a murder suspect? A suspect accused of sexual assault? It would be less likely, though not impossible.

Whether through Holder's three-part test, or an alternate argument, the executive branch successfully carried out the targeted killing of Awlaki, maintaining that it could justify the targeted killing of Awlaki as legal and constitutional.[173] Should others outside of the OLC have been brought in to give a possibly more objective opinion? This is not the first time this question has been asked.[174] The concern that the executive branch authorizes actions based on its own in-house legal advice has lingered for many years and through several administrations.[175]

V. THE OLC AND ITS SECRET MEMORANDUM

The Washington Post's Richard Cohen sardonically asks a very important question: "Who the hell is David Baron?"[176] The answer being that he is one of two lawyers (the other being Martin Lederman) in the U.S.

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[172] *See generally supra* Part IV, A.

[173] Holder, *supra* note 18 (laying out the three-part test for targeting a senior operational leader in al-Qaeda or an affiliate, but never directly indicating that it justified the killing of Anwar al-Awlaki).

[174] Harold Hongju Koh, *Protecting the Office of Legal Counsel from Itself*, 15 CARDOZO L. REV. 513, 514–15 (1993-1994).

[175] *See id*.

[176] Cohen, *supra* note 2.

Department of Justice's Office of Legal Counsel[177] who wrote a lengthy memo supporting the position that it was legally permissible to kill al-Awlaki.[178] Cohen concluded that the targeted killing of al-Awlaki dealt with "[g]overnment's most awesome power — to take a life — [which] has been exercised on one of its own citizens without benefit of trial … [and] [a] guy named Barron and another named Lederman apparently said it was okay."[179]

Additionally, these two men, employed by the OLC, provided a justification for a targeted killing carried out by the executive branch.[180] This is not to say Barron and Lederman should be rebuked for their actions, even if it is ultimately concluded that their memo is wrong or legally unsound. There is enormous pressure to do the right thing, in this case justifying the killing of a man deemed to be a significant threat to the United States. The same issue arose with the "torture memos" authored by John Yoo and Jay Bybee.[181] It is easy for outside observers, after the immediate terrorist threat has subsided, to condemn those who justified a widely held sentiment or at least one tacitly condoned by lack of public condemnation. The OLC should not be placed in the position of being a sycophant to the president.

Regardless of the "rigorous standards and process of review" to which the executive branch claims to hold itself when "considering and authorizing strikes against a specific member of al-Qaida outside the hot battlefield of Afghanistan," how truly unbiased can the process be without impartial review?[182] Jack Goldsmith, a former assistant attorney general in George W. Bush's administration and current Harvard Law professor stated:

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[177] Sudha Setty, *No More Secret Laws: How Transparency of Executive Branch Legal Policy Doesn't Let the Terrorists Win*, 57 U. KAN. L. REV. 579, 583 (2009) ("The [OLC] . . . has been in existence since 1933 as a part of the Department of Justice. Its role is to provide legal advice on the actions of all of the administrative departments that report to the President: it makes a determination on whether proposed actions and programs are illegal or unconstitutional, and provides advice to the President as to whether programs should be cancelled or modified due to legal constraints.").

[178] Cohen, *supra* note 2.

[179] *Id*.

[180] Setty, *supra* note 177, at 583 (that "although the Attorney General originally served as a counselor to both the President and to Congress, the Attorney General and the Department of Justice are now understood to be firmly within the auspices of the executive branch.").

[181] Eric Lichtblau and Scott Shane, *Report Faults 2 Authors of Bush Terror Memos*, N.Y. TIMES, Feb. 19, 2010, http://www.nytimes.com/2010/02/20/us/politics/20justice.html?_r=0.

[182] Brennan, *supra* note 93.

> The government needs a way to credibly convey to the public that its decisions about who is being targeted, especially when the target is a U.S. citizen, are sound. First, the government can and should tell us more about the process by which it reaches its high-value targeting decisions. The more the government tells us about the eyeballs on the issue and the robustness of the process, the more credible will be its claims about the accuracy of its factual determinations and the soundness of its legal ones. All of this information can be disclosed in some form without endangering critical intelligence.[183]

John O. Brennan, responding to the comment, said that President Obama agrees.[184] Brennan assured Americans in his speech that there is "absolutely nothing casual" about the process of targeted killing, including that of American citizens.[185] After all, Brennan reminded the public that the President is a Nobel Peace Prize recipient.[186] President Obama assured the world in his acceptance speech that "all nations, strong and weak alike, must adhere to standards that govern the use of force."[187] Still, this is Brennan, an executive branch official, assuring the public, *experto credite*, that the executive branch has a legal, fair, and rigorous process to its targeted killings, but cannot give too many details due to national security concerns. This process should not be so easy.

A solution to the bias problem may be to seek out a less partial group to provide legal opinions to the executive branch. Partisan scholars are quick to point out the failures of the OLC of one administration but overlook the same issue repeating itself in an administration more favorable to their political ideology.[188] This makes it difficult for a real and beneficial change to occur in the system in which the president receives legal advice from an executive agency under the direction of an executive appointee.

Some people suggest that the Bush administration's favored "systemic opacity and routine ex post use of the opinion function drew the OLC into repeated interbranch conflicts and ultimately undermined its own commitment to *stare decisis*."[189] It is almost impossible not to conclude

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[183] *Id*.
[184] *Id*.
[185] *Id*.
[186] *Id*.
[187] *Id*.
[188] *See*, *e.g*., Rachel W. Saltzman, *Executive Power and the Office of Legal Counsel*, 28 YALE L. & POL'Y REV. 439, 475–76 (2010).
[189] *Id*. at 479.

the same with Holder's three-part test. It is hard to accept the fact that there is now a strong commitment to *stare decisis* when it appears Obama has continued many of his predecessor's policies. Furthermore, it is suggested that, "in order to restore its role going forward, the Obama OLC should also align itself with the OLC's substantive traditions of respect for historical precedent, commitment to considering all relevant legal authorities, and a willingness to delimit the legal boundaries of executive authority."[190] It seems, however, that while Obama received praise for transparency early in his presidency,[191] the problems persist.[192] Anwar al-Awlaki has been dead for nearly a year, yet the evidence supporting his killing and the reasoning behind it are still filed away within the OLC. The "opacity" of the Bush administration seems to have carried over into the Obama administration.

A. Reforming the OLC

If national security is still an issue with the Awlaki case, then the memorandum and evidence should be released in an appropriately censored document (or in full for judiciary review). It is a widely held belief that careful transparency and openness within the OLC and other areas of national security is needed to maintain the public's confidence in the government.[193] Noting instances such as the Iran-Contra affair, extraterritorial abductions, and the application of U.S. law to Haitian refugees captured on the high seas, Harold Koh (before his current role in the State Department) stated that, "over the years, [the] OLC has developed certain informal procedural norms designed specifically to protect legal judgments from the winds of political pressure and expediency that buffet its executive branch clients."[194] These informal procedures are both "procedural" and "jurisdictional" in nature. The procedural and jurisdictional rules "exist to counter OLC's own understandable desire to please its principal client, the President, by telling him what he wants to hear."[195] Koh describes that the problem of opacity – "the danger that it will support political action with a legal opinion that

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[190] *Id*. at 480.

[191] Setty, *supra* note 177, at 608; Sheryl Gay Stolberg, *On First Day, Obama Quickly Sets a New Tone*, N.Y. TIMES, Jan. 22, 2009, http://www.nytimes.com/2009/01/22/us/politics/22obama.html.

[192] Saltzman, *supra* note 191, at 480.

[193] *See* Koh, *supra* note 174, at 523; Setty, *supra* note 180, at 630; *see also* Peter Scheer, *Most Wanted Secret Doc: Justice Dept Memo Analyzing Drone Strikes Against Suspected Terrorists*, HUFFINGTON POST, Aug. 27, 2012, http://www.huffingtonpost.com/peter-scheer/drone-strikes-terrorism_b_1832380.html.

[194] Koh, *supra* note 174, at 513–14 (Harold Koh is a former attorney-adviser to the OLC under President Reagan and Dean of Yale Law School. He is currently the Legal Adviser of the Department of State and is one of a select few people who have spoken publically for the President about targeted killing).

[195] *Id*. at 515.

cannot be publicly examined or tested. To meet this problem, OLC has admirably decided to publish its opinions."[196]

The Attorney General has refused to publish the OLC's Awlaki opinion or even acknowledge that it exists (it was reported to have been written over a year ago).[197] As a basis for not publishing it, the government cites the FOIA exemptions, specifically maintaining that the al-Awlaki case remains a covert operation.[198] Elaborating on the importance of promptly publishing OLC decisions, Koh notes the three purposes of publication:

> First, accessibility; second, unveiling the factual predicate upon which an opinion is based; and third and most important, to prevent the client (or third parties who acquire an OLC opinion as 'holders in due course') from stripping a carefully nuanced opinion of all its subtleties and thereby reducing it to the simplistic conclusion that 'OLC says we can do it.' [199]

As the memorandum that justified the killing of Anwar al-Awlaki continues to be held in secret, a reasonable response to the question of why al-Awlaki could be killed by a U.S. drone attack would be "because the OLC says so."[200]

In the determination of whether a U.S. citizen can be targeted for death, the process should have checks and balances as well as more transparency.[201] It is understood that important and confidential information was considered in the justification to target al-Awlaki.[202] It is concerning, however, that so much power rests in the OLC, which has

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[196] *Id*.

[197] Charlie Savage, *A Not-Quite Confirmation of a Memo Approving Killing*, N.Y. TIMES, Mar. 9, 2012, http://www.nytimes.com/2012/03/09/us/a-not-quite-confirmation-of-a-memo-approving-killing.html.

[198] *See* Cohen, *supra* note 2; Information Access Guide, *supra* note 16.

[199] Koh, *supra* note 174, at 517.

[200] The Obama administration's policy of not releasing documents is a continuation of George W. Bush's policy. *See* Setty, *supra* note 177, at 597–98 ("Without a leak or voluntary administration disclosure, Congress and the public remained unaware of executive branch legal policy. A number of OLC memoranda that delineated the Bush administration's view on the legal parameters of the war on terror were only released to the public in January 2009, in the waning days of the Bush administration [a policy Obama is likely to follow]. This lack of disclosure by the OLC is consistent with the attitude of the administration as a whole. Whereas under previous administrations, the disclosure of legal opinions and other documents was routine, the Bush administration took a dramatically different view. Reliance on secret laws—near anathema to the rule of law—became routine.").

[201] *See* Editorial, *The Power to Kill*, N.Y. TIMES, Mar. 11, 2012, http://www.nytimes.com/2012/03/11/opinion/sunday/the-power-to-kill.html.

[202] Scheer, *supra* note 193.

great pressure to "tweak" the law to meet the executive's goals.[203] Harold Koh suggests that in order for the OLC to be protected from its eagerness to please,[204] it should begin by looking at Part III of *Planned Parenthood of Southeastern Pennsylvania v. Casey*.[205] The:

> Opinion urges judicial adherence to the principle of *stare decisis* to a rule unless it has been found unworkable, can be removed without serious inequity to those who have relied upon it, has been rendered 'a doctrinal anachronism discounted by society,' or its factual premises have so far changed as to render its central holding somehow irrelevant or unjustifiable.[206]

It is hard, however, to hold the OLC accountable when it will not release its memoranda and reasoning behind its decisions.[207]

A better system might be a panel of impartial judges (something like the Office of Special Counsel) who are the final arbiters in the sanctioning of targeted killing (or at least when it involves a U.S. citizen). In his work, "On the Heavens," Aristotle wrote "to give a satisfactory decision as to the truth it is necessary to be rather an arbitrator than a party to the dispute."[208] When opinions contain confidential or classified information and really do need to be kept secret for some time in order to ensure safety, it would probably be wiser to have memoranda written by people who are detached from an eagerness to please the president.

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[203] This problem has also carried over from the George W. Bush administration. *See* Setty, *supra* note 180, at 600–01 (where "Political pressure, combined with OLC opinions shrouded in secrecy from inception through issuance, undermined the credibility and quality of legal reasoning found in OLC opinions … A lack of such external checks established the environment for the OLC to become a "hothouse for rogue ideological opinion, protected from the winds of scrutiny and peer review and other things by the classification shield.").

[204] Planned Parenthood v. Casey, 112 S.Ct. 2791, 2808–2816 (1992).

[205] Koh, *supra* note 174, at 53; Koh may be now experiencing this problem himself. Ross Douthat of the New York Times writes that many Democrats are following roughly the same path as Harold Koh, "a staunch critic of Bush's wartime policies who now serves as a legal adviser to the State Department, supplying constitutional justifications for Obama's drone campaigns. What was outrageous under a Republican has become executive branch business-as-usual under a Democrat." Ross Douthat, Op-Ed., *All the Presidents Privileges*, N.Y. TIMES, Jun. 24, 2012, www.nytimes.com/2012/06/24/opinion/sunday/douthat-all-the-presidents-privileges.html.

[206] *Id*.

[207] Setty, *supra* note 177, at 602 ("making disclosure the default standard encourages self-policing by OLC lawyers. Disclosure would also generate political and public sentiment regarding legal policies, the same way that congressional lawmaking and judicial opinions are subject to public scrutiny."); Professor Ramsden also argues that in order "To minimize the risk and abuse and error, and to maximize transparency and accountability, the US government should publically state the precise legal basis, the criteria used for determining who is a legitimate target and ensure some form of review procedure of all targeted killing decisions." Ramsden, *supra* note 147, at 406.

[208] ARISTOTLE, ON THE HEAVENS, Book I, Part 10 (350 B.C.) (J.L. Storks trans.).

B. Judicial Process

A change in the way the executive branch operates and decides who can be targeted for death is in order. A New York Times editorial notes the disturbing nature of Attorney General Eric Holder "utterly reject[ing] any judicial supervision of a targeted killing."[209] While judges may certainly be inappropriate in many areas of national defense, it does not mean it is wise to reject judicial process from the arena all together, especially when considering targeting U.S. citizens. The decision to kill an American citizen should have judicial oversight in a court similar to the Foreign Intelligence Surveillance Court ("FISC").[210]

FISCs were created by the Foreign Intelligence Surveillance Act ("FISA") of 1978.[211] Attorney General Holder rejects the idea of judicial review because he believes it could slow the strike on a terrorist.[212] FISCs, however, work with great speed and rarely reject warrant requests, largely because the executive branch does not bring frivolous claims, knowing they will be held accountable.[213] In terms of secrecy, the FISC courts "operates in secret, and at least Americans are assured that some legal authority not beholden to a particular president or political party is reviewing such operations."[214]

Holder's response to critics claiming a denial of due process for targeted U.S. citizens is a *non sequitur* -- that judicial process and due process guaranteed by the Constitution are not one and the same.[215] The executive branch, however, working "in secret as the police prosecutor, jury, judge and executioner is the antithesis of due process."[216]

The judiciary is entrusted to interpret the Constitution and make sure the executive branch applies and enforces it properly.[217] A case where there is "hot pursuit" is one thing, but it is clear that Awlaki's case had been an ongoing investigation spanning over two years.[218] For instances similar to Awlaki, the executive branch should seek the approval of the

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[209] *The Power to Kill*, *supra* note 201. (This policy of cutting the judiciary out of decisions was also used by the Bush administration and is not in line with many past administrations); Setty, *supra* note 180, at 588 ("In fact, the Bush Administration's concerted effort to cut the judiciary and Congress out of the decision-making process on legal policy is the antithesis of the approach undertaken by the Lincoln and Roosevelt administrations.").

[210] *Foreign Intelligence Surveillance Court,* Electronic Privacy Information Center, http://epic.org/privacy/terrorism/fisa/fisc.html.

[211] *Id*.

[212] *The Power to Kill*, *supra* note 201.

[213] *Id*.

[214] *Id*.

[215] *Id*.

[216] *Id*.

[217] *Id*.; *See generally* Marbury v. Madison, 5 U.S. (1 Cranch) 137, 177 (1803).

[218] *The Power to Kill*, *supra* note 201; *See supra* Part II-A.

judiciary, in a court like FISA, which can handle matters of urgency and secrecy. It should be the same, should the time come, when armed drones are present within the borders of the United States. The system of balances upon which the United States was founded, should be preserved in all areas of government, especially when it involves the situation of targeting a U.S. citizen for death. Ensuring that our democratic-republic is preserved is what makes the War on Terror worth fighting.

VI. CONCLUSION

Anwar al-Awlaki was a U.S. citizen, who the U.S. government claimed was an operational leader of AQAP. He was widely known for his jihadist sermons, which could be readily found on the Internet.[219] The Executive Branch claims to have evidence which links al-Awlaki to the planning of several terrorist acts.[220] The OLC, which advised the President and CIA on the legality of a drone strike on Awlaki, still refuse to release the document that justifies the attack, citing that the Awlaki covert operation remains in effect, though reporters with inside information have put forward many of its principles.[221]

Attorney General Holder, speaking about national security at Northwestern University School of Law, provided a three-part test that allowed for the targeted killing of a senior operational leader in al-Qaeda or an affiliate.[222] The target must be an immediate threat to the lives of U.S. citizens, cannot be feasibly captured, and the attack must comply with the international laws of war.[223] The test is narrowly tailored to Awlaki, even being satirized as an infomercial-like product for presidents who have trouble with the targeted killings of U.S. citizens in a *New York Times* cartoon.[224] It would likely justify the killing of Awlaki, especially in consideration of the AUMF's broad authority. Beyond the Holder three-part test, the more troubling part of the Awlaki killing is the reported preparedness of the OLC to justify it outside of the warfare context and as an imminent threat within the Fourth Amendment. Targeted killing could likely be justified under seizure cases such as *Garner* and *Scott* where terrorism is involved. While there are factors that a court may find a targeted killing of a U.S. citizen unjustified, whether it is lack of deterrence or certainty of death, there is nothing clearly unconstitutional.

Judicial process should first be required, with a court similar to the

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[219] *See supra* Part I.
[220] Obama, *supra* note 47.
[221] Savage, *supra* note 197.
[222] Holder, *supra* note 18.
[223] *See generally*, *supra* Parts II-V.
[224] Brian McFadden, *The New "Due" Process*, N.Y. TIMES, Mar. 18, 2012, http://www.nytimes.com/slideshow/2012/01/08/opinion/sunday/the-strip.html#2.

Foreign Intelligence Surveillance Court, providing a check on the executive branch. The iconoclastic notion that the targeted killing of a U.S. citizen without judicial process does not warrant immediate and full justification is quite disconcerting. A less biased panel of arbitrators should be sought for review when dealing with the grave matter of targeting a U.S. citizen for death, especially as drones (though unarmed) are becoming increasingly present in the United States. Only a few weeks after Awlaki's death, his sixteen-year-old son, also a U.S. citizen, was killed in a drone strike.[225] U.S. officials reported that he was collateral damage in an attack on a known al-Qaeda operative.[226] Clear boundaries must be set as to who can be targeted and to what extent collateral damage is acceptable. These decisions should not remain solely within the executive branch.

Ultimately, it is quite difficult to formulate a complete opinion on the legality of Anwar al-Awlaki's targeted killing under an imminent threat argument because the executive branch will not release evidence against him.[227] While the targeted killing of Anwar al-Awlaki may be justified under the system as it exists today, it does not mean the system should necessarily remain the way it is. Not questioning the death of Awlaki could chip away at American rights at home. Benjamin Franklin said "those who can give up essential liberty to obtain a little temporary safety, deserve neither liberty nor safety."[228] Having FISA courts review executive branch decisions on targeting American citizens would preserve democratic principles by eliminating the executive branch's monopoly of power and giving accountability to its decisions.

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[225] Tom Finn & Noah Browning, *An American Teenager in Yemen: Paying for the Sins of His Father?*, TIME, Oct. 27, 2011, http://www.time.com/time/world/article/0,8599,2097899,00.html.

[226] *Id*.

[227] Savage, *supra* note 197; Professor Ramsden finds a similar problem in reaching his conclusion "with respect to the legality of any targeted killing due to much information being classified by the US government and thus unavailable for public scrutiny. Ramsden, *supra* note 144, at 406.

[228] BENJAMIN FRANKLIN & WILLIAM TEMPLE FRANKLIN, MEMOIRS OF THE LIFE AND WRITINGS OF BENJAMIN FRANKLIN 187 (Philadelphia, T.S. Manning, 1818).