

TOOLS AND TRADEOFFS:

CONFRONTING U.S. CITIZEN TERRORIST SUSPECTS ABROAD

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EXECUTIVE SUMMARY

Anwar Awlaki, the U.S.-born preacher and operational leader of Al Qaeda in the Arabian Peninsula, was killed on September 30, 2011, by a U.S. drone strike. The strike itself was not unusual; before Awlaki's killing, the Obama administration had put the Bush administration's drone program on steroids, killing hundreds of suspected militants with near-constant strikes in the tribal areas of Pakistan. However, this strike was unique insofar as Awlaki was the first U.S. citizen to be specifically targeted by a drone strike overseas by his government.

The killing of Awlaki as he left a funeral in Yemen put a spotlight on an important question: how does the U.S. government confront an American terror suspect abroad? For policymakers, the presence of American jihadists in foreign countries presents several tricky policy problems compared with similar foreign terrorists. In this paper, we explore the costs and benefits of several distinct approaches available to the U.S. government in confronting the threat of Americans fighting jihad against the United States from abroad. These include:

- Targeting suspects with lethal force.
- Capturing terror suspects and trying them in federal court.
- Capturing suspects and detaining them in military custody.
- Assisting the government of other countries to prosecute suspects on their own.
- Tolerating the activities of the terror suspects.

Also within this paper, we catalog the American citizens abroad who have joined the jihadist cause and operated overseas, focusing on those Americans who traveled overseas to join the enemy and have not attempted to return. We specifically profile Anwar Awlaki, the most dangerous traitor to America in the post-9/11 era, explaining why his killing was deemed necessary to the United States government and of particular interest to President Obama. We also examine other cases of American suspects of terrorism, including John

Walker Lindh, Yaser Esam Hamdi, Jaber Elbaneh, Kamal Derwish, Adam Gadahn, Samir Khan, Ahmed Oman Abu Ali, and the so-called Lackawanna Six, among others.

Much of the U.S. effort against Americans involved in jihadist activity abroad is quite robust. However, the U.S. approach leaves considerable gaps, particularly regarding Americans involved in pro-Al Qaeda propaganda and recruitment. On some issues, particularly killing suspected American terrorists, outside oversight of executive conduct is thin, leading to the potential for abuse of power. Regarding drone strikes, as long as the number of Americans targeted with lethal force remains low, we argue that leaving targeting questions entirely in executive hands makes sense. The argument for a more formal, prescribed oversight mechanism becomes stronger to the extent the activity becomes more common.

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By its very name, the Hellfire missile promises to visit Biblical wrath upon those on its receiving end. On September 30, 2011, it delivered just that to Anwar Awlaki, the U.S.-born preacher and an operational leader of Al Qaeda in the Arabian Peninsula (AQAP), who had plotted repeated attacks from his hideout in Yemen. The same strike also took out Samir Khan, another U.S. national and propagandist for Awlaki's organization. A separate strike a few weeks later killed Awlaki's teenaged son, also an American citizen. The latter two deaths were collateral damage in strikes aimed at others. Awlaki, by contrast, was not. He was specifically targeted with lethal force by a government, his own government, which had semi-publicly sought his death for months—tracking him across Yemen even as it fended off litigation by his family to remove him from the U.S. government's targeting list.

Long before the Awlaki killing, the Obama administration had put the Bush administration's drone program on steroids, killing hundreds of suspected militants with near-constant strikes in the tribal areas of Pakistan. Awlaki, however, was not just another dead terrorist. Because of his U.S. citizenship, his killing moved the Obama administration into an uncharted realm for counterterrorism. His seemingly straightforward killing masked innumerable complexities, and, perhaps more than any single operation, it illustrated the jump between the pre-9/11 and post-9/11 worlds. Once upon a time, Attorney General Janet Reno had fretted about whether the United States had the legal authority to kill the Saudi terrorist Osama bin Ladin, who had never set foot in the United States, but who had publicly declared war on it—demonstrating his grim intentions by planning the bombings of U.S. embassies in Africa and the *USS Cole*. By contrast, in killing Awlaki, the Obama administration targeted a U.S. citizen—one who had never been proven in any court to have been directly responsible for actual deaths—and it has actively resisted judicial supervision of the decision to target him.¹ Indeed, the administration has insisted in court that such targeting could not be reviewed, either before the strike or after—and that it cannot be forced to release publicly the memoranda that lay out its legal rationale for undertaking the strike.

1 Had Omar Faruk Abdulmuttalab, the so-called “underwear bomber,” not pled guilty in a plot to detonate a bomb aboard an airplane over Detroit, the U.S. government would have presented considerable evidence regarding Awlaki's involvement in this attack, portraying him as the operational commander who vetted Omar, persuaded him to attack America, provided him with a bomb, and gave him detailed instructions for finding a flight.

The Obama administration carried out the strike not against a member of the core of Al Qaeda, but against a member of an affiliated group that had not even existed on September 11, 2001, emphasizing that the Obama administration expanded field of battle—a field expanded both geographically and conceptually—even though Obama had criticized the Bush administration for having had too expansive a concept of the War on Terror.²

Yemen itself, meanwhile, was both ally and enemy, helping the United States fight terrorism at times, while at other times tolerating—or even directly aiding—jihadists bent on killing Americans. And while the killing led to condemnation from human rights groups that it “violates both U.S. and international law”³—some of whom had earlier brought an unsuccessful lawsuit to prevent it from happening—it barely caused a ripple of protest among the American people. More Americans agree that “terror suspects who are U.S. citizens” should “be deliberately killed by U.S. forces” than favor granting these suspects “the constitutional right given to U.S. citizens to be tried in a court of law.”⁴ If anything, the strike made President Obama more popular at a time when the stagnating American economy showed his presidency’s popularity at a low ebb.

The Awlaki strike, however, is only one of a diverse array of approaches the United States has taken towards U.S. citizens abroad who align themselves with the enemy and travel abroad to wage war. This relatively small group of people has provoked, in addition to drone strikes, a treason indictment, other terrorism prosecutions in federal courts, detention under military law, imprisonment in allied countries, and a number of instances of what we might call tolerance—a decision that the individual in question just does not merit any serious effort at either an arrest or a kill. The handful of American jihadists active overseas against the United States present special challenges in counterterrorism, because they are comparatively free, relative to citizens actually inside the United States, to integrate themselves into enemy forces. Those who stay at home, by contrast, may find it difficult to make contact with the enemy despite their earnest desire to do so. At the same time, U.S. citizens also enjoy certain legal rights vis-a-vis the U.S. government and

2 Although Al Qaeda of the Arabian Peninsula did not exist on 9/11, Al Qaeda itself and the broader jihadist movement have long had a presence there, going back to the early days of the movement.

3 Suzanne Ito, “ACLU Lens: American Citizen Anwar Al-Aulaqi Killed Without Judicial Process,” *Blog of Rights* (blog), *American Civil Liberties Union*, September 30, 2011, <http://www.aclu.org/blog/national-security/aclu-lens-american-citizen-anwar-al-aulaqi-killed-without-judicial-process>. Numerous other groups have issued similar statements.

4 “Killing Al-Awlaki Raises Obama’s Approval on Terrorism Eight Points,” *The Economist/YouGov* poll, October 7, 2011, <http://today.yougov.com/news/2011/10/07/killing-al-awlaki-raises-obamas-approval-terrorism/>.

consequent expectations of free travel and government protection both domestically and overseas that non-citizens do not enjoy. In essence, citizens like Awlaki are potentially the most dangerous terrorists—in part because the array of U.S. policy tools to defeat them is comparatively restrictive and has gaps, while policy towards them is inconsistent.

For Al Qaeda and associated movements, however, such Americans present both a blessing and a risk. For propaganda purposes, they enable Al Qaeda to play up its appeal and underscore its claim to be a global organization. And the cultural and personal connections these Americans have to their home make them more effective propagandists and recruiters—and as operators, potentially better able to avoid suspicion. However, Americans often do not fit in neatly with the locals, not understanding the language and culture. In addition, there is always the chance that an American might be uncommitted and thus easily suborned upon his return—or perhaps even a spy from the start. Successful terrorist groups are often paranoid ones, and trust of an American would come slowly.

In this paper, we look at American citizens abroad who join the jihadist cause and operate overseas. We do not consider those—like Jose Padilla, David Headley, or Najibullah Zazi—who returned to the United States and were captured domestically. Though such people raise some of the same issues as Americans who remain abroad, the ability to capture them domestically makes them analytically distinct in critical respects and at key moments. Rather, our focus here is on Americans who travel overseas to join the enemy and either do not attempt to return or have not yet done so—and with whom the United States must thus contend while they remain abroad.

For policymakers, American jihadists in foreign countries present several tricky policy problems compared with similar foreign terrorists. Very few scholars and commentators argue for judicial review of targeting decisions with respect to strikes on Al Qaeda leaders in general, for example. But the Awlaki case has spawned multiple calls for judicial review when the government targets a U.S. citizen. U.S. nationals are also far more politically difficult to hold in long-term military detention than are non-citizens, and the courts tend to show a greater interest in and solicitude for their cases. What's more, they are not eligible for trial before military commissions. A few, like Awlaki, are operationally active at a senior level, enabling an administration to claim that they pose an imminent threat; but others are propagandists, engaging in behavior that is insidious but arguably more protected legally. So the options for handling U.S. nationals supporting terrorists abroad

tend to be starker. As a practical matter, there are only four: In narrow legal circumstances, as in Awlaki's case, the United States can target them with lethal force. When American forces manage to capture them, trial in federal court is a virtual certainty. Sometimes, the United States can assist the government of the country they have ensconced themselves to prosecute on their own. Beyond that, however, authorities—although they never quite say this—have to tolerate the activities of such people. These different tools each involves tradeoffs, some of them obvious and some of them subtle.

In this paper, we explore these tradeoffs—looking at the benefits and costs of criminal prosecution, lethal targeting, military detention, proxy detention or prosecution by allied forces, and toleration. We conclude, in brief, that the American counterterrorism arsenal with respect to citizens overseas is generally robust and flexible, but that it also has some notable gaps—particularly regarding enemy propagandists and recruiters. We do not propose closing these gaps, since any effort to do so would raise significant constitutional questions and the number of people involved does not justify such a step. Moreover, we similarly do not endorse proposals to create judicial review of targeting decisions like the one to kill Awlaki—and for much the same reason. These cases are, at least for now, so rare that they do not justify a major policy shift toward judicialization of overseas lethal targeting operations.

WHO WAS ANWAR AWLAKI?

Anwar Awlaki was the most important and most dangerous traitor to America in the post-9/11 era. Awlaki was born in New Mexico, where his father was studying for his master's degree in agricultural economics. He later moved to Minnesota, where his father received his doctorate, and then went with his family back to Yemen, where he rejoined family members of the Awlak tribe. His father would eventually serve as minister of agriculture in the government of Ali Abdullah Saleh, and as president of Sana'a University. While in Yemen, the young Awlaki studied the Koran, and his community gathered to honor young men who went off to fight the Soviets in Afghanistan. "There was constant talk of the heroes who were leaving Yemen to join the fight and become martyrs and go to paradise," recalled one neighbor at the time.⁵ In Yemen, those going off to fight the Soviets had the support of the government, tribes, and religious associations—a rare unanimity.⁶ Awlaki returned to the United States as a student, first receiving his bachelor's at Colorado State University in 1991, then getting his master's at San Diego State University, and eventually studying for his doctorate at George Washington University. No doubt unusual among his classmates, Awlaki spent one of his summers while in college in Afghanistan, fighting with *the mujahedin*.⁷

It is hard to pin a label on Awlaki and say that he was an Al Qaeda member born and bred. Even as he railed against Israel and encouraged young Muslims to fight in places like Chechnya, he also condemned the September 11 attacks, attended a Pentagon luncheon as part of an outreach effort to moderate Muslims, conducted a prayer breakfast at the U.S. Capitol, and even appeared in a *Washington Post* video explaining Ramadan to non-Muslims.⁸ When serving as an imam in Virginia, mosque members claimed he did

5 Scott Shane and Souad Mekhennet, "Imam's path from condemning terror to preaching jihad," *The New York Times*, May 8, 2010, <http://www.nytimes.com/2010/05/09/world/09awlaki.html?pagewanted=all>.

6 Gregory D. Johnsen, *The Last Refuge: Yemen, Al-Qaeda, and America's War in Arabia* (New York: W.W. Norton & Company, 2012), 8.

7 Aamer Madhani, "Cleric dubbed 'bin Laden of the Internet,'" *USA Today*, September 30, 2011, http://www.usatoday.com/news/nation/2010-08-25-1A_Awlaki25_CV_N.htm.

8 Shane and Mekhennet, "Imam's path from condemning terror to preaching jihad."

not espouse radicalism.⁹ In 1996 and 1997 he was arrested for soliciting prostitutes while in San Diego—hardly the act of a religious fanatic.¹⁰

Yet Awlaki appeared at the same time to lead a dual life of radicalism and violence. He became the imam of the Denver Islamic Society in 1994 and ran into trouble after encouraging a member to go fight the Russians in Chechnya. In 1998 and 1999, he helped run a small charity that the FBI later described as “a front organization to funnel money to terrorists.” He also met with an Osama bin Laden associate and an associate of Omar Abdel Rahman, who was in prison for plotting terrorist attacks in New York. In a story that was never satisfactorily explained, Awlaki also met with Khalid al-Midhar and Nawaf Al-Hazmi, two of the 9/11 hijackers, when he led a mosque in San Diego. Al-Hazmi followed Awlaki when the imam moved to the Dar al-Hijrah mosque in Virginia in 2001 and called him his “spiritual advisor.” The FBI concluded that these contacts were random, not part of the 9/11 plot, but at least one FBI investigator believed Awlaki “was at the center of the 9/11 story.”¹¹ Similarly, the 9/11 Commission “shares the suspicions” about Awlaki.¹²

Despite not having pieced together all of the puzzle, U.S. investigators were suspicious of Awlaki. At this point in the story, they found a way to go after him. When Awlaki had returned to the United States in 1990 to go to college, he had claimed to have been born in Yemen, not New Mexico—perhaps in an effort to win scholarship money reserved for foreign students. This fraud, minor in itself, was enough for a warrant years later. Prosecutors in Colorado, however, rescinded it, claiming they could not make a criminal case.¹³ Awlaki had also been observed crossing state lines with prostitutes in the Washington D.C. area, so the FBI had earlier considered charging him under the Mann Act, which prohibits transporting women across state line for “immoral purposes.”¹⁴

9 “Al Qaeda’s Anwar al-Awlaki killed in Yemen,” *CBS News*, September 30, 2011, http://www.cbsnews.com/2100-202_162-20113732.html.

10 Joseph Rhee and Mark Schone, “How Anwar Al-Awlaki Got Away,” *ABC News: The Blotter*, November 30, 2009, <http://abcnews.go.com/Blotter/FtHoodInvestigation/anwar-awlaki/story?id=9200720&page=1#.UI95kWK-uup>.

11 Shane and Mekhennet, “Imam’s path from condemning terror to preaching jihad.”

12 *The 9/11 Commission: Final Report of the National Commission for Terrorist Attacks on the United States*, official government edition (Washington, DC: U.S. Government Printing Office, 2004), 33.

13 Shane and Mekhennet, “Imam’s path from condemning terror to preaching jihad.”

14 Rhee and Schone, “How Anwar Al-Awlaki Got Away.”

Awlaki ultimately left the United States of his own volition, moving first to the United Kingdom in 2002 and then to Yemen in 2004. He lived in Shabwa, where his family was from, and taught at Iman University, whose alumni included another American jihadist, John Walker Lindh.

While in Yemen, Awlaki's role in inspiring young Americans and westerners more generally came into focus. Faisal Shahzad, the would-be Times Square bomber, claimed he was "inspired" by Awlaki and had made contact with him over the Internet. Perhaps more important, Awlaki was also believed to have inspired Nidal Hasan.¹⁵ On November 5, 2009, Hasan, a U.S. Army major, went on a shooting rampage at Fort Hood, Texas, killing thirteen of his fellow servicemen. Between December 2008 and June 2009, Hasan had been in regular email contact with Awlaki, asking him questions about jihad, suicide bombings, and the role of Muslims but also for recommendations "for a wife that is willing to strive with me to please Allah."¹⁶ Although U.S. intelligence agencies intercepted these communications, and the FBI informed the Army about them, authorities took no action. Bruce Riedel, a former CIA officer and terrorism expert, declared, "E-mailing a known al-Qaeda sympathizer should have set off alarm bells. Even if he was exchanging recipes, the bureau should have put out an alert."¹⁷

After Hasan's rampage, Awlaki declared, "The only way a Muslim could Islamically justify serving as a soldier in the US army is if his intention is to follow the footsteps of men like Nidal."¹⁸ Playing to U.S. fears, he gloated, "*Jihad* [holy war] is becoming as American as apple pie and as British as afternoon tea."¹⁹

Awlaki was unusually qualified for the role of inspiring Americans like Shahzad and Hasan. The plodding rhetoric of bin Laden's successor, Ayman al-Zawahiri, comes off as flat in translation, but Awlaki had excellent English and was Web savvy, using the Internet

15 "Al Qaeda's Anwar al-Awlaki killed in Yemen," *CBS News*.

16 "Anwar Awlaki E-Mail Exchange with Fort Hood Shooter Nidal Hassan," Intelwire, July 19, 2012, <http://news.intelwire.com/2012/07/the-following-e-mails-between-maj.html>.

17 Brooks Egerton, "Imam's e-Mails to Fort Hood suspect Hasan tame compared to online rhetoric," *The Dallas Morning News*, November 29, 2009, <http://www.dallasnews.com/news/state/headlines/20091129-Imam-s-e-mails-to-Fort-7150.ece>.

18 Denis MacEoin, "Anwar al-Awlaki: 'I Pray that Allah Destroys America'," *The Middle East Quarterly*, Vol. XVII, No. 2 (Spring 2010), 13-19 <http://www.meforum.org/2649/anwar-al-awlaki-pray-allah-destroys-america>.

19 Duncan Gardham, "Anwar al-Awlaki Profile," *The Telegraph*, October 30, 2010, <http://www.telegraph.co.uk/news/uknews/terrorism-in-the-uk/8097898/Anwar-al-Awlaki-profile.html>.

to reach out to disaffected Muslims in the West. Awlaki could cite Koranic justifications and then sneak in a Michael Jackson reference, a blend of humor and knowledge that made him compelling.²⁰ Juan Zarate, a top counterterrorism official in the Bush administration, described him as “kind of a pied piper for Western ears.”²¹ Citing the U.S. invasion of Iraq and “continued U.S. aggression against Muslims,” Awlaki explained that the call to jihad against America was binding on him even though he was a U.S. citizen and went on to exhort his fellows: “To the Muslims in America, I have this to say: How can your conscience allow you to live in peaceful coexistence with a nation that is responsible for the tyranny and crimes committed against your own brothers and sisters?”²² Al Qaeda expert Brian Fishman points out that because he was born in the United States, he was more credibly able to say, “this is why I turned on my country. And in doing so, he was trying to lay out a pathway for other people to follow.”²³

A preacher inspiring others to violence is certainly dangerous. But had Awlaki been no more than that, he certainly could not have been lawfully targeted with lethal force. A citizen who exhorts others in general terms to arms has broad protection under the free speech guarantees of the First Amendment. Indeed, the activity of an independent actor would generally qualify as protected speech unless it threatens “imminent lawless action”—like, for example, the exhorting of a mob to burn buildings or lynch someone.²⁴ While doing propaganda work for and at the direction of a designated foreign terrorist group might well qualify as material support for terrorism, neither the Bush nor Obama administrations have claimed the authority to target such a person with lethal force. But over time, authorities recognized Awlaki as more than just a preacher—or even a preacher acting as part of an enemy group. Although he was not the leader of AQAP, nor even an especially important figure in its operations inside Yemen, he did take the lead in what mattered most to Americans: attacks on the United States. Senior Treasury Department official Stuart Levey in 2010 said Awlaki “has involved himself in every aspect of the

20 Aamer Madhani, “Cleric dubbed ‘bin Laden of the Internet.’”

21 “Was U.S.-Backed Killing of Anwar al-Awlaki Legal?” PBS Newshour, September 30, 2011, http://www.pbs.org/newshour/bb/terrorism/july-dec11/awlaki2_09-30.html.

22 “Anwar al-Awlaki in His Own Words,” The Guardian, September 30, 2011 <http://www.guardian.co.uk/world/2011/sep/30/anwar-al-awlaki-video-blogs>.

23 “Was U.S.-Backed Killing of Anwar al-Awlaki Legal?” PBS Newshour.

24 *Brandenburg v. Ohio*, 395 U.S. 444 (1969).

supply chain of terrorism—fundraising for terrorist groups, recruiting and training operatives, and planning and ordering attacks on innocents.”²⁵ In May 2013, Attorney General Eric Holder in a letter and President Obama in a major speech publicly laid on successive days out an overview of the government’s evidence against Awlaki. Said Obama:

[H]e was continuously trying to kill people. He helped oversee the 2010 plot to detonate explosive devices on two U.S. bound cargo planes. He was involved in planning to blow up an airliner in 2009. When Farouk Abdulmutallab—the Christmas Day bomber—went to Yemen in 2009, Awlaki hosted him, approved his suicide operation, and helped him tape a martyrdom video to be shown after the attack. His last instructions were to blow up the airplane when it was over American soil.²⁶

Holder, who offered more detail in his letter (and used a different spelling of Awlaki’s name), put it like this:

It was not al-Aulaqi’s words that led the United States to act against him: they only served to demonstrate his intentions and state of mind, that he “pray[ed] that Allah [would] destro[y] America and all its allies.” Rather, it was al-Aulaqi’s actions—and, in particular, his direct personal involvement in the continued planning and execution of terrorist attacks against the U.S. homeland—that made him a lawful target and led the United States to take action.²⁷

While the public record on Awlaki surely does not contain all the information that informed that judgment, it unambiguously supports the government’s view of the matter.

In addition to his email exchanges with Hasan, Awlaki allegedly tried to orchestrate two attacks on U.S. airliners and allegedly sought to use cyanide and ricin for attacks on westerners in Yemen.²⁸ U.S. officials linked him to the near-miss attempt to blow up a passenger jet over Detroit on Christmas Day 2009 and the 2010 plot to use explosives cunningly

25 Thomas Joscelyn, “AQAP confirms Anwar al Awlaki killed in US drone strike,” *Long War Journal*, October 10, 2011, http://www.longwarjournal.org/archives/2011/10/al_qaeda_confirms_an.php.

26 Barack Obama, “Address at the National Defense University” (speech, Washington DC, May 23, 2013), National Defense University, <http://www.lawfareblog.com/2013/05/text-of-the-presidents-speech-this-afternoon/>.

27 Holder, Eric. Eric Holder to Patrick J. Leahy, 22 May 2013, <http://www.lawfareblog.com/wp-content/uploads/2013/05/AG-letter-5-22-132.pdf>.

28 “Al Qaeda’s Anwar al-Awlaki killed in Yemen,” *CBS News*.

hidden in packages to down two cargo jets over the Atlantic. Either of these attacks, had they succeeded, would have been blows to the U.S. homeland. The so-called “underwear bomber,” Umar Farouk Abdulmutallab, provided U.S. investigators with a detailed account of Awlaki’s role.²⁹ The Justice Department contends that when Abdulmutallab went to Yemen, he stayed with Awlaki—who assured him he would help him conduct a martyrdom operation. Awlaki approved the operation, connected Abdulmutallab with AQAP’s ace bombmaker, prosecutors argued, helped him write his martyrdom video, and gave him specific instructions to strike a U.S. aircraft over American soil.³⁰

Awlaki also allegedly fomented terrorism in Europe. He worked with Bangladesh-born Rajib Karim, an airline employee in the United Kingdom, whose younger brother Tehzeeb met with Awlaki in Yemen. Tehzeeb put his brother in email contact, and Awlaki tried to learn about how much access Karim had to airports, about the limits to security systems, about what a watch-listed person would have to go through, and about other operational details.³¹ Yet Awlaki still saw the United States as the brass ring, sending Karim an email saying that the “highest priority is the U.S. . . . Anything there, even if on a smaller scale compared to what we may do in the U.K., would be our choice.”³²

Holder described some of these incidents in his letter:

When Umar Farouk Abdulmutallab . . . went to Yemen in 2009, al-Aulaqi arranged an introduction via text message. Abdulmutallab told U.S. officials that he stayed at al-Aulaqi’s house for three days, and then spent two weeks at an AQAP training camp. Al-Aulaqi planned a suicide operation for Abdulmutallab, helped Abdulmutallab draft a statement for a martyrdom video to be shown after the attack, and directed him to take down a U.S. airliner. Al-Aulaqi’s last

29 Charlie Savage, “U.S. Law May Allow Killings, Holder Says,” *New York Times*, March 5, 2012, <http://www.nytimes.com/2012/03/06/us/politics/holder-explains-threat-that-would-call-for-killing-without-trial.html>.

30 See Government’s Sentencing Memorandum, *United States of America v. Umar Farouk Abdulmutallab*, No. 2:10-cr-20005 (E.D. Mich.), February 10, 2012, <http://www.washingtonpost.com/wp-srv/world/documents/umar-farouk-abdul-mutallab-sentence-brief.pdf>.

31 Thomas Joscelyn, “Awlaki’s emails to terror plotter show operational role,” *The Long War Journal*, March 2, 2011, http://www.longwarjournal.org/archives/2011/03/anwar_al_awlakis_ema.php. See also Mark Hosenball, “Secret panel can put Americans on ‘kill list,’” *Reuters*, October 5, 2011, <http://www.reuters.com/article/2011/10/05/us-cia-killlist-idUSTRE79475C20111005>. There is some debate about Awlaki’s role in the email exchanges, with some believing that it was Karim’s brother who sent the emails. However, intelligence community analysts believe that if so, then Awlaki was at the brother’s side.

32 Thomas Joscelyn, “AQAP confirms Anwar al-Awlaki killed in US drone strike.”

instructions were to blow up the airplane when it was over American soil. Al-Aulaqi also played a key role in the October 2010 plot to detonate explosive devices on two U.S.-bound cargo planes: he not only helped plan and oversee the plot, but was also directly involved in the details of its execution—to the point that he took part in the development and testing of the explosive devices that were placed on the planes.³³

The near-success of mass casualty attacks like Abdulmutallab's attempt to bomb a U.S. airplane, made Awlaki one of America's most wanted terrorists. In April 2010, U.S. forces were authorized to kill Awlaki, in what was now named "Objective Troy," on sight.³⁴ Awlaki's U.S. citizenship did not diminish President Obama's personal enthusiasm for killing him. According to one account, Obama grew especially eager to get Awlaki as his operational role became clearer and asked frequently for updates on progress in locating him.³⁵ In May 2010, U.S. forces got close. Awlaki paused to switch vehicles, and watched the one he had abandoned be destroyed.³⁶

The key tip eventually came from Yemeni intelligence, which found Awlaki in the town of Al Khasaf. Yemen alerted U.S. intelligence, which followed him with a drone from that point.³⁷ Awlaki was leaving a funeral when the United States struck.³⁸

President Obama declared at the time, "The death of Awlaki is a major blow to Al Qaeda's most active operational affiliate"—a claim that holds up. Awlaki's operational abilities were not unique, and indeed AQAP's bomb maker, Ibrahim al-Asiri, is far more lethal. But few Al Qaeda members both played an active operational role and could inspire westerners the way Awlaki could, or otherwise radicalize and recruit them. The danger of future Nidal Hasans is thus diminished by his death. Politically, killing Awlaki helped

33 Eric Holder, Eric Holder to Patrick J. Leahy, 22 May 2013, <http://www.lawfareblog.com/wp-content/uploads/2013/05/AG-letter-5-22-132.pdf>.

34

35 Daniel Klaidman, *Kill or Capture: The War on Terror and the Soul of the Obama Presidency* (New York: Houghton Mifflin Harcourt, 2012), 261-264.

36 Greg Miller, "Strike on Aulqi demonstrates collaboration between CIA and military," *The Washington Post*, September 30, 2011, http://articles.washingtonpost.com/2011-09-30/world/35272700_1_lethal-operations-cia-director-qaeda.

37 Hakim Al-Masmari, Margaret Coker, and Siobhan Gorman, "Drone Kills Top Al Qaeda Figure," *Wall Street Journal*, October 1, 2011, <http://online.wsj.com/article/SB10001424052970204138204576602301252340820.html>.

38 Paul Harris and Jamie Doward, "How US tracked Anwar al-Awlaki to his death in Yemen," *The Guardian*, October 1, 2011, <http://www.guardian.co.uk/world/2011/oct/01/yemen-drone-killing-ibrahim-al-asiriri>.

President Obama shore up his credentials as a tough counterterrorism president. Peter King, the Republican Chairman of the House Homeland Security Committee and a politician known for holding controversial hearings on Muslim radicalization in the United States that implicitly challenge the loyalty of American Muslims, declared the operation a “tremendous tribute” to the President.³⁹ But the controversy over targeting Awlaki did not end with his death. Civil libertarians filed suit for damages on behalf of the families of Awlaki, his son, and Samir Khan.⁴⁰

39 “Anwar al-Awlaki Dead: Politicians React to Death of U.S.-Born Al Qaeda Cleric,” *The Huffington Post*, September 30, 2011, http://www.huffingtonpost.com/2011/09/30/anwar-al-awlaki-dead-poli_n_988853.html.

40 See Complaint in *Al Aulaji v. Panetta*, No. 12-cv-01192 (D.D.C), July 18, 2012 (http://www.aclu.org/files/assets/tk_complaint_to_file.pdf).

BEYOND AWLAKI

Awlaki was the most prominent American acting on behalf of Al Qaeda abroad, but he is not the only one. Since September 11, a variety of other Americans have made their way into the ranks of Al Qaeda and its affiliates overseas, and the United States' political and legal systems have handled them quite differently. The result is a lack of consistency, perhaps inevitable, that leads to gaps in the overall counterterrorism effort.

The following is not an exhaustive account of every American suspect of terrorism whom the United States government has confronted abroad. But it includes the major cases in this particular field. We group them according to major areas of thematic common ground.

Early Fighters

John Walker Lindh was the first American to come to prominence as a jihadist abroad after operations in Afghanistan began. Lindh achieved notoriety in the scary days after 9/11, when U.S. forces captured him in Afghanistan along with Taliban forces. His capture sparked fears that the United States harbored a large fifth column of terrorist supporters in the country. Lindh's case, in hindsight, turned out to be far less dramatic—and to herald little. After converting to Islam at 16, Lindh traveled to Yemen for further study in Islam. He then journeyed to Pakistan and, a few months before 9/11, went to Afghanistan to fight alongside the Taliban. He trained at an Al Qaeda camp and then went to the front lines. Unlike Awlaki, however, Lindh was never part of the leadership cadre of any enemy organization—more of a foot soldier with a glaring oddity. He briefly met Bin Ladin, and the Saudi Al Qaeda leader appears to have solicited him to conduct a terrorist operation that took advantage of his citizenship. Lindh claims to have declined the offer, however, and there appears to be little reason to disbelieve him. In 2002, Lindh pled guilty to “supplying services to the Taliban” and “carrying an explosive” while supplying these services and is now serving a 20-year prison sentence.⁴¹

⁴¹ See Plea Agreement in *United States of America v. John Lindh*, Criminal No. 02-cr-37A (E.D. Va.), July 15, 2002 (<http://www.justice.gov/ag/pleaagreement.htm>).

Like many young people in the Saudi neighborhood where he grew up, **Yaser Esam Hamdi** made his way to Afghanistan to fight for the Taliban after 9/11. He was captured by the Northern Alliance, the coalition of anti-Taliban forces that eventually became the government of Afghanistan. Hamdi was so undifferentiated from other Taliban foot soldiers from Saudi Arabia and the other Gulf states that, at first, his American captors did not even realize his citizenship—and thus shipped him, along with other Taliban captives, to Guantánamo Bay. Only once they had him there did they realize he had been born in Baton Rouge, Louisiana, and had lived there until his family moved back to Saudi Arabia when he was three. When authorities learned of his citizenship they transferred Hamdi to a Navy brig in Virginia in 2002, and then in 2003 to another brig in South Carolina. Designated an “enemy combatant”—a member of forces opposing American forces in an armed conflict—and initially denied access to a lawyer, he was held by the military in non-criminal detention under the laws of war. He claimed, meanwhile, that he had no Al Qaeda links and, in fact, had tried to leave Afghanistan but was captured along the way. Hamdi became particularly famous after his case went before the Supreme Court, which ruled in 2004 that citizen detainees have a due process right to challenge their detentions—including the evidentiary bases of those detentions.⁴² Hamdi himself, however, never ended up doing that. His case, rather, resolved itself in a creative way, albeit one that is almost impossible to repeat. The government struck a deal with Hamdi in which he was flown to Saudi Arabia and released. He was required to renounce his U.S. citizenship and agreed not to leave the Kingdom for five years nor travel to the United States for ten. Hamdi was also barred from going to Afghanistan, Iraq, Israel, Pakistan, Syria, the Gaza Strip, and the West Bank. He must also “advise” the U.S. embassy in Saudi Arabia 30 days before he travels outside the Kingdom.⁴³

Ironically, Hamdi, the protection of whose civil liberties became a cause célèbre, ended up spending only three years locked up—fully 17 years shorter than Lindh’s sentence: though Lindh’s case was regarded by civil libertarians as the model of the right, law-enforcement-oriented way to proceed.

42 A general outline of the facts of the case can be found in the Supreme Court’s decision in *Hamdi v. Rumsfeld*, 542 U.S. 507 (2004) and the lower-court litigation that preceded it. For an account of Hamdi’s side of the story, see Joel Brinkley and Eric Lichtblau, “U.S. Releases Saudi-American It Had Captured in Afghanistan,” *The New York Times*, October 12, 2004, <http://www.nytimes.com/2004/10/12/international/middleeast/12hamdi.html>.

43 See Settlement Agreement in *Yaser Esam Hamdi v. Donald Rumsfeld*, September 17, 2004 (<http://news.findlaw.com/hdocs/docs/hamdi/91704stlagmnt.html>).

Higher-Level Figures

Another post-9/11 scare involved the so-called **Lackawanna Six**, a group of Yemeni Americans who attended an Al Qaeda training camp before the 9/11 attacks. The members of the group pled guilty to material support to a foreign terrorist organization, though they seem to have evinced little actual enthusiasm for Al Qaeda, much less for playing an actual operational role.⁴⁴

However, two of the larger group ended up abroad. **Jaber Elbaneh**—the so-called “seventh member” of the group—showed significantly more enthusiasm than the others. While the other six came home and later pled guilty, Elbaneh never returned to New York. Instead he fled Afghanistan to Yemen where he became a sufficiently significant figure that the U.S. government offered a \$5 million reward for information leading to his capture. The government there imprisoned him in 2004, but he escaped along with many other Al Qaeda figures in 2006. He later was recaptured and returned to prison, but Yemen has no extradition treaty with the United States so there he remains.⁴⁵ He remains on the FBI’s Most Wanted Terrorist list.⁴⁶ Elbaneh’s citizenship status is a bit murky on the public record. The FBI refers to him as a Yemeni national, whereas the *Washington Post* describes him as “a U.S.-Yemeni citizen.” Elbaneh has clearly benefited from a certain degree of political protection in Yemen.

Similarly, **Kamal Derwish**, the Yemeni American whose speeches and sermons had pushed the Lackawanna group to travel to Afghanistan, also fled to Yemen and became more deeply involved in Al Qaeda activity. One member of the Lackawanna group called Derwish a “music man of religion,”⁴⁷ and another Lackawanna resident confirmed that “When he spoke, people listened. He was a very charismatic person. He talked quite a bit about it, you know, how the—you know, the situation in Chechnya, the situation in

44 For a good account of the case in general, see Dina Temple-Raston, *The Jihad Next Door: The Lackawanna Six and Rough Justice in an Age of Terror*, (Public Affairs, 2007).

45 Craig Whitlock, “Bounties a Bust in Hunt for Al-Qaeda,” *Washington Post*, May 17, 2008, <http://www.washingtonpost.com/wp-dyn/content/article/2008/05/16/AR2008051603921.html>. See also Craig Whitlock, “Al-Qaeda Operative Loses Freedom in Yemen,” *Washington Post*, May 19, 2008 <http://www.washingtonpost.com/wp-dyn/content/article/2008/05/18/AR2008051800968.html>. See also Temple-Raston, *The Jihad Next Door*, p. 209.

46 “Most Wanted Terrorists: Jaber A. Elbaneh,” undated, http://www.fbi.gov/wanted/wanted_terrorists/jaber-a.-elbaneh/view.

47 James Sandler, “Kamal Derwish: The Life and Death of An American Terrorist,” *Frontline*, October 16, 2003, <http://www.pbs.org/wgbh/pages/frontline/shows/sleeper/inside/derwish.html>.

Bosnia, the situation in Palestine.”⁴⁸ Like Al Awlaki’s son, he was killed in a drone strike of which he does not appear to have been the target. The November 5, 2002, Predator strike was more likely aimed at Abu Ali al-Harithi, an operative suspected of involvement in the bombing of the *U.S.S. Cole*. Derwish was among a group of people in the vehicle along with the target.⁴⁹

The only American to play in Awlaki’s league in terms of prominence—though not in terms of dangerousness—is **Adam Gadahn**. Born Adam Pearlman, Gadahn converted to Islam at age 17. He left his California birthplace and moved to Pakistan in 1998, where he joined the jihadist movement and worked closely with Abu Zubaydah, a leading jihadist facilitator now at Guantánamo Bay.⁵⁰ In 2001, became head of *As-Sahab* (“The Clouds”), Al Qaeda’s media division that produced numerous videos after the 9/11 attacks. *As-Sahab* issued slick videos with small professional touches (just as CNN has a CNN logo on its coffee mugs, so too does *As-Sahab*). Gadahn first appeared in October 2004, referring to himself as “Azzam al-Amriki” or “Azzam the American.”

In response to Gadahn’s propaganda activities on behalf of the enemy, the United States charged him with treason—the first American so charged in over fifty years.⁵¹ Gadahn also appears to have been a significant adviser to Osama bin Laden on media matters in Bin Ladin’s later years. Gadahn, like Awlaki, can tailor his remarks to an American and western audience, though in most of his recent remarks he has focused on Arabic-speaking audiences. In addition, he offers a sophisticated understanding of the U.S. media scene. In January 2011, for example, Gadahn discussed how to exploit media coverage for the tenth anniversary of 9/11. He went over how different U.S. media outlets treated Al Qaeda, praising CNN for its use of original *As-Sahab* videos and lamenting the firing of Keith Olberman at MSNBC. (Fox, he noted, “falls into the abyss” and “lacks neutrality too.”)⁵² Unlike Awlaki, however, there is no evidence that Gadahn has been put on a kill

48 “Transcript: Chasing the Sleeper Cell,” *Frontline*, October 16, 2003, <http://www.pbs.org/wgbh/pages/frontline/shows/sleeper/etc/script.html>.

49 Temple-Raston, *The Jihad Next Door*, 249.

50 John Broder, “American Being Sought by FBI Found His Place in Islam, Relatives Say,” *New York Times*, May 28, 2004, <http://www.nytimes.com/2004/05/28/us/american-being-sought-by-the-fbi-found-his-place-in-islam-relatives-say.html?n=Top%2fReference%2fTimes%20Topics%2fSubjects%2fTerrorism>

51 First Superseding Indictment, *United States v. Adam Gadahn*, No. 05-cr-254(A) (C.D. Cal.), October 11, 2006 (http://www.usdoj.gov/opa/documents/adam_indictment.pdf); See also Press Release, U.S. Dep’t of Justice, U.S. Citizen Indicted on Treason, Material Support Charges for Providing Aid and Comfort to al Qaeda, October 11, 2006 (http://www.usdoj.gov/opa/pr/2006/October/06_nsd_695.html).

52 Adam Gadahn letter, January 2011, captured during the Abbottabad raid. Available at *SOCOM-2012-0000004-Trans.pdf*

list. Despite the dramatic charges against him, the United States does not appear to have made Gadhafi a counterterrorism priority—probably because his activities do not seem to involve operational direction of attacks.

The other American who rose to prominence was the previously-mentioned **Samir Khan**, who—like Awlaki—ended up working for AQAP in Yemen. Khan grew up first in Queens, New York, and then in North Carolina. United States law enforcement officers first noticed him because he ran the pro-Al Qaeda website, “Inshallah Shaheed,” out of his parents’ basement. The site praised Bin Ladin and offered links to anti-U.S. jihadi videos. Khan’s propaganda activities were protected by the First Amendment to the extent he conducted them independently of any foreign terrorist group, but he decamped to Yemen as FBI investigations of his links to terrorism grew.⁵³

In Yemen, Khan edited *Inspire*, Al Qaeda’s English-language journal.⁵⁴ Like Awlaki’s sermons and messages, *Inspire* mixed Islamic proselytizing and operational advice with humor, again showing how Al Qaeda varied its messaging to reach young men in the United States and Europe. Articles ranged from railing against the West’s supposed war on Islam, to calls to join the holy struggle, to advice on how to build a bomb from ingredients in your mother’s kitchen. Perhaps inevitably, there was also a feature on Congressman Anthony Weiner’s emailing of pictures of himself in his underwear to his would-be paramours. Writing in *Inspire*, Khan authored an article called “I Am Proud to Be a Traitor to America.” In it, he declared that while in America, he had to respect the laws that stopped him from inciting violence; but, “at the same time, I knew the real truth wouldn’t be able to reach the masses unless and until I was above the law.”⁵⁵

The FBI had investigated Khan while he was in the United States, but decided it did not have enough evidence to seek an indictment.⁵⁶ That may have changed had Khan not been killed in the strike that also killed Awlaki, but as a practical matter, the U.S. took

53 Dina Temple-Raston, “Grand Jury Focuses on N.C. Man Tied to Jihad Magazine,” *National Public Radio*, August 18, 2010, <http://www.npr.org/templates/story/story.php?storyId=129263809>.

54 For an example of *Inspire*’s work, see the magazine’s special issue, “The Greatest Special Operation of All Time,” *Inspire*, Fall 2011, Issue 7, <http://azelin.files.wordpress.com/2011/09/inspire-magazine-7.pdf>.

55 Samir Khan, “I Am Proud to Be a Traitor to America,” *Inspire*, October 2010, <http://azelin.files.wordpress.com/2010/10/samir-khan-i-am-proud-to-be-a-traitor-to-america.pdf>.

56 Suzanne Kelly, “Samir Khan: Proud to be An American Traitor,” *CNN*, September 30, 2011, <http://www.cnn.com/2011/09/30/world/meast/analysis-yemen-samir-khan>.

little intentional action against Khan. In addition to not being as prominent as Awlaki, Khan was not an operator and some of his activity could, perhaps, have been defended with a broad reading of the First Amendment—though his behavior, as reported at least, could likely have supported an indictment for material support for terrorism. That indictment, however, never materialized. Khan was not the target of the strike that killed him; his death was treated as collateral damage in the Awlaki strike. In fact, and somewhat incredibly, the State Department placed an official condolence call to his family, treating his death like that of any other American citizen killed abroad.⁵⁷

The operational American terrorist who most closely rivals Awlaki in terms of his dangerousness is **Ahmed Omar Abu Ali**, who was born in Texas and grew up in Falls Church, Virginia. Abu Ali comes in a very distant second to Awlaki, but like Elbaneh and Derwish, he was clearly not—as were Lindh and Hamdi—just a foot soldier. And he was clearly operational, unlike Khan and Gadahn. After graduating from the Saudi Islamic Academy in Virginia and doing a semester at the University of Maryland, Abu Ali took off for Saudi Arabia, where he enrolled at the Islamic University in Medina. There, in November 2002, he became involved with an Al Qaeda cell and began plotting an attack inside the United States. Some of the cell's plans were quite ambitious—including the assassination of then-President George W. Bush. The cell, meanwhile, was actively involved in attacks within the Kingdom. Abu Ali stayed in safe houses, received training in weapons, explosives, and forgery, and also did guard duty at the safe houses.

Saudi authorities arrested Abu Ali in June 2003 and held him for a year and half in the Kingdom before transferring him for trial in the United States. Indicted on a variety of conspiracy charges, including a conspiracy to assassinate the President, he was convicted in November 2005 and sentenced to life in prison.⁵⁸ Unlike Awlaki, Abu Ali was not an operational leader. He was, however, a particularly ambitious—and apparently capable—young man, who wished to take advantage of his access to the United States to inflict maximum impact and damage.

57 Kirit Radia, "Slain al Qaeda Propagandist's Family Gets Condolence Calls from State Department," *ABC News*, October 11, 2011, <http://abcnews.go.com/blogs/politics/2011/10/slain-al-qaeda-propagandists-family-gets-condolence-calls-from-state-department/>; "Daily Press Briefing," U.S. Department of State, October 11, 2011 <http://www.state.gov/r/pa/prs/dpb/2011/10/175222.htm>.

58 See *U.S. v. Abu Ali*, No. 06-4334 (4th Cir.), June 21, 2007 (<http://www.ca4.uscourts.gov/Opinions/Published/064334.P.pdf>). The life prison sentence followed the Fourth Circuit's ruling. See Agence France Presse, "American Al-Qaeda gets life in prison for Bush plot," July 27, 2009, <http://www.google.com/hostednews/afp/article/ALeqM5gvn6aq8ZB9yWuVbhKuVtqsFSsRwQ>.

Later Convert Cases

Several American converts to Islam—in addition to Gadahn and Lindh—have traveled abroad for jihad. **Bryant Neal Vinas**, whose parents immigrated from South America, converted to Islam in 2004, two years after leaving the Army. Vinas was “self-radicalized” by looking at extremist websites and listening to lectures by Awlaki. He traveled to Pakistan in 2007, where he joined the fight against U.S. forces and even fired rockets at a U.S. base in Afghanistan in 2008. Drawing on his knowledge of the United States, he gave information on the Long Island Railroad to Al Qaeda to plot an attack.⁵⁹ In the proceedings of his guilty plea, Vinas admitted, “I consulted with a senior al-Qaeda leader and provided detailed information about the operation of the Long Island Rail Road system which I knew because I had ridden the railroad on many occasions.” He also drew maps and explained the train routes to Al Qaeda leaders.⁶⁰

Pakistani authorities captured Vinas in 2008, with information given to them by the United States, and he would later cooperate with U.S. investigators, to whom he was turned over—giving information to U.S. and investigators from numerous other countries that drew on the Al Qaeda figures he met at various camps in the Afghanistan-Pakistan region.⁶¹ He pled guilty to conspiracy to commit murder, providing material support to a terrorist organization, and taking military-style training from Al Qaeda.⁶² No doubt because of his cooperation with investigators and willingness to testify in the trial of Adis Medunjanin, an alleged accomplice in the unsuccessful 2009 NYC subway plot, however, he has not yet been sentenced.⁶³

59 Sebastian Rotella and Josh Meyer, “A Young American’s Journey into Al Qaeda,” *The Los Angeles Times*, July 24, 2009, <http://articles.latimes.com/2009/jul/24/nation/na-american-jihadi24>. For the role of Awlaki’s lectures in Vinas’s self-radicalization, see Phil Hirschhorn, “Homegrown Terrorist Bryant Neal Vinas Shows His Face in Brooklyn,” *CBS News*, April 25, 2012, http://www.cbsnews.com/8301-201_162-57419566/homegrown-terrorist-bryant-neal-vinas-shows-his-face-in-brooklyn/.

60 Transcript of Guilty Plea, *U.S. v. Vinas*, 08 Cr. 823, (E.D.N.Y. Jan. 28, 2009), pp. 31-32. (http://www.investigativeproject.org/documents/case_docs/1028.pdf).

61 William K. Rashbaum and Souad Mekhennet, “L.I. Man Helped Qaeda, Then Informed,” *The New York Times*, July 23, 2009, [http://www.nytimes.com/2009/07/23/nyregion/23terror.html?_r=4&hp&"; Sebastian Rotella and Josh Meyer, “U.S.-Born Militant Who Fought for Al Qaeda is in Custody,” *The Los Angeles Times*, July 23, 2009, <http://articles.latimes.com/2009/jul/23/nation/na-american-jihad23>](http://www.nytimes.com/2009/07/23/nyregion/23terror.html?_r=4&hp&)

62 Transcript of Guilty Plea, *U.S. v. Vinas*.

63 Phil Hirschhorn, “Homegrown Terrorist Bryant Neal Vinas Shows His Face in Brooklyn,” *CBS News*, April 25, 2012, http://www.cbsnews.com/8301-201_162-57419566/homegrown-terrorist-bryant-neal-vinas-shows-his-face-in-brooklyn/.

Daniel Maldonado, another convert to Islam, grew up in New England but moved to Cairo in 2005. From there, he chatted on the internet with another American convert to Islam, **Omar Hammami**, and the two discussed moving to Somalia, which Maldonado did in November 2006, to work with the Islamic Courts Union—the predecessor group to the Shabaab. There he learned how to make improvised explosive devices (IEDs). After Ethiopia invaded Somalia in 2006, Maldonado fled to Kenya, where he was arrested and then returned to the United States. In 2007, he pled guilty to working with the Islamic Courts Union and was sentenced to ten years in prison.⁶⁴

Hammami, for his part, also went to fight with the Shabaab in 2006. Hammami had been President of the Muslim Students' Association at the University of Alabama and had vehemently criticized the 9/11 attacks.⁶⁵ While there he became one of the faces of Shabaab propaganda, using the *nom de guerre* “Abu Mansour al Amriki.” He was chosen to issue a response to President Obama’s 2009 speech in Cairo, meant to be an overture to the Muslim world. Hammami replied by criticizing Obama as false, praising the 9/11 attacks and highlighting the Shabaab’s relationship with Bin Ladin.

In 2012 Hammami broke with the Shabaab over its generally local focus and complaints that the more senior figures were corrupt, with tweets that blasted the organization for “persecuting, imprisoning, and killing foreign fighters; executing civilians; hoarding the spoils of war; unfairly taxing civilians; allowing prostitution and drugs in some areas under Shabaab control; and other crimes.”⁶⁶ Hammami has the distinction of live-tweeting what he called a Shabaab assassination attempt.⁶⁷ Despite these problems, he remains committed to the cause, telling a journalist via Twitter, “I believe in attacking u.s. Interests everywhere,”⁶⁸ In 2007, the United States indicted him on terrorism charges, and in 2009 this indictment was superseded by another, also related to terrorism, that charged

64 See “U.S. Citizen Sentenced to Prison for Receiving Military Training from a Terrorist Organization,” U.S. Department of Justice, Press Release, July 27, 2007, http://www.justice.gov/opa/pr/2007/July/07_nsd_531.html.

65 Matt Blake, “We Will Love Him until We Die,” *Mail Online*, June 10, 2013, <http://www.dailymail.co.uk/news/article-2338786/Most-wanted-Al-Qaeda-terrorist-Omar-Hammami-family-tell-heartbreak.html>

66 Bill Roggio, “Omar Hammami’s personal dispute with Shebaab,” January 6, 2013, http://www.longwarjournal.org/archives/2013/01/analysis_omar_hammam.php

67 Matt Blake, “We Will Love Him until We Die,” *Mail Online*, June 10, 2013, <http://www.dailymail.co.uk/news/article-2338786/Most-wanted-Al-Qaeda-terrorist-Omar-Hammami-family-tell-heartbreak.html>

68 Spencer Ackerman, “There’s No Turning Back: My Interview with a Hunted American Terrorist,” *Wired*, April 4, 2013 <http://www.wired.com/dangerroom/2013/04/omar-hammami/all/>

Hammami with leaving the United States to join a terrorist organization..⁶⁹ He has not been captured, but the United States has put out a \$5 million reward and in 2012 added him to the FBI's "Most Wanted" list.

Finally, the government recently brought charges against a convert from Phoenix Arizona: an Army veteran named **Eric Harroun**. Harroun, it alleges, traveled to Syria to fight the Bashar al-Assad regime. There he ended up fighting alongside the Al Qaeda-linked Al Nusrah Front. Harroun talked to *Fox News* and to *Foreign Policy* magazine about his exploits in Syria.⁷⁰ And, the government alleges, he voluntarily talked to the FBI at the U.S. Consulate in Istanbul, where he confessed to fighting with Al Nusrah. He has been charged with conspiring to use a weapon of mass destruction outside of the United States.⁷¹ Jeremy C. Kamens, Harroun's lawyer, has pointed out that the cause Harroun embraced—trying to overthrow the Assad regime is one the United States also endorses.⁷²

Other Cases

A number of Somali-Americans have ended up attracted to the Shabaab. Shirwa Ahmed, a naturalized American citizen of Somali origin, has the dubious honor of being the first American suicide bomber. In 2008, he blew himself up in a car loaded with explosives on behalf of the Shabaab in Somalia.⁷³

Somalia has also attracted American converts like Zachary Adam Chesser (known as Abu Talha al-Amriki), who was convicted of providing material support to the Shabaab in 2011.⁷⁴

69 See Superceding Indictment in *U.S. v. Hammami*, 07-Cr.-384 (S.D. Ala.), Sep. 24, 2009.

70 Greg Tepper and Ilan Ben Zion, "US-born former Army vet known as "The American" fights alongside Al Qaeda," *FoxNews.com*, March 11, 2013, <http://www.foxnews.com/world/2013/03/11/muslim-holy-warrior-known-as-american-seen-in-syria/>. See also Greg Tepper and Ilan Ben Zion, "The Jihadist from Phoenix," *Foreign Policy*, March 22, 2013, http://www.foreignpolicy.com/articles/2013/03/22/the_jihadist_from_phoenix_eric_harroun?wp_login_redirect=0.

71 See Affidavit in Support of a Criminal Complaint in *U.S. v. Harroun*, 13-Cr.-182, (E.D. Va.), March 28, 2013 (<http://www.lawfareblog.com/wp-content/uploads/2013/03/Harroun-Complaint.pdf>). Harroun has so far not been charged with material support for a terrorist group; and the term "weapon of mass destruction" in U.S. law has an exceptionally broad definition that includes a wide range of explosive devices.

72 Scott Shane and Rebekah Zemansky, "Judge Rules against Veteran Who Fought Alongside Syrian Rebels," *New York Times*, April 9, 2013, <http://www.nytimes.com/2013/04/09/world/eric-harroun-who-fought-with-syrian-rebels-loses-a-court-fight.html?pagewanted=all&r=0>.

73 Josh Kron, "American Identified as Bomber in Attack on African Union in Somalia," *New York Times*, October 30, 2011, <http://www.nytimes.com/2011/10/31/world/africa/shabab-identify-american-as-bomber-in-somalia-attack.html>.

74 See Criminal Information in *U.S. v. Chesser*, 10-Cr.-384, (E.D. Va.), Oct. 20, 2010 (http://jnsfp.com/wp-content/uploads/2010/10/chesser_information.pdf).

All in all, more than two dozen Somali-Americans are believed to have gone to fight for the Shabaab. Most appear to be fighters on behalf of the Shabaab, confining their activities to operations within Somalia itself rather than engaging in international terrorism.

The Somalia conflict has also attracted non-Somalis. **Sharif Mobley** grew up in New Jersey and worked at three nuclear power plants there. In 2008, he traveled to Yemen, where he came into contact with Awlaki. Yemeni authorities arrested him in 2010 and, after being taken to a hospital, he grabbed a soldier's gun and tried to shoot his way out. In October 2010, Yemen charged him with the murder of a soldier.⁷⁵

In December 2009, Pakistani police—acting after an assistance request from the FBI—arrested **five American Muslims from the DC suburb of Alexandria**, who had traveled to Pakistan looking for training for jihad. Fearing for their sons, the families of the five men met with officials from the Council on American-Islamic Relations (CAIR), which put the families in touch with the FBI. A Pakistani court blocked the men's extradition and tried them in Pakistan, where they were sentenced to 10 years in prison.⁷⁶ Defense attorneys for the men claim that their Pakistani jailors tortured them and one of the Americans said they were beaten, deprived of sleep, food and water, and threatened with electrocution.⁷⁷ A lawyer for the families in America, Nina Ginsberg, stated, she was "very disturbed by the lack of involvement by the U.S. government to protect the rights" of these defendants.⁷⁸

In his May 22 letter declassifying details of the Awlaki case, Holder also mentioned another American—in addition to Awlaki's son and Samir Khan—who had been killed collaterally in a drone strike: **Jude Kenan Mohammad**. Mohammad had apparently made contact with the Virginia five in Pakistan, and Holder didn't say anything about him—other than that he had been killed in "U.S. counterterrorism operations." He was apparently a 23-year-old from Raleigh, North Carolina, who had come under the influence

75 Peter Finn, "The Post-9/11 Life of an American Charged with Murder," *Washington Post*, September 4, 2010, <http://www.washingtonpost.com/wp-dyn/content/article/2010/09/04/AR2010090403328.html>.

76 Scott Shane, "Pakistan Detains Five Americans in Raid Tied to Militants," *New York Times*, December 9, 2009, http://www.nytimes.com/2009/12/10/world/asia/10inquire.html?_r=1.

77 Jerry Markon, Karin Brulliard and Mohammed Rizwan, "Pakistan Charges Five Northern Virginia Men in Alleged Terrorism Plot," *Washington Post*, March 19, 2010, <http://www.washingtonpost.com/wp-dyn/content/article/2010/03/17/AR2010031700430.html?hpid=topnews>.

78 Zahid Hussain, Tom Wright, and Keith Johnson, "Americans Get 10 Years in Pakistan in Terror Case," *Wall Street Journal*, June 25, 2010, http://online.wsj.com/article/SB10001424052748704911704575326372755608814.html?mod=WSJ_World_LEFTSecondNews.

of an older, radical named Daniel Patrick Boyd. On Boyd's instructions, he had gone to Pakistan to join militants in the tribal areas and was killed in a November 2011 strike. His wife in Pakistan alerted his mother to his death, and rumors of his death circulated through the Muslim community in North Carolina.⁷⁹

Finally, there are at least two well-known cases—and there are probably more unknown cases—of Americans who ended up detained in Iraq for activities related to the insurgency there. **Shawqi Omar**, a Jordanian-American, went to Iraq in 2002. In 2004, U.S. forces raided his house in Baghdad and detained him on suspicion that he had been working with Abu Musab al-Zarqawi, Jordanian-born founder of Al Qaeda in Iraq. The raid bagged several fighters, explosives, and other weapons—and the captured insurgents offered information implicating Omar. He received a hearing under the Geneva Convention and was determined to be a “security internee” lawfully held by U.S. forces acting as part of a multinational coalition—pending transfer to the Iraqi government for trial.

Similarly, **Mohammad Munaf**, an Iraqi-American dual national, traveled to Iraq as a translator for a group of Romanian journalists. The journalists, however, were quickly kidnapped, and upon freeing them, the members of the multinational force detained Munaf on the theory that he had played a role in the kidnapping. Like Omar, Munaf had a hearing under the laws of war and was determined to be a “security internee.” He was later convicted in an Iraqi court, but that conviction was thrown out on appeal, and he remained in U.S.—or multinational—custody while his case was reinvestigated. Both Munaf and Omar ended up filing habeas corpus petitions, and their consolidated cases made their way to the Supreme Court in 2008. Both men sought both release and an injunction preventing their transfers to Iraqi custody. The Supreme Court unanimously rejected the request.⁸⁰ A number of American citizens have filed suit claiming to have been detained and interrogated for alleged insurgent ties while serving the military or its contractors in Iraq. So far, the courts have batted back these cases, but they do suggest that the number of Americans detained in Iraq is probably significantly larger than the number of cases publicly reported.⁸¹

79 Scott Shane and Eric Schmitt, “One Drone Victim’s Trail From Raleigh to Pakistan,” *New York Times*, May 22, 2013, <http://www.nytimes.com/2013/05/23/us/one-drone-victims-trail-from-raleigh-to-pakistan.html>.

80 *Munaf v. Geren*, 553 U.S. 674 (2008) (<http://www.supremecourt.gov/opinions/07pdf/06-1666.pdf>).

81 See, for example, *Vance v. Rumsfeld*, 10-CV-1687 & 10-CV-2442 (CA7) en banc, August 8, 2001 (<http://www.lawfareblog.com/wp-content/uploads/2012/11/Vance-en-banc-opinion.pdf>). See also *Doe v. Rumsfeld*, No. 11-cv-5209, (CADC), June 15, 2012 ([http://www.cadc.uscourts.gov/internet/opinions.nsf/3DA05C9A3814B28C85257A1E004D6D69/\\$file/11-5209-1378889.pdf](http://www.cadc.uscourts.gov/internet/opinions.nsf/3DA05C9A3814B28C85257A1E004D6D69/$file/11-5209-1378889.pdf)).

STRATEGIES FOR HANDLING AMERICAN TERRORIST SUSPECTS ABROAD

As the preceding survey suggests, the United States has followed several distinct approaches in confronting the threat of Americans fighting jihad against the United States from abroad: in rare instances, it has killed them; it has worked with foreign governments to arrest, detain, and prosecute them; it has detained them using U.S. military authorities; it has prosecuted them at home; and it has sometimes simply tolerated their activities—either consciously or out of a failure to capture them. At times, the United States employs a mix of these approaches, which we consider in turn.

Targeting With Lethal Force

The deliberate targeting of an American is a strategy the United States has employed only once. It is important in conceptual terms, as it represents such a dramatic exercise of government power with respect to the individual. But it is important to remember that it is not—and has never been—a common strategy.

The process for deciding whether to kill even a foreign suspected terrorist was long and convoluted in the Clinton administration—and ultimately contributed to the failure to take Osama bin Ladin out before September 11. Today, however, the Obama administration kills suspected terrorists on a regular basis, conducting over 100 attacks in 2010 and 70 in 2011 (the number grew again to over 100 in 2012, though more than half of these were in Yemen).⁸² If the suspect is a foreigner, the intelligence community and the military are both authorized, under somewhat different rules, to take the shot—though both are generally required to observe international law requirements designed to minimize collateral civilian casualties.⁸³ President Obama's May 2013 speech suggested that

82 New America Foundation, "2012: The Year of the Drone," 2012, <http://counterterrorism.newamerica.net/drones/2012>; Adam Baron, "U.S. drone strikes in Yemen increase," *McClatchy Newspapers*, December 27, 2012, <http://www.mcclatchydc.com/2012/12/27/178476/us-drone-strikes-in-yemen-increase.html>.

83 Indeed, the administration has defended the use of drones in part on the basis that their use is consistent with traditional law of war principles. See, for example, John O. Brennan, "The Ethics and Efficacy of the President's Counterterrorism Strategy," (speech, Washington DC, April 30, 2012, Woodrow Wilson International Center for Scholars, <http://www.wilsoncenter.org/event/the-ethics-and-ethics-us-counterterrorism-strategy>).

the criteria for drone strikes in general is narrowing sharply, particularly outside of the hot battlefields of the Afghanistan combat theater. So the line between the rules for Americans and the rules for everyone else may be narrowing too. But at least to date, Americans have presented a special case—and the normal rules have clearly not applied. The administration has adopted heightened legal standards. Only five American citizens are known to have been killed in drone strikes or special forces operations, and only one of those—Awlaki—is known to have been the specific target, as opposed to a collateral kill.

Still, the Obama administration has specifically reserved the authority to conduct lethal operations against American citizens, and it has specifically eschewed the necessity of judicial process before doing so. Obama put it bluntly: “[W]hen a U.S. citizen goes abroad to wage war against America—and is actively plotting to kill U.S. citizens; and when neither the United States, nor our partners are in a position to capture him before he carries out a plot—his citizenship should no more serve as a shield than a sniper shooting down on an innocent crowd should be protected from a SWAT team.”⁸⁴

Because it has only been done once, it is hard to write categorically about the rules for killing an American overseas. The Awlaki killing clearly involved a great deal of review at all levels of the U.S. government. A great many analysts scrubbed the intelligence, and the Justice Department’s Office of Legal Counsel wrote an opinion on the legality of the strike before it took place. Reports have varied as to how personally involved President Obama is in reviewing the intelligence and authorizing specific strikes. But there’s little ambiguity in Awlaki’s case, where the President not only knew about it, he followed the intelligence personally. Obama not only approved the strike, but actively pushed for it.⁸⁵ At the same time, no judge signed off on the strike, and while the congressional intelligence committees were presumably kept abreast, legal oversight of the killing was limited to the executive branch.

In his National Defense University speech, Obama seemed to flirt with the idea of imposing judicial review on future such strikes, saying that he had “asked my Administration to review proposals to extend oversight of lethal actions outside of warzones that go beyond our reporting to Congress.” But his embrace was less than fulsome. While “[e]ach option

84 Obama, “Address at the National Defense University.”

85 Klaidman, *Kill or Capture*, 261-264.

has virtues in theory,” he said, there are “difficulties in practice. For example, the establishment of a special court to evaluate and authorize lethal action has the benefit of bringing a third branch of government into the process, but raises serious constitutional issues about presidential and judicial authority.” He worried that establishing an independent oversight board within the executive branch would “introduce a layer of bureaucracy into national-security decision-making, without inspiring additional public confidence in the process.” He promised nothing more than to “actively engag[e] Congress to explore these—and other—options for increased oversight.”⁸⁶

In other administration statements, officials have emphasized that targeting is an executive function. Attorney General Eric Holder has specifically and publicly rejected the notion that an executive-only process is inadequate to protect the due process rights of a targeted American citizen:

Some have argued that the President is required to get permission from a federal court before taking action against a United States citizen who is a senior operational leader of al Qaeda or associated forces. This is simply not accurate. “Due process” and “judicial process” are not one and the same, particularly when it comes to national security. The Constitution guarantees due process, not judicial process.

And due process, in Holder’s words, is satisfied in “an operation using lethal force in a foreign country, targeted against a U.S. citizen who is a senior operational leader of al Qaeda or associated forces, and who is actively engaged in planning to kill Americans at least in the following circumstances”: “First, the U.S. government has determined, after a thorough and careful review, that the individual poses an imminent threat of violent attack against the United States; second, capture is not feasible; and third, the operation would be conducted in a manner consistent with applicable law of war principles.”⁸⁷

Note a few features of Holder’s formulation: First, this is only the standard where the putative target is someone like Awlaki—a senior operational leader actively engaged in

86 Barack Obama, “Address at the National Defense University.”

87 Eric Holder, “Address at Northwestern University School of Law” (speech, Chicago, IL, March 5, 2012), Northwestern University School of Law, <http://www.justice.gov/iso/opa/ag/speeches/2012/ag-speech-1203051.html>.

plans to kill Americans. The implication is that the United States would have some higher threshold for specifically targeting lower-level citizens, or would refrain from doing it at all. Second, Holder has only insisted on the constitutional permissibility of a strike in situations in which capture is not feasible. This legal limitation that does not apply in cases involving non-citizens, though recent administration statements suggest that the administration is now applying it as a policy matter outside of “areas of active hostilities.”⁸⁸ Third, Holder also limits the legal strike in the case of the citizen to situations involving an “imminent” threat of violence. The definition of imminence he uses does not quite comport with the common use of the term, which would restrict the targeting of citizens to situations where the threat could become a reality at any moment. However, using the language of imminence does limit the authority considerably, requiring intelligence suggesting active, ongoing continuous plotting that left uninterrupted would result in disaster, not mere senior membership or, importantly, propaganda activity.⁸⁹ Finally, Holder’s careful inclusion of the words “at least” leaves the administration some wiggle room. Specifically, it leaves open the possibility that the government would regard as lawful the targeting of a wider class of Americans, and completely different rules in the context of battlefield targeting. That said, the administration has not yet asserted that right to date.

Ironically, although targeting citizens with lethal force raises significant legal issues and liberal voices have been highly critical of the perceived lack of due process in the Awlaki strike, in general, such operations are highly popular. In one recent *Huffington Post/YouGov* poll, respondents favored drone strikes as a tool by a wide margin, whether

88 See “Fact Sheet: U.S. Policy Standards and Procedures for the Use of Force in Counterterrorism Operations Outside the United States and Areas of Active Hostilities,” White House Office of the Press Secretary, May 23, 2013, <http://www.lawfareblog.com/2013/05/white-house-fact-sheet-on-use-of-force-away-from-hot-battlefields/>; “The policy of the United States is not to use lethal force when it is feasible to capture a terrorist suspect, because capturing a terrorist offers the best opportunity to gather meaningful intelligence and to mitigate and disrupt terrorist plots.”

89 Eric Holder, “Address at Northwestern University School of Law.” Holder explained the administration’s view of “imminence” as follows: “The evaluation of whether an individual presents 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. As we learned on 9/11, al Qaeda has demonstrated the ability to strike with little or no notice—and to cause devastating casualties. Its leaders are continually planning attacks against the United States, and they do not behave like a traditional military—wearing uniforms, carrying arms openly, or massing forces in preparation for an attack. Given these facts, the Constitution does not require the President to delay action until some theoretical end-stage of planning—when the precise time, place, and manner of an attack become clear. Such a requirement would create an unacceptably high risk that our efforts would fail, and that Americans would be killed.” For a more detailed account of the administration’s view of imminence, see “Department of Justice White Paper: Lawfulness of a Lethal Operation Against a U.S. Citizen Who is a Senior Operational Leader of Al Qaeda or an Associated Force,” U.S. Department of Justice, undated, 7-8, http://msnbcmedia.msn.com/i/msnbc/sections/news/020413_DOJ_White_Paper.pdf.

citizens were the targets or not.⁹⁰ Moreover, the political benefits to Obama or to another president do not come simply in the form of additional votes but, rather, in inoculation against the charge that they are soft on terrorism. The Awlaki strike, for example, led conservative Republican Rick Perry, governor of Texas and then a presidential candidate, to praise the president. And Obama's eventual rival for the presidency, Governor Mitt Romney felt compelled to say, "I commend the President."⁹¹

The major advantage to killing suspected terrorists—to put the matter bloodlessly—is that it removes important, skilled operators from the ranks of the enemy when their capture may not be an option, and it does so without significant litigation risk. Just as important, the threat of force compels those on the run to play defense. Drone strikes rely on spies, on intercepted phone calls, and on other forms of intelligence to pinpoint their targets. To reduce exposure to drones, terrorists must trust fewer people, talk on the phone or use the internet less, and otherwise minimize their contact and communications. In so doing, however, they become less effective as terrorists. An Awlaki who cannot use a computer or phone cannot inspire others to join the jihad or instruct recruits on the best targets to strike.

Such strikes also free the United States from complete dependence on allies. Awlaki did not have the support of the Yemeni government when he hid there, but Sana'a certainly had little power to force his tribe to surrender him. If the United States had sought to have him arrested, the Yemeni government would probably not have even bothered to try; and if it did try, it probably would have failed. In any event, Yemen lacks an extradition treaty with the United States, and its record of holding high-value detainees in its own prisons is poor.

But killing terrorist suspects has substantial downsides too—ones that policymakers should not overlook. The most important is the possibility of error. Like any use of force, drones can miss their targets or, more importantly, hit the wrong target.⁹² On January 23, 2009, the Obama administration launched its second strike on its third day in office. The

90 "Drone Poll Finds Support For Strikes, With Limits," *Huffington Post*, February 8, 2013, http://www.huffingtonpost.com/2013/02/08/drone-support-poll_n_2647051.html.

91 Daniel Strauss, "Romney, Perry Congratulate Obama, Perry Gives Backhanded Praise," *The Hill*, September 30, 2011, <http://thehill.com/blogs/ballot-box/gop-presidential-primary/184813-romney-perry-congratulate-obama-perry-gives-backhanded-praise>.

92 The United States actually tried to kill Awlaki unsuccessfully in May 2011, but the strike missed Awlaki and killed several other combatants, none of whom were U.S. citizens. See Johnsen, *The Last Refuge*, pgs. 274-276.

strike hit the wrong house in Pakistan, killing a pro-government tribal leader and two children.⁹³ Obama's first known authorization of a missile strike in Yemen on December 17, 2009, killed more than 40 Bedouins, including 14 women and 21 children, in the village of Majala in Abyan. In May 2010, a strike reportedly killed a tribal leader, sparking widespread anger at the United States and the Yemeni government.⁹⁴ Such tragedies can happen any time one deploys lethal force, and they give targeting a particularly heavy load of baggage to carry. Unlike an indictment, a Hellfire missile cannot be dropped, once launched. For drone strikes to succeed, military and covert forces need excellent intelligence, and excellent intelligence is not always available—even when it seems to be.

Drone strikes can actually hinder intelligence gathering. Detention of any sort is far better for intelligence purposes—as it allows one to search, interrogate, and otherwise learn from a suspect what he has to tell about terrorist groups. Dead men, of course, tell no tales. And, just as importantly, incinerated sites tell many fewer tales than intact ones. Sites of captures can be intelligence gold mines—as was the Bin Ladin compound, for example. Blowing up such sites comes with huge costs.

Moreover, targeting a suspect with lethal force obviously precludes the many salutary benefits of prosecuting suspects—particularly, the public pronouncement a successful prosecution yields that the evidence in fact justifies the government's actions. The legitimacy this process yields for subsequent coercive action—long-term imprisonment, even death—does not materialize when the government neutralizes a suspect based on information that never becomes public and based on processes invisible to outside eyes.

Other common critiques of the drone program, in general, are that it angers allied governments, alienates allied populations, and discredits allied governments with their own publics. According to a Pew poll, more than 90 percent of Pakistanis believe the drone strikes “kill too many innocent people,” and more than 70 percent do not believe they are

93 Klaidman, *Kill or Capture*, p. 40.

94 Jeremy Scahill, “Washington's War in Yemen Backfires,” *The Nation*, February 14, 2012, <http://www.thenation.com/article/166265/washingtons-war-yemen-backfires#>.

necessary.⁹⁵ And while public attitudes overseas towards drone strikes are not simple,⁹⁶ drones do appear to offend a great many people. If you kill Bin Laden, particularly in a dramatic way that does not discredit his cause, critics contend, one thousand bin Ladens rise to take his place. Hyperbole aside, this logic has at least some backing. Some experts contend that drones make the problem worse, particularly when they accidentally kill civilians. For example, counterinsurgency experts David Kilcullen and Andrew Exum argue that “every one of these dead non-combatants represents an alienated family, a new desire for revenge, and more recruits for a militant movement that has grown exponentially even as drone strikes have increased.”⁹⁷ This is, of course, no more true for citizens than for non-citizens. It is a larger feature of the use of lethal force as a strategy in counterterrorism operations. But the Awlaki case may be a good example of it. Awlaki belonged to a powerful southern Yemeni tribe, the Awlak. A Yemeni journalist claims similar strikes in Yemen “have recruited thousands,” as those killed are “sons of the tribesmen, and the tribesmen never, ever give up on revenge.”⁹⁸ Al Qaeda gains support by claiming to be an instrument of revenge. Reportedly, many Awlak tribesmen have joined up. “The Americans are targeting the sons of the Awlak,” said one Yemeni who claims to have lost a relative unaffiliated with Al Qaeda in a strike that killed Fahd al-Quso, a senior Al Qaeda operative. “I would fight even the devil to exact revenge for my nephew.”⁹⁹

It is particularly easy to overstate these more general concerns about drone strikes with respect to strikes on U.S. citizens. Drone strikes may be unpopular, but so too is U.S. counterterrorism policy in general. And the overwhelming majority—all but a tiny number—of the strikes that gain the antipathy of local populations are aimed at non-U.S. nationals. What’s more, U.S. popularity in Pakistan was abysmal even before the drone

95 “Pakistani Public Opinion Ever More Critical of U.S.,” *Global Attitudes Project*, Pew Research Center, June 27, 2012 (<http://www.pewglobal.org/files/2012/06/Pew-Global-Attitudes-Project-Pakistan-Report-FINAL-Wednesday-June-27-2012.pdf>).

96 A recent survey in Britain, for example, found that a majority of Britons supported U.S. drone strikes. See “Drone war: 54% of Britons support targeted killing of terrorists—poll,” *RT*, March 26, 2013, <http://rt.com/news/uk-support-targeted-killing-844/>. For a more nuanced Afghan take on drone strikes, see Alan Rozenshtein, “Lawfare Podcast: Episode #27: Afghan Parliamentarian and Female Presidential Candidate Fawzi Koofi on Afghan Security and the Condition of Women and Girls,” *Lawfare* (blog), February 16, 2013, <http://www.lawfareblog.com/2013/02/lawfare-podcast-episode-27-afghan-parliamentarian-and-female-presidential-candidate-fawzia-koofi-on-afghan-security-and-the-condition-of-women-and-girls/>.

97 David Kilcullen and Andrew McDonald Exum, “Death From Above, Outrage Down Below,” *New York Times*, May 16, 2009, <http://www.nytimes.com/2009/05/17/opinion/17exum.html?pagewanted=all&r=0>.

98 Jeremy Scahill, “Washington’s War in Yemen Backfires,” *The Nation*, February 14, 2012, <http://www.thenation.com/article/166265/washingtons-war-yemen-backfires#>.

99 Sudarsan Raghavan, “In Yemen, U.S. airstrikes breed anger, and sympathy of al-Qaeda,” *Washington Post*, May 29, 2012, http://www.washingtonpost.com/world/middle_east/in-yemen-us-airstrikes-breed-anger-and-sympathy-for-al-qaeda/2012/05/29/gJQAUmKI0U_story.html.

campaign there took off, and while it has fallen slightly since, the difference is marginal. Moreover, the death of Awlaki in particular does not seem to have generated a recruiting surge. “Most Yemenis don’t even know who Anwar Awlaki is. I think that speaks for itself,” said opposition party leader Hasan Zaid in Yemen.¹⁰⁰ Moreover, while the Awlaki strike included some collateral damage, it was clearly not in error.

For now, at least, the legal authority to use lethal force seems relatively secure, at least for those threats linked solidly to Al Qaeda, the Taliban, or groups the government can reasonably construe as “associated forces.” One danger of relying on lethal force operations is that, as the enemy shifts in character, the legal authority to conduct such operations—at least absent congressional action to modernize the post-9/11 Authorization for the Use of Military Force (AUMF)—will atrophy, as the AUMF, which is tied closely to the 9/11 attacks, describes ever-less-accurately the groups American forces feel the need to target.¹⁰¹ This is not a problem limited to citizens. Rather, it is a general problem of a growing mismatch between the legal instruments that authorize the conflict and the nature of the conflict itself. In his speech at the National Defense University, President Obama actively embraced this problem, suggesting that the AUMF conflict should come to an end and that he would not support legislative renewal of it.

Moreover, while killing terrorists reduces American reliance on the often-unreliable law enforcement apparatuses of foreign allies, it does not entirely eliminate the problem of working with allies. Yemen and Pakistan have both cooperated quietly with the United States on killing operations at times, but both are—to put it charitably—flawed partners. Both have provided vital cooperation with U.S. intelligence, enabling important counterterrorism successes like the capture of 9/11 mastermind Khalid Sheikh Mohammad and the killing of many senior Al Qaeda figures in tribal parts of Pakistan. However, both have also aided an array of jihadist groups and at times turned a blind eye to Al Qaeda activities, enabling the Al Qaeda core to use Pakistan as its main haven and AQAP to emerge as Al Qaeda’s most important affiliate.

100 Tom Finn, “Anwar al-Awlaki’s Death Greeted by Skepticism in Streets of Yemen,” *The Guardian*, September 30, 2011, <http://www.guardian.co.uk/world/2011/sep/30/anwar-al-awlaki-death-yemen>.

101 Authorization for the Use of Military Force, Public Law 107–40, September 18, 2001. Also see Jack Goldsmith, “What to Do About Growing Extra-AUMF Threats?” *Task Force on National Security and Law*, Hoover Institution, January 23, 2013, <http://www.advancingafreesociety.org/the-briefing/what-to-do-about-growing-extra-aumf-threats>; Robert Chesney, “Beyond the Battlefield, Beyond Al Qaeda: The Destabilizing Legal Architecture of Counterterrorism,” August 29, 2012, *Michigan Law Review*, forthcoming 2013, <http://ssrn.com/abstract=2138623>.

And while killing Americans, at least in small numbers, seems to have been good politics—that won't last if things go wrong, of course. Should a strike on an American go badly awry, perhaps killing other innocent Americans or somehow displaying a mix of incompetence and blood thirst, the political fallout could be considerable.

Criminal Prosecution

Criminal prosecution is, by far, the best option for neutralizing terrorist suspects when it is available. The Obama administration, in fact, takes the position that it is the *only* means by which it will process those terrorist suspects it manages to capture. As White House terrorism adviser John Brennan put it in a speech at the Harvard Law School, “when it comes to U.S. citizens involved in terrorist-related activity, whether they are captured overseas or at home, we will prosecute them in our criminal justice system.”¹⁰² In terms of sheer numbers, as our earlier survey shows, criminal prosecution has been the workhorse instrument for handling U.S. citizens who have joined overseas jihadist groups.

The reason is pretty simple: the advantages to domestic criminal prosecution as a counterterrorism instrument are considerable—and gravely underestimated by those who insist on giving primacy in counterterrorism to military detention and trial. In general, prosecuting terrorists garners more legitimacy—both overseas and domestically—than the use of other counterterrorism instruments, particularly for long-term detention or incapacitation. This approach raises the fewest civil liberties concerns and is therefore strongly endorsed by human rights groups. And it raises the fewest concerns among allied governments as well. The criminal law is a stable system, one whose rules have not changed dramatically over the past decade. A terrorist who is convicted and locked up pursuant to a prison sentence is very likely to remain in prison for the duration of that sentence; whereas terrorists held by allied governments might be released by those governments. In addition, the U.S. military has faced great political and legal pressures to free detainees held for long periods in U.S. military custody. The criminal justice system, like a Hellfire missile launched from a drone, thus has great capacity for neutralizing terrorists; but unlike drone strikes, it neutralizes them in ways that generate maximal societal acceptance.

102 John O. Brennan, “Strengthening Our Security by Adhering to Our Values and Laws,” (speech, Cambridge, MA, September 16, 2011), Harvard Law School, <http://www.whitehouse.gov/the-press-office/2011/09/16/remarks-john-o-brennan-strengthening-our-security-adhering-our-values-an>.

The legitimacy of criminal convictions is rooted in the care, the adversarial process, and the multiple layers of independent review our criminal process involves. Using the courts, with the constitutional protections and due process they promise the accused, is much more likely, though by no means certain, than any other means of neutralizing terrorist suspects to avoid mistakes—at least to avoid those mistakes injurious to the accused.

As with detention under the laws of war and targeting with lethal force, criminal prosecution takes the suspected terrorist off the streets and can often—though not always—facilitate interrogation for intelligence purposes, as some of the cases described above illustrate. Critics of the use of the criminal justice system for counterterrorism cases often worry that it impairs intelligence gathering, particularly when suspects shut down and stop speaking after being read their *Miranda* rights or are otherwise informed of their rights to counsel and to avoid self-incrimination. The reality is far more complicated. While there are times when criminal proceedings encourage silence, they can also produce—through the plea bargaining process—highly cooperative arrangements between suspects and authorities. As former Assistant Attorney General David Kris explained in a speech at the Brookings Institution in 2010, “The criminal justice system has worked as what the Intelligence Community would call a Humint collection platform. The fact is that when the government has a strong prosecution case, the defendant knows he will spend a long time in prison, and this creates powerful incentives for him to cooperate with us,” Kris said. In Kris’s account, cooperating criminal justice suspects have provided intelligence on Al Qaeda phone numbers and email addresses, recruiting techniques, finances, and tradecraft. They have revealed the locations of terrorist training camps and safe houses, as well as the locations of senior Al Qaeda leaders. And they have compromised communications methods and security protocols. They have named operatives involved in past attacks—and planned future ones—and they have given up plots.¹⁰³

Kris’s implicit point, that the criminal justice system has unique and powerful coercive capacities with intelligence implications, is an important one that is often overlooked both by civil libertarians and by enthusiasts of military authorities—both of whom tend to see it as a system built around fairness to the accused and lacking in the coercive dimensions of military and intelligence detention. To be sure, the justice system does

103 David Kris, “Law Enforcement as a Counterterrorism Tool,” (speech, Washington, D.C., June 11, 2010). The Brookings Institution, <http://www.brookings.edu/events/2010/06/11-law-enforcement>.

not permit waterboarding (though neither does the CIA any more), and it does require the involvement of lawyers and all sorts of other protections for the accused. But it also permits forms of coercion that the military system precludes. Military interrogators, for example, are not allowed to threaten detainees.¹⁰⁴ FBI agents routinely threaten suspects with long-term prison sentences, and can sometimes even hold over their heads the possibility of indicting family members; as Kris points out, these can be powerful levers to induce cooperation.¹⁰⁵

Criminal prosecution, however, does have certain downsides and constraints. At the most obvious level, to be useful in neutralizing a terrorist in practice, it requires that American forces have custody of the suspect. It would have been better to capture and interrogate Awlaki than to have killed him and let him take his secrets to his grave, but one has to catch a suspect if one wants to bring him before a judge and jury. When the terrorist is hiding out in a U.S. or allied country's city with competent security forces nearby, he can usually be arrested quickly once discovered. When the terrorist hides out in the wilds of Yemen or Pakistan, however, capture becomes far more difficult—and dangerous. In such cases, simply finding the suspect is hard, and even if discovered, it may take precious hours or far more for security forces to arrive and arrest him. To have grabbed Awlaki, under the most ambitious circumstances, a capture operation would have required a special operations force to insert a team to grab him once his location was found. Awlaki and other wanted terrorists have bodyguards and friendly tribal support, and an American strike team would have encountered resistance. Soldiers might die or be captured, giving the terrorists a symbolic win and hostages for future use. As a result, the United States often tries to go in “big” with larger strike teams and plenty of rescue craft nearby in case things go wrong. This, in turn, takes even more time to put together and makes the affront to local sovereignty all the greater. Moreover, some countries might consent to a drone strike but not to a ground operation.

The point is that any operation to capture Awlaki involves far greater risk to U.S. personnel than does a drone strike. One of the values of military instruments is that they permit

104 See Department of the Army, Army Field Manual 2 22.3, Human Intelligence Collector Operations, September 6, 2006.

105 See, for example, the pressure prosecutors were able to put on Najibullah Zazi by filing charges against his father—and making clear that they were prepared to prosecute his mother as well. See A.G. Sulzberger and William K. Rashbaum, “Guilty Plea Made in Plot to Bomb New York Subway,” *New York Times*, February 22, 2010, http://www.nytimes.com/2010/02/23/nyregion/23terror.html?_r=0.

the projection of force into areas beyond those to which American jurisdiction normally runs. To gain custody of a suspect abroad, where the United States cannot rely on foreign law enforcement partners, it has to depend on military or covert intelligence operations.

The disadvantages of prosecution tend to mirror its advantages. The very high standards that lend legitimacy to formal prosecutions also make the criminal system uniquely demanding. It is not enough in court for the executive branch to know that it has got the right guy. It has to have sufficient evidence to prove in court to a unanimous jury every element of a criminal offense beyond a reasonable doubt, and it has to have that evidence in a form that a court will find admissible. The government cannot always meet these conditions—even when government officials know to a moral certainty that a given suspect is dangerous. Just as the less rigorous procedures associated with military detention and targeting make it more likely that an innocent person will be wrongly held or killed, prosecution's more demanding approach increases the chance that a terrorist will go free.

Particularly difficult is ensuring the proper chain of evidence and treatment of suspects when an individual is caught with the assistance of a foreign intelligence service. The courts want to be sure that evidence was not tampered with and that suspects were not tortured—concerns that, given the track records of countries like Pakistan and Yemen, are certainly well-founded. So when an individual is caught along with important evidence—say, a laptop with emails revealing plans of a terrorist attack—U.S. law enforcement officials feel strong pressures to monitor and keep some control over the handling of evidence. Allies may balk at this presence or they may have captured the individual for reasons of their own and thus not even tried to follow procedures that would make their evidence useful in a U.S. court. Moreover, historically, it has often been the case that the CIA has worked with allied intelligence services overseas. Because the CIA's focus was on gathering intelligence, not on prosecution, it often took little care to ensure that material that made its way to U.S. hands could be used as evidence, that chains of custody were preserved, and that evidence was properly monitored at all times, making prosecution far harder. As intelligence-law enforcement cooperation have improved, this problem has been considerably alleviated, but it remains an issue.

Similarly, U.S. intelligence officials regularly repeat fears that sensitive intelligence sources and methods—say, the name of a highly-placed spy or a hitherto-unknown collection capability—could be revealed as part of the discovery process in a courtroom. These concerns are at least somewhat overblown, in the sense that the criminal justice system has developed elaborate procedures—through the Classified Information Procedures Act and a great deal of case law¹⁰⁶—to protect against the inadvertent release of classified material and the protection of government security interests in criminal prosecutions. That said, there are times when the government faces choices: is it more important to keep a given piece of material secret or is it more important to secure the conviction it might help win? Such tradeoffs are inevitable in the justice system, at least to some degree, because the justice system’s legitimacy has its roots in public accountability—while the intelligence community’s bread and butter lies in secrecy. There is, to make this point especially vivid, no way the United States could have neutralized Awlaki with a federal court prosecution without releasing far more evidence about his conduct than it did before deciding to target him.

The U.S. legal system also can be highly resource intensive. Some prosecutions, particularly those involving plea bargains and minor charges related to terrorism-like material support, resolve themselves quickly. Others drag on for years—including sometimes years of appeals.

The justice system also inherently involves a certain degree of litigation risk. That is, putting someone on trial always incurs some risk of acquittal—as was vividly on display in the case of Ahmed Ghailani, a non-citizen acquitted of 284 of 285 counts in connection with the East African embassy bombing (Ghailani was sentenced to life in prison without the possibility of parole in connection with the one charge, conspiracy, on which the jury convicted him). This risk has not materialized in any of the high-profile cases of U.S. citizens accused of jihadist activity abroad. But it is an omnipresent theoretical possibility. In some ways, the more significant risk is that of a short sentence. While many convicted terrorists are sentenced to very lengthy terms, others plead guilty to, or are convicted, of more minor charges, some of which are not directly related to terrorism, such as credit card fraud. The result is that not all suspects are taken off the streets forever, and one has to worry about a terrorist’s second act. For

106 See 18 U.S.C. App. §§ 1-16.

example, John Walker Lindh will go free while still a relatively young man, having pled guilty and accepted a 20 year sentence that is, by now, mostly served. Again, in practical terms, this risk has not been particularly onerous; sentences have tended to be quite long, including for relatively low-grade actors.

In some respects, the justice system's biggest weakness is political. Prosecutions at home are often derided as weak, juxtaposed with the supposedly more muscular military options. Senate Minority Leader Mitch McConnell (R-KY), for example, complained that the Obama administration's decision to try Ahmed Abdulkadir Warsame, a Somali captured overseas and believed to coordinate Shabaab operations with Al Qaeda, in the criminal justice system as opposed to a military tribunal "is harming the national security of the United States of America." He complained that the administration's actions were "inexplicable, create unnecessary risks here at home, and do nothing to increase the security of the United States."¹⁰⁷ The political pressure not to use the criminal justice system has been intense at times, though generally not with respect to citizen terror suspects captured abroad. That would presumably change fast if someone who had been acquitted or received a light sentence then committed a second terrorism offense. This prospect is terrifying for officials, as it opens them up to charges that their softness led to the deaths of innocents. This political weakness of the justice system is somewhat ironic, however, since the criminal justice system tends to mete out much *longer*, more determinate periods of incarceration than does military detention or military commission trials. But politically, it is a factor nonetheless.

Military Detention By U.S. Forces

At least in theory, Americans who are caught overseas may be detained in military custody. The authority, however, is at this stage more notional than practical, and the fact that the United States has chosen not to test it in recent years—either in the later years of the Bush administration or under the Obama administration—suggests the many problems inherent in using this approach for U.S. citizens. Yaser Hamdi first went to Guantánamo without his captors' being aware of his citizenship. Prior to the *Hamdi* case, the Bush administration assumed that the courts would largely stay out of detention matters—much

¹⁰⁷ Paul Eaton, "Fear unwarranted for terror suspect," *Politico*, July 12, 2011, <http://www.politico.com/news/stories/0711/58756.html#ixzz2B6clPSxV>.

as they have, in fact, stayed out of targeting matters. The U.S. Supreme Court, however, ruled that Hamdi must be given some form of due process for his detention to continue. So, in theory, detention remains on the option list for other Americans, though in practice the executive branch has not tried to play that card. Indeed, the Obama administration went so far as to reject it as a possibility, with the President stating: “My Administration will not authorize the indefinite military detention without trial of American citizens.”¹⁰⁸

In principle, the advantages of detention for U.S. citizens should be the same as the advantages for anyone else. Military detention removes people from a dangerous operational environment into one in which they cannot recruit, plan, or kill. Hamdi, hardly a terrorist mastermind, was nevertheless part of the Taliban when caught in Afghanistan, and while detained was not able to rejoin the movement. What’s more, suspected terrorists in military detention can also be interrogated for intelligence, and thus, authorities can learn more about their organizations and personnel, enabling more arrests and otherwise disrupting their groups. Unlike the criminal justice system, detention in the military system does not occur pursuant to a specific sentence of a set duration; its duration is, legally speaking, tied to the conflict itself. As long as the United States is fighting Al Qaeda, it is entitled to detain Al Qaeda militants. This can provide for significant operational flexibility in the sense that the military can, theoretically at least, hold people for as long a time—or as little time—as it needs to.

Perhaps the most significant advantage to military detention is the depressed standard pursuant to which detention can proceed. To prosecute someone for a terrorism-related crime, as we have explained, one needs admissible evidence of every element of criminal offense—and one needs to convince a jury of guilt beyond a reasonable doubt. To hold someone in military detention, by contrast, one needs only to show by a preponderance of the evidence—a standard that equates to more likely than not—that he was “part of” or “substantially supporting” the forces on the other side of the conflict. One can use intelligence data for this purpose, not just evidence that would meet the standards of a federal criminal trial. So at least in theory, one would expect that military detention would have certain attractions as a way of handling citizens about whom the government harbors significant fears yet against whom it—for one reason or another—cannot muster a criminal case.

108 Barack Obama, “Statement by the President on H.R. 1540,” *Office of the Press Secretary*, The White House, December 31, 2011, <http://www.whitehouse.gov/the-press-office/2011/12/31/statement-president-hr-1540>.

Yet military detention has not—at least not so far—proven an attractive alternative to the criminal justice system for handling U.S. citizens. The reason is that, particularly as a longer-term proposition, its advantages fade and its disadvantages become acute. The Obama administration has said flatly that it will not use military detention for citizens.¹⁰⁹ And while a subsequent administration might revisit this judgment, the record of the criminal justice system has grown strong enough that there might not exist cause to do so—at least not until a highly dangerous suspect falls into American custody and authorities find that they cannot make a case against him.

Like criminal prosecution, military detention requires custody of the suspect. So unlike killing, it does not present an alternative to a suspect's capture. It presents only an alternative to criminal process *after capture*. Its value as an option in the toolbox, therefore, arises only when one has already captured a detainee whom one wants to hold, yet against whom one cannot make a criminal case. This situation arises often in the context of foot soldiers, about whom one may know relatively little individually. Guantánamo Bay to this day has no end of Yemenis about whom the United States can show little more than that they traveled to Afghanistan to hook up with the wrong sort of people and join enemy forces. For example, in the case of Uthman Abdul Rahim Mohammed Uthman, the government satisfied the D.C. Circuit Court of Appeals—using a standard of proof far below the criminal standard of proof beyond a reasonable doubt—that a Yemeni Guantánamo detainee was detainable by showing only that he had been captured near Tora Bora in December of 2001, that he was traveling there with a small group of men including two Al Qaeda members and bin Laden bodyguards, that he had begun his journey at a school in Yemen where Al Qaeda recruited fighters, that he had traveled to Afghanistan along a route used by Al Qaeda recruits, that someone else paid for his travel and he lied about that fact, that he was seen at an Al Qaeda guesthouse, and that his own explanation of these facts involved “a host of unlikely coincidences.”¹¹⁰ This would not come close to establishing criminal liability, but it is sufficient for the government to hold Uthman until the termination of hostilities.

109 Ibid.

110 *Uthman v. Obama*, No. 10-5235 (D.C. Cir.) Mar. 29, 2011 ([http://www.cadc.uscourts.gov/internet/opinions.nsf/727BF5F-867C51399852578620051FD30/\\$file/10-5235-1300403.pdf](http://www.cadc.uscourts.gov/internet/opinions.nsf/727BF5F-867C51399852578620051FD30/$file/10-5235-1300403.pdf)).

This problem, however, turns out to seldom arise with respect to bigger fish and those against whom one can devote significant investigative energy. The rarity of citizens fighting abroad limits the circumstances in which non-criminal detention will be a viable option but in which prosecution will not be. In recent years, as the criminal justice system has increased in its capability, the set of these cases has grown close to empty. The circumstances in which non-criminal detention becomes a necessary tool generally involves the capture of relatively large numbers of people—numbers that preclude extensive individual investigations. And in recent years, the number of captures has not overwhelmed American investigative capacity.

Leaving aside the limited number of situations that genuinely call for non-criminal detention of citizens, preventive detention of U.S. citizens in the name of counterterrorism has big downsides. Most importantly, it is seen, both at home and abroad, as illegitimate—although the courts domestically have not decisively disallowed it and have actively and repeatedly affirmed the authority to detain enemy fighters who are not citizens. The legitimacy problem with detention is partly legal and partly not. The non-legal element lies in an inchoate sense that there's something wrong with holding people outside of the criminal justice system. At least domestically, this sense is not a particular problem among the public at large—a majority of which, for example, has consistently favored keeping Guantánamo open. But it is clearly a problem in elite opinion, one that leads to obsessive press attention to detention operations and to ongoing suggestions among elites that the United States is engaged in activity that either violates its own laws, the Constitution, or international obligations.

The legal element lies in the sense that the courts are not comfortable with the protracted detention of citizens—and that any effort to detain a citizen risks a significant rebuke in a habeas corpus case. Notionally, the case law—particularly *Hamdi*—supports the proposition that the military can detain citizens as enemy combatants, at least those citizens captured in a foreign theater of combat operations. Wrote a plurality of justices in that case:

The capture and detention of lawful combatants and the capture, detention, and trial of unlawful combatants, by “universal agreement and practice,” are “important incident[s] of war.” . . . The purpose of detention is to prevent captured individuals from returning to the field of battle and taking up arms once again. . . . There is no

bar to this Nation's holding one of its own citizens as an enemy combatant. . . . A citizen, no less than an alien, can be "part of or supporting forces hostile to the United States or coalition partners" and "engaged in an armed conflict against the United States" [S]uch a citizen, if released, would pose the same threat of returning to the front during the ongoing conflict.¹¹¹

The trouble is that in two subsequent cases—those of Jose Padilla and Ali Saleh Al-Marri—the court seemed poised to take a different view with respect to both foreigners captured on U.S. soil and citizens captured domestically. In both of those cases, the government moved the detainee into the criminal justice system to avoid an adverse Supreme Court ruling. But the result has been that we lack any kind of certainty regarding the parameters of the authority to detain an American in military custody. Any effort to do so, therefore, necessarily incurs legal risk, so we can reasonably expect no administration to try it unless it absolutely has to.

The indefinite nature of military detention, in addition to affording a certain operational flexibility, can also erode legitimacy and thus make leaders miss the long, fixed terms of confinement criminal convictions can bring. From a civil libertarian perspective, having detention tied to the end of hostilities risks meaning perpetual detention without trial. Experts have no authoritative answer to offer to the question of when the war on terror ends—in marked contrast to the answer in more conventional struggles like the world wars or the Korean War. Neither the death of bin Laden nor the paucity of successful attacks on U.S. soil have convinced government leaders that Al Qaeda is defunct, and no political leader wants to risk declaring the war to be ended, fearing an attack would occur by chance or design the next day—not to mention that declaring the war over would itself ultimately require the release of detainees who might then launch attacks.¹¹² In the meantime, however, detainees languish, potentially for the rest of their lives. The non-terminate nature of non-criminal detention, ironically, makes it also not ideal from a security point of view—at least not for detainees one really wants to hang onto irrespective of political developments. For example, the United States is negotiating with the Taliban for

111 *Hamdi v. Rumsfeld*, 542 U.S. 507 (2004) (plurality opinion).

112 The Defense Department General Counsel addressed the end of the conflict in theoretical terms, including what it might mean for detention operations, in a December 2012 speech at the Oxford Union. See Jeh Charles Johnson, "The Conflict Against Al Qaeda and its Affiliates: How Will It End?" (speech, Oxford, U.K., November 30, 2012), Oxford University, <http://www.lawfareblog.com/2012/11/jeh-johnson-speech-at-the-oxford-union/>.

an end to the Afghanistan war. If these negotiations were to succeed, the agreement might require the release of all Taliban detainees not convicted of or charged with some crime. The more important it is to hold a given detainee because he is individually dangerous—rather than because he is an arm of a group with which one is at war and with which one can either defeat or make peace—the less ideal military detention is in the long run.

As a result of these disadvantages, military detention by U.S. forces is more of a notional option at this stage than a live one, particularly as U.S. forces are now out of Iraq and drawing down from Afghanistan. The one exception to this rule may be short-term detention in operational theaters as a kind of stop-gap measure. It is conceivable that U.S. forces might, for example, capture an enemy and hold him briefly before transferring him to law enforcement. Or it is possible that they might capture him and not realize initially his citizenship—as happened with Hamdi—and discover this only once interrogation begins. U.S. forces, however, seem unlikely to attempt to detain a citizen captured abroad over a long period of time again, as long as any other option for handling him remains available.

Detention by Foreign Forces

Because of the many problems associated with American prosecution and detention of terrorist suspects, it is often easier to let our allies detain in our stead—either under their own criminal justice systems, pursuant to their own military authorities, or for ultimate transfer to U.S. custody for prosecution. Using proxy detention or prosecution, the United States still takes supposed bad guys off the streets, but this system allows the United States to avoid some of the costs and risks. From the day the Saudis picked up Abu Ali, after all, the threat he posed was largely neutralized. They didn't turn him over to the FBI for another twenty months, but the initial detention prevented him from engaging in any sort of jihad, and because of U.S.-Saudi intelligence cooperation, the United States appears to have had good access to the fruits of his interrogation.

Indeed, from an intelligence perspective, foreign interrogators often have advantages over U.S. partners if the individual grew up and was acculturated in a foreign country. Those interrogators will generally have better language skills and cultural awareness, both of which are vital for successful interrogations. More ominously, of course, foreign governments in the developing world are often more able and willing to put pressure on a

suspect or his family that would be illegal in the United States. The Saudis are particularly prone to using family pressures to generate compliance. A brother might be threatened with the loss of his job, the father with denial of a business permit, a sister about access to the hospital for her sick child, and so on. In some countries, family members might be threatened physically, imprisoned, or worse in an attempt to coerce a suspect. This pressure is exceptionally difficult for most individuals to resist. And that's before one contemplates physical coercion of the suspect himself, a common feature of many justice systems. Human Rights Watch notes that in Jordan—one of the better Arab countries when it comes to human rights and counterterrorism, “Prison guards torture inmates with near impunity because police prosecutors and police judges at the Police Court do too little to pursue cases against their fellow officers.”¹¹³ In Pakistan, Amnesty International documented that “Arbitrary detention, torture, deaths in custody, forced disappearances, and extrajudicial execution are rampant.”¹¹⁴

Getting someone off the streets using detention is also often easier in the developing world, as the bar for imprisonment is much lower than it would be in the U.S. court system or that of western democratic allies—or sometimes entirely arbitrary. If relying on such illiberal systems is morally distasteful, it has a certain appeal from an operational counterterrorism point of view—particularly if only limited information on if a suspect exists or if it comes from highly sensitive intelligence sources and methods that the government would not want revealed in a trial or a habeas hearing.

Finally, using allies to detain suspects is not resource intensive. The allies, not us, maintain the facilities, pay people to watch over and interrogate suspects, handle legal issues that arise, and otherwise do the day-to-day lifting on counterterrorism.

Allies, however, will not always prove suitable for detaining Americans. For one thing, if the courts were truly convinced that the ally were acting entirely at America's behest, such that foreign custody amounted to *de facto* or constructive U.S. custody, they might assume jurisdiction over habeas corpus cases on the theory that foreign custody was really a fiction. This nearly happened, in fact, in the Abu Ali case, before the Saudi government

113 “Torture and Impunity in Jordan's Prisons: Reforms Fail to Tackle Widespread Abuse,” Human Rights Watch, October 2008, <http://www.hrw.org/reports/2008/10/08/torture-and-impunity-jordan-s-prisons>, 1.

114 “Pakistan Human Rights,” Amnesty International, <http://www.amnestyusa.org/our-work/countries/asia-and-the-pacific/pakistan>.

transferred Abu Ali to the United States to face trial.¹¹⁵ Initially, Saudi authorities had picked up Abu Ali and held him without charge for twenty months. Abu Ali's family went to court in the United States and alleged that this was being done at the behest of the U.S. government and with its ongoing involvement. The government responded that the court had no jurisdiction because Abu Ali was in Saudi custody. But the district court judge, John D. Bates, did not accept this:

The position advanced by the United States is sweeping. The authority sought would permit the executive, at his discretion, to deliver a United States citizen to a foreign country to avoid constitutional scrutiny, or, as is alleged and to some degree substantiated here, work through the intermediary of a foreign country to detain a United States citizen abroad.

The Court concludes that a citizen cannot be so easily separated from his constitutional rights.

He ordered what he termed “jurisdictional discovery” to explore whether Abu Ali was really in the constructive custody of his own government.¹¹⁶ The matter was, of course, mooted when the Saudis sent Abu Ali here to face trial for what turned out to be dramatic and well-substantiated charges.

The point is that detention by foreign forces has to be credible as such—not simply an exercise in the circumvention of U.S. law to avoid granting Americans the rights the Constitution promises them. Foreign detention is most plausible as an option where—as with Abu Ali—U.S. interests and those of the foreign country are truly aligned such that Saudi Arabia can pick up a U.S. national in the exercise of its own sovereignty, perhaps with American intelligence help. The wanna-be terrorists who went from suburban Washington to Pakistan offer a similarly repeatable model. Here the individuals were tried and held by Pakistan on grounds that they were violating Pakistan's laws. While the United States may have benefited from Pakistan's actions, it does not appear to have been operating the puppet strings.

115 *Abu Ali v. Ashcroft*, 305 F.Supp.2d 28 (D.D.C. Dec. 16, 2004) (Bates, J.).

116 *Ibid.*

The difficulties with proxy detention arise when the relationship between the United States and the foreign intelligence or law enforcement service in question become so intertwined that the U.S. becomes implicated in the detention—and in any mistreatment of the detainee. The lower bar for detention in many foreign countries also makes it more likely that innocents will be caught up with the guilty and that the U.S. will be implicated in, or responsible for, detentions based on erroneous facts or the nasty impulses of authoritarian governments.

Beyond the risk of sweeping up innocents, there is also the problem that proxy governments are not always reliable. Both Yemen and Pakistan have repeatedly tolerated, even aided, groups the United States considers terrorists, after all. Reliance on proxies assumes a confluence of American and proxy interests that may not always reflect reality.

Moreover, in any reliance on proxies, the human rights of the guilty are also of tremendous concern. Although critics of Guantánamo and other U.S. detention programs lament the indefinite nature of the detention and the supposed flaws in current legal processes, the human rights situations in Pakistan, Saudi Arabia, and other developing countries in the Muslim world are far more dire. Frequently, proponents of the “advantages” of interrogation abroad are euphemistically talking about torture and its supposed rewards for revealing information. The effectiveness of torture is a hotly debated subject, but its prevalence in these countries is not subject to serious debate. The United States has to accept that by transferring suspects to allies with poor human rights records—or by encouraging those countries to take custody of U.S. nationals in the first instance—those suspects risk brutal treatment. So when U.S. administrations use allies instead of the U.S. system to detain terrorists, they make the human rights problem worse even though human rights criticisms of the U.S. might decline.

There are legal limits on the U.S.’s authority to transfer people to foreign governments where torture or even lesser forms of abuses are a risk. The Convention Against Torture forbids transfers where mistreatment is likely—and the United States takes the position that it will not transfer detainees if it cannot receive assurances that it regards as sufficient to make humane treatment the likeliest outcome. However, whether and how exactly the law constrains America’s ability to encourage the arrest or detention of its own nationals where abuse is likely, yet where American forces never assume formal custody, is less clear. Certainly, if the ultimate goal is prosecution in U.S. courts, the government

has an abiding interest—as it did in the Abu Ali case—to make sure that the foreign treatment of the American suspect does not prejudice the later criminal case. In the Abu Ali case, Saudi authorities treated the suspect benignly enough that his statements in Saudi custody were deemed admissible in U.S. courts and his claims of coercion were rejected.¹¹⁷ Where ultimate U.S. prosecution is not an issue, authorities' hands may be freer.

To increase partner capacity, the United States conducts a range of training programs to bolster the ability of allies like Yemen to collect and process intelligence, deploy military forces effectively, and otherwise fight terrorism. Such seemingly uncontroversial programs, however, carry risks—and not principally for American citizens. At the very least, the United States is bolstering the least democratic part of an undemocratic state: the same intelligence services that hunt terrorists with U.S. support also spy on and imprison dissidents and otherwise protect the regime against threats from peaceful as well as violent protests. In 2010, the United States gave the then-[Ali Abdullah] Saleh government \$150 million worth of support, a substantial sum for an impoverished nation. When unrest in Yemen heated up, the specially trained Yemeni counterterrorism forces headed back to Sana'a to shore up the regime, even though terrorists used the growing power vacuum to expand their activities. The threat to the regime, not surprisingly, was more important than fighting U.S. battles on counterterrorism.

Supporting democracy, however, can also jeopardize counterterrorism cooperation. The key tip on Awlaki came from an Al Qaeda member in Yemeni custody—and it came at a time when the United States was trying to move the Saleh regime out the door in response to protests in Yemen. Saleh's deputy information minister Abdu al-Janadi contended bitterly, "The Americans don't even respect those who cooperate with them."¹¹⁸

Toleration

Finally, there's the option no one talks about: doing nothing and simply tolerating the activity in question. Officially, the United States seeks to hunt down terrorists of any stripe, and in most cases involving Americans, it uses or benefits from one or more of

117 *U.S. v. Abu Ali*, No. 06-4334 (4th Cir.) June 21, 2007, pp. 19-23.

118 Erika Solomon and Mohammed Ghobari, "Yemen official decries call for Saleh to quit," *Reuters*, October 1, 2011, <http://www.reuters.com/article/2011/10/01/us-yemen-awlaki-idUSTRE78T0W320111001>.

the above approaches to try to fight the threat. Yet there are some cases where the cost of going after terrorists is so high or the individuals involved are so obscure or well-hidden that their activities are effectively tolerated—either because the above tactics fail or because our forces simply do not care enough to pursue them aggressively. Some of the Somali-Americans who went to fight on behalf of the Shabaab, for example, are the subject of intelligence efforts in the event that they plan to return home, but the United States is not actively seeking to find and arrest or kill them in Somalia itself. And Samir Khan, the editor of *Inspire* who was killed in the Awlaki strike, was oddly an example of toleration too. He was, after all, *not* the target of the strike that killed him but was collateral damage in a strike targeting someone else. He was also never charged with a crime.¹¹⁹ While he might have been arrested had the opportunity arisen, the government was not taking active steps against him.

Sometimes, decision-makers adopt a hybrid of one of the approaches above with a kind of toleration in practice. In the case of Adam Gadahn, a treason indictment has been handed up, but actually arresting him seems relatively low on anyone's priority list—and he doesn't seem to be the subject of active targeting either.

Toleration is a form of discretion and priority-setting. Not all terrorists are created equal—not all necessarily need to be neutralized. An American who goes abroad to act as a foot soldier for foreign forces with lots of foot soldiers is not a distinct actor from those forces. And one might simply decide that the marginal risk he poses over and above those forces generally is a negligible one. The danger, of course, is that one can sometimes misjudge that marginal risk. Once upon a time, after all, Anwar Awlaki was thought to be a moderate cleric—and his activities were tolerated. That turned out to be a huge mistake.

119 The FBI began building a case against Samir Khan, and a grand jury even convened to consider the evidence against him in 2010. However, these charges were later dropped. See Dina Temple-Raston, "Grand Jury Focuses on N.C. Man Tied to Jihad Magazine" and Suzanne Kelly, "Samir Khan: Proud to be an American traitor."

WHERE DO WE STAND, AND WHAT ARE WE MISSING?

The good news is that much of the U.S. effort against Americans involved in jihadist activity abroad is quite robust. Allies usually pitch in, and the American court system has put away some dangerous people. Targeted killing also worked in the one instance in which the administration used it. Perhaps most importantly, the problem is limited, and the U.S. decision to effectively ignore or tolerate some suspected terrorists is sensible, given resource limits.

The bad news is that the U.S. approach leaves considerable gaps, particularly regarding Americans involved in pro-Al Qaeda propaganda and recruitment. On some issues, particularly killing suspected American terrorists, oversight of executive conduct is theoretically thin, leading to the potential for abuses of power.

The Propaganda Gap

American citizens rank, in small numbers, among the most dangerous terrorists around. Awlaki's charisma, savvy about the West, and operational interest made him exceptionally dangerous. Far more often, however, American jihadists are nobodies. John Walker Lindh, the so-called "American Taliban," posed little threat beyond that of an ordinary, and not particularly competent, Taliban soldier. In some cases, like Hamdi, U.S. citizenship is an afterthought—a matter that arose only after capture and played no identifiable role in his activities overseas. In some cases, like Gadahn, Americanness is central to the jihadist's activities and identity as a fighter. The result is that the American response to the problem has to encompass an enormous range of possible threats—a range concentrated at the low-threat end, but one that at times pops up at the very highest end.

The American approach focuses on stopping attacks, but this misses a key piece of the picture. The Al Qaeda core has suffered many setbacks at an operational level since 9/11, but its ideas and brand remain powerful—in part because of its propaganda. Conventional wisdom—correct in part—is that Al Qaeda suffered serious setbacks with the death of Bin Ladin and the Arab Spring, which offered the alternative vision that peaceful protests can produce political change. In addition, Islamist theologians bitterly criticized

Al Qaeda for its killing of Muslim civilians. But Al Qaeda still is far more popular than it was in the 1990s. Polling data, however imperfect, suggests the power of some of these ideas. A 2011 poll found declining, but still quite high, support for Al Qaeda in Muslim countries—easily high enough to support an insurgency. In Nigeria, Al Qaeda received a favorability rating of almost 50 percent. This figure came in at just over 25 percent in the Palestinian territories and about 20 percent in Indonesia and Egypt.¹²⁰

By focusing on operators, the United States misses much of what makes the organization so dangerous. During the Algerian insurgency against France, the French commander declared, “the man who places the bomb is but an arm that tomorrow will be replaced by another arm.”¹²¹ Al Qaeda and like-minded organizations need propagandists, recruiters, financiers, and other logisticians to keep the movement alive and thriving. They have more than enough foot soldiers.

Indeed, Donald Rumsfeld identified the right question. In 2003, when he was U.S. Secretary of Defense, he asked whether the United States was killing terrorists faster than Al Qaeda could churn them out. The first part of this question depends on operations like the drone strike on Awlaki or arrests of suspected terrorists like Padilla and Lindh. The second part, however, requires stopping Al Qaeda from attracting new recruits to replace those who have fallen—and that’s the role of the Gadahns, the Hammamis, and the Khans.

From Al Qaeda’s point of view, American members are more than just potential operators. Propaganda efforts are as important as the group’s terrorist campaign—indeed more so, according to many analysts. Although the United States understandably focuses on Al Qaeda’s most violent actions, much of what the organization strives to do is spread its interpretation of Islam and inspire young Muslims to fight. So part of Al Qaeda’s battle is within the broader Islamist and Muslim community. Its leaders want to shake, or from their perspective wake up, Muslims, convincing them that their lands are occupied by the United States and that their religion is under assault. Perhaps equally important, they want to convince the myriad strands of the jihadist world, most of which are focused on

120 “Osama Bin Laden Largely Discredited Among Muslim Publics in Recent Years,” *Global Attitudes Project*, Pew Research Center, May 2, 2011, <http://www.pewglobal.org/2011/05/02/osama-bin-laden-largely-discredited-among-muslim-publics-in-recent-years/>.

121 Alistair Horne, *A Savage War of Peace: Algeria 1954-1962* (USA: New York Review of Books, 2011), 194.

local regimes and social issues, to join their global fight against the United States and the West in general. Bin Ladin told Mullah Omar, the Taliban leader, that 90 percent of his battle would be fought in the media.¹²²

To this end, Bin Ladin pushed propaganda from the start. Bin Ladin supported the Afghan mujahedin's efforts to produce crude magazines to glorify their struggle, and when Al Qaeda was first created, it had a media committee along with one for military operations and religious matters (the media committee's head was dubbed "Abu Reuter.") As Al Qaeda grew more sophisticated, and as media technology became more sophisticated, Al Qaeda would produce well-crafted videos and slick publications to advance its agenda.

Violence is a servant of propaganda. Even the most spectacular and bloody attacks like 9/11 itself were meant to spread a message as much as to inflict casualties. Because the attacks capture media attention, and because they provoke a response from the United States that often angers Muslims, they are a way of inspiring the faithful.

With respect to U.S. citizens, however, a class of people clearly exists who are "part of" the enemy forces yet who are *not* lawfully targetable. This is almost certainly why Samir Khan—who was undoubtedly "part of" AQAP—was nonetheless considered collateral damage in the Awlaki strike, not targetable in his own right. Conveniently for U.S. targeting, Awlaki was both operator *and* propagandist, but for many years, the United States did not have direct evidence of Awlaki's involvement in operations specifically, and thus under the standards the government has articulated, would not have been able to target him. This leaves an important gap with respect to U.S. citizens—propagandists—that does not appear with non-U.S. nationals. The United States justified the Awlaki killing based on his operational role—the most public example of which is his work with the Karim brothers, who sought to attack aviation targets in Britain. But Awlaki was as dangerous as a propagandist as he was as an operator. His role in radicalizing Nidal Hasan likely contributed to the deaths of 13 people, and his broader propaganda efforts may have radicalized many others in the West. Yet ironically, as explained above, the Constitution offered a certain degree of protection for some of his most dangerous activity—both because the First Amendment protects advocacy of violence and, more importantly, because the Due

122 Peter L. Bergen, *Manhunt: The Ten-Year Search for Bin Laden from 9/11 to Abbottabad* (USA: Crown, 2012), 143.

Process clause, as the Obama administration has interpreted it, permits targeting of citizens only under highly restrictive conditions that are effectively limited to operational leaders.

Gadahh today may well fall into a similar category today as Awlaki did before he went operational. Gadahn was a senior advisor to Bin Ladin (and now, presumably, to Zawahiri) and is an important media face of Al Qaeda in the West. However, he probably cannot be targeted, though he has been indicted for treason, because his activities are not operational in character and thus do not present the kind of imminent threat that would satisfy the due process standards Holder articulated in his speech. His situation thus highlights the distinction between how Al Qaeda views its campaign and how the United States tries to counter it. Gadahn, like Awlaki, is an important propagandist and as such can play a role in inspiring new recruits and reaching out to Western audiences – a priority for Al Qaeda and an historic area of weakness. Yet he appears to get a kind of pass—unless he happens, as Samir Khan did, to become collateral damage in an attack targeting someone else or unless he happens to fall into American hands.

It is important to emphasize that the propagandist gap is probably unclosable, and we are not urging that it be closed with more permissive targeting rules. The only way to close it would be for the administration to take a much more aggressive legal stance regarding due process requirements for killing citizens—one that would either deny the applicability of due process to citizens fighting for the enemy or that would consider its requirements met by compliance with law of war targeting standards. Even if such a position could be advanced in good faith, there are strong prudential arguments against the President's claiming the same broad targeting power against individual Americans that the military routinely uses against foreign forces. As long as the number of Americans operating abroad remains so small, it is likely worth incurring some additional risk to avoid such dramatic legal positions. Should a significant number of non-operational but highly-effective propagandists emerge, however, the costs of this gap might become more substantial.

The Stability of the Legal and Oversight Framework

If the United States were ever to target a larger number of its citizens abroad, the problem of the legal and oversight framework in which it does so would emerge acutely. The courts, so far, have shown no interest in involving themselves in sorting out who can be killed and under what circumstances. Prior to the Awlaki strike, his father, Nasser Awlaki, filed suit—with the aid of the American Civil Liberties Union and the Center for Constitutional Rights—in an effort to preclude the targeting of his son. A district court in Washington dismissed the case, on grounds that he lacked standing to bring it (in other words, the father could not claim to represent the son), and that targeting is a political question in which the judiciary has no role. Judge John D. Bates—the same Judge Bates that ruled in the Abu Ali case—was fully aware of the oddity of the case and the oddity of declining to hear it. In dismissing the matter, he wrote that “Stark, and perplexing, questions readily come to mind.” Asked Judge Bates:

How is it that judicial approval is required when the United States decides to target a U.S. citizen overseas for electronic surveillance, but that, according to defendants, judicial scrutiny is prohibited when the United States decides to target a U.S. citizen overseas for death? Can a U.S. citizen—himself or through another—use the U.S. judicial system to vindicate his constitutional rights while simultaneously evading U.S. law enforcement authorities, calling for “jihad against the West,” and engaging in operational planning for an organization that has already carried out numerous terrorist attacks against the United States?

There were other questions too—all of them interesting. Can the courts really make real-time targeting decisions? Are they really positioned to weigh the benefits and costs of possible diplomatic and military responses, and ultimately decide whether, and under what circumstances, the use of military force against such threats is justified? Would the United States really litigate these questions, thereby disclosing in advance to the prospective target “the precise standards under which [the United States] will take that military action”? Ultimately, however, Judge Bates avoided all of the questions. “No matter how interesting and no matter how important this case may be . . . we cannot address it unless we have jurisdiction.”¹²³

123 *Al Aulqi v. Obama*, 727 F.Supp.2d 1 (D.D.C. Dec. 7, 2010) (Bates, J.).

At least for now, the courts—though fully aware of the significance of their hands off approach—show no sign of insinuating themselves into the process.

Because the courts appear determined to avoid entering the debate over the parameters of when, how, and where an American abroad can be killed in the name of counterterrorism, Congress becomes the only plausible external source for the imposition of restraint on the Executive Branch. Congressional intervention, however, seems highly unlikely as long as drone strikes remain as popular—and as apparently effective—as they are. If Obama, derided as a Marxist and crypto-Muslim by his foes, asserts the right to use drone strikes against Americans, any other likely administration will as well. Not surprisingly, in the 2012 election Governor Mitt Romney also endorsed drone strikes “entirely” and stated that “we should continue to use it to go after the people who represent a threat to this nation and to our friends.”¹²⁴

As long as the number of Americans targeted with lethal force remains so tiny, leaving such targeting questions entirely in executive hands makes sense. The Awlaki intelligence appears to have been vetted extensively. Awlaki was put on public notice that his surrender would be accepted. He knew that he was being targeted. As long as such targeting is a once-a-decade event, the anomalies Judge Bates identifies are less significant. Surveillance, after all, is common and regularized. It makes sense to have a statute governing it. Lethal targeting of the highest-value American terrorists, by contrast, is not at all routine; so far, we can even use the word unique. And leaving such rare events to the presidency, as overseen by the congressional intelligence committees, makes sense—as long as the events remain exceptionally rare.

A lethal and public mistake, however, could change all this. Intelligence is imperfect in most circumstances, and even precise missiles at times miss their targets. Killing an American who later turns out to be innocent—or killing large numbers of innocent locals—might prompt calls for more formal oversight. Having a mistake captured on video would make this even more likely.

124 “Third Presidential Debate,” Boca Raton, FL, October 22, 2012, transcript, <http://www.nytimes.com/2012/10/22/us/politics/transcript-of-the-third-presidential-debate-in-boca-raton-fla.html?pagewanted=all>.

The argument for a more formal, prescribed oversight mechanism becomes stronger to the extent the activity becomes more common. Thoughtful legislative proposals to ensure accountability exist: suggesting either court review modeled on that in the Foreign Intelligence Surveillance Act or, more plausibly, a formally-structured review system within the Executive Branch.¹²⁵ As long as the targeting of citizens remains so uncommon, so effective when it does happen, and so politically popular, however, Congress is even more unlikely than the courts to slap restrictions on the President's latitude. For now, at least, the law of this area seems likely to remain a self-generated creature of the executive branch.

More broadly, the handling of U.S. citizens abroad is likely to remain a weirdly bifurcated domain in which our policy rules out non-criminal detention and largely eschews targeting—the bread and butter approaches to non-citizens abroad. Citizens, rather, are much more likely to go through process-rich handling in the criminal justice system, on the one hand, or toleration on the other—with a dollop of targeting and proxy detention thrown in occasionally. It's not an elegant solution conceptually. But it has successfully addressed, at least in broad strokes, most of the threats that U.S. citizens abroad have posed.

125 Jennifer C. Daskal, "The Geography of the Battlefield: A Framework for Detention and Targeting Outside the 'Hot' Conflict Zone," June 1, 2012, University of Pennsylvania Law Review, Vol. 161, forthcoming 2013, <http://ssrn.com/abstract=2049532>.

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