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Targeting the Twenty-First Century Outlaw

ABSTRACT. This Note proposes using outlawry proceedings to bring legitimacy to the government's targeted killing regime. Far from clearly contrary to the letter and spirit of American due process, outlawry endured for centuries at English common law and was used to sanction lethal force against fugitive felons in the United States until as recently as 1975. Because it was the outlaw's refusal to submit to the legal process that warranted the use of lethal force against him, the choice of process was necessarily preserved through basic protections such as charges and notice. This Note argues that these principles can be updated for the twenty-first century and used to subject the government's targeted killing of U.S. citizens to limited judicial review.

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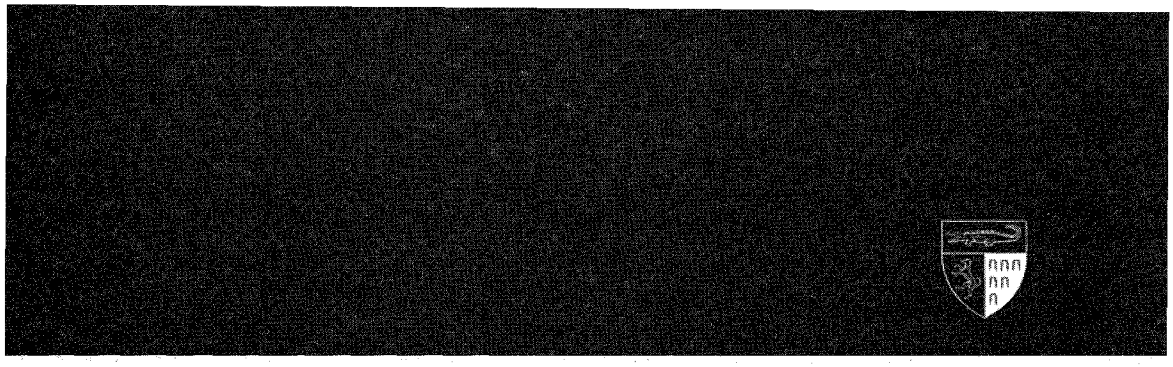

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INTRODUCTION

> *[T]hat outlawry is to be put aside as obsolete, and for that reason never to be enforced in any case, however grave, is a proposition which at least would seem to require further consideration. Future generations may unhappily have to face more troubled times, and 'treason' may again be found in the indices of our text-books. Is it well to throw away a weapon which has been proved of service and which may be the only weapon available?*
>
> – Sir Henry Erle Richards (1902)[1]

On September 30, 2011, when drones fired Hellfire missiles at his convoy in Yemen, Anwar al-Awlaki did not become the first American citizen to be successfully targeted by his own government for execution without a trial. He became the first citizen known to be so killed abroad as part of the CIA's covert counterterrorism operations.[2]

As a general matter, government-sanctioned execution without trial is not a novel practice. Under the common law judgment of outlawry, a penalty "as old as the law itself,"[3] a fugitive fleeing summons or indictment for a capital crime such as treason could be killed instead of captured on the theory that individuals unwilling to subject themselves to the judgment of the law could not avail themselves of its protections. A number of authorities have incorrectly asserted that outlawry, a legal weapon of critical importance for centuries in England,[4] "has never been known on this side of the Atlantic."[5] In fact,

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1. H. Erle Richards, *Is Outlawry Obsolete?*, 18 LAW Q. REV. 297, 304 (1902).

2. *See* Mark Mazzetti, Eric Schmitt & Robert F. Worth, *Two-Year Manhunt Led to Killing of Awlaki in Yemen*, N.Y. TIMES, Sept. 30, 2011, http://www.nytimes.com/2011/10/01/world/middleeast/anwar-al-awlaki-is-killed-in-yemen.html. In contrast, Kamar Derwish, an American citizen killed well before al-Awlaki in 2002 and the object of far less scrutiny, was not a premeditated target. Erik Kain, *The US Assassination of Anwar al-Awlaki and the Blurring of Bright Lines*, FORBES (Sept. 30, 2011, 12:31 PM), http://www.forbes.com/sites/erikkain/2011/09/30/the-us-assassination-of-anwar-al-awlaki-and-the-blurring-of-bright-lines.

3. ARCHER M. WRIGHT, OUTLINES OF LEGAL HISTORY 214 (London, Swan Sonnenschein & Co. 1895).

4. *See infra* Part II.

5. Mark DeWolfe Howe, *The Process of Outlawry in New York: A Study of the Selective Reception of English Law*, 23 CORNELL L.Q. 559, 566 (1937) (quoting Donald D. Holdoegel, *Jurisdiction over Partnerships, Nonpartnership Associations, and Joint Debtors*, 11 IOWA L. REV. 193, 197 (1926)). Howe focuses on the use of civil outlawry against absent joint debtors, but other authorities have flatly denied the existence of outlawry in any form in the United States. *See, e.g.*, Harlow v. Carroll, 6 App. D.C. 128, 133 (D.C. Cir. 1895) ("There is no such thing as

outlawry was practiced in the American colonies and remained in force as a criminal sanction in a number of states well after the ratification of the Constitution. North Carolina put its outlawry statute into occasional use until as late as 1975.[6]

In the context of modern terrorism, however, the term "outlawry" has been used loosely to refer to terrorist movements or state counterterrorism activities that operate outside a cognizable legal regime or violate established legal norms.[7] On the rare occasion when outlawry has been invoked as a legal sentence, it has been disparaged as the Western equivalent of the Islamic fatwa and as the barbaric analogue to current targeted killing practices.[8] In contrast, this Note examines the historical use and legitimacy of outlawry as a court-issued judgment.[9] My central argument is that the theory and past practice of outlawry provide helpful principles for narrowly crafting due process protections for prospective targets who are U.S. citizens.[10] Properly implemented, these protections would prevent their targeted killing from

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legal outlawry in our American jurisprudence.").

6. *See, e.g.*, Tom Tiede, *North Carolina Still Employs 'Outlaw Law,'* SARASOTA J., Aug. 13, 1975, at 7-A, http://news.google.com/newspapers?nid=1798&dat=19750813&id=lxUfAAAAIBAJ&sjid=T0oEAAAAIBAJ&pg=6045,2420074.

7. *See, e.g.*, Mary Bunch, *Terror, Outlawry and the Experience of the Impossible*, *in* ENGAGING TERROR: A CRITICAL AND INTERDISCIPLINARY APPROACH 112 (Jane Haig et al. eds., 2009).

8. *See infra* Part I.

9. Professor Larry May has recognized the right not to be arbitrarily outlawed as one of four major "legacy rights" enshrined in the Magna Carta in his work on these rights' significance for modern international law and their potential usefulness in shaping Guantanamo detention policies. *See* Larry May, *Magna Carta, the Interstices of Procedure, and Guantánamo*, 42 CASE W. RES. J. INT'L L. 91, 95 (2009) [hereinafter May, *Magna Carta*]. But Professor May uses the term "outlaw" primarily to refer to individuals such as refugees who have "been forced outside of the protection of the law" and analogizes states' detention policies to unlawful outlawry. LARRY MAY, GLOBAL JUSTICE AND DUE PROCESS 186 (2010) [hereinafter MAY, GLOBAL JUSTICE]. This Note uses "outlaw" to refer to people whom Professor May prefers to call "bandits," a category of individuals "who have voluntarily chosen to be outside of the protection and obligation of the law." *Id.*

10. This Note focuses on reconciling targeted killing with basic constitutional rights but recognizes that the lawfulness of the practice turns more broadly on the norms of customary international law, the Universal Declaration of Human Rights, and the provisions of widely ratified international treaties. *See* Special Rapporteur on Extrajudicial, Summary or Arbitrary Executions, *Addendum to Study on Targeted Killings*, ¶¶ 28-33, U.N. Doc. A/HRC/14/24/Add.6 (May 28, 2010) (by Philip Alston), http://www.extrajudicialexecutions.org/application/media/14%20HRC%20Targeted%20Killings%20Report%20(A.HRC.14.24.Add6).pdf [hereinafter Alston Report]. The use of outlawry against noncitizens raises issues that I touch on only briefly in this Note. *See infra* Section V.C.

amounting to extrajudicial execution.[11]

The extraordinary circumstances of Awlaki's killing could not more clearly attest to the need for an extraordinary mechanism by which citizens accused of terrorism can be guaranteed an opportunity to partake in the legal process. One year and one month before the CIA-led drone attack on Awlaki and fellow American-born radical Samir Khan,[12] Awlaki's father sought unsuccessfully to enjoin the government from killing his son.[13] Nasser al-Aulaqi[14] claimed that the rumored targeted killing program violated both his rights and his son's rights under the Constitution and international law.[15] In its opposing brief, the Obama Administration refused to confirm or deny the existence of such a state-sponsored program but nevertheless objected to the requested injunction as an "unprecedented, improper, and extraordinarily dangerous" interference with the President's military powers.[16]

Judge Bates of the U.S. District Court for the District of Columbia ruled that the Executive's targeting determinations fall outside the courts' purview. This had the practical effect of permitting the Executive to kill Awlaki without judicial intervention, irrespective of whether the killing constituted a denial of due process.[17]

But the controversial decision also contained the intuition that informs this Note. Judge Bates declined to grant Awlaki's father standing as Awlaki's next friend, declaring that "*no* U.S. citizen may simultaneously avail himself of the

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11. *Black's Law Dictionary* defines extrajudicial action as action taken "outside the functioning of the court system." BLACK'S LAW DICTIONARY 665 (9th ed. 2009). Even when understood as a form of executive action, the concept of outlawing terrorists has held intuitive appeal. Days after 9/11, when asked by a reporter whether he wanted Osama bin Laden dead, President Bush alluded to the "Wanted Dead or Alive" posters that littered the Western frontier. He later stated, "It was a little bit of bravado, but it was also an understanding that in self-defense of America, . . . 'Dead or Alive,' that it's legal." BOB WOODWARD, BUSH AT WAR 100-01 (2002).

12. Khan was not a premeditated target. Mazzetti et al., *supra* note 2.

13. Al-Aulaqi v. Obama, 727 F. Supp. 2d 1 (D.D.C. 2010). The American Civil Liberties Union and the Center for Constitutional Rights brought the case on Nasser al-Aulaqi's behalf.

14. This is the spelling of the petitioner's surname as it appeared in the case proceedings.

15. *Al-Aulaqi*, 727 F. Supp. 2d at 10-12.

16. Opposition to Plaintiff's Motion for Preliminary Injunction and Memorandum in Support of Defendants' Motion To Dismiss at 2-3, *Al-Aulaqi*, 727 F. Supp. 2d 1 (No. 10-cv-1469).

17. *See, e.g.*, John C. Dehn & Kevin Jon Heller, Debate, *Targeted Killing: The Case of Anwar al-Aulaqi*, 159 U. PA. L. REV. PENNUMBRA 175, 184 (2011), http://www.pennumbra.com/debates/pdfs/Targeted_Killing.pdf (Heller, Rebuttal) (describing as "profoundly disingenuous" Judge Bates's assertion that deeming the President's individual targeting determinations unreviewable by the courts did not amount to granting the President unlimited power to kill).

U.S. judicial system and evade U.S. law enforcement authorities."[18] Judge Bates's reasoning suggests that even under modern precepts, a citizen's access to the legal system and his rights under that system are—or should be—predicated on his recognition of his obligations under that system.

The alternative would be to permit the alleged citizen-terrorist to exercise his legal rights even while refusing to submit to the legal system that affords those rights, turning the law into his shield while denying the government the use of the law as a sword. It is perhaps an unwillingness to accept this alternative, one that renders the government captive to its own legal process, that informs the Obama Administration's targeted killing policy. That policy is part of an aggressive counterterrorism agenda that has, by all media accounts, "baffled liberal supporters and confounded conservative critics alike."[19]

This Note shows that outlawry offers a narrow procedural avenue for bringing targeted killing within the bounds of the law, by explaining the conditions under which alleged citizen-terrorists place themselves outside the law.

The Note proceeds in five Parts. Part I provides an overview of the legal void that outlawry proceedings can be tailored to fill. Due process demands that targeted killings be subject to some measure of judicial scrutiny, but the most commonly proposed models of judicial review suffer serious defects. Part II traces the use of outlawry as a basis for executing untried fugitives throughout history, and distinguishes arbitrary and extrajudicial forms of outlawry from court-issued outlawry.

Part III presents a three-part case for outlawry-based targeted killings. First, outlawry can be used to subject the Executive's targeting determinations to judicial process without forcing the judiciary to make substantive national security assessments outside of its proper role. Second, this schema corrects the perverse effects of allowing the Executive to kill citizens with impunity while its other counterterrorism activities, notably in the context of detainment and surveillance, are subject to limited judicial scrutiny. Third, outlawry offers coherent principles for legitimating and delimiting the government's targeting powers.

Part IV addresses threshold issues that bear on the constitutionality of present-day outlawry. Part V then draws upon the theoretical justifications and

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18. *Al-Aulaqi*, 727 F. Supp. 2d at 18.

19. Jo Becker & Scott Shane, *Secret 'Kill List' Proves a Test of Obama's Principles and Will*, N.Y. TIMES, May 29, 2012, http://www.nytimes.com/2012/05/29/world/obamas-leadership-in-war-on-al-qaeda.html; *see also* JACK GOLDSMITH, POWER AND CONSTRAINT: THE ACCOUNTABLE PRESIDENCY AFTER 9/11, at x (2012) ("[I]n perhaps the most remarkable surprise of his presidency, Obama continued almost all of his predecessor's counterterrorism policies.").

historical underpinnings of outlawry law to spell out necessary conditions for the lawful outlawing of alleged citizen-terrorists. Part V concludes by proposing additional restrictions on the government's use of outlawry, given the demands of modern international law and key practical considerations.

Denial of a citizen's right to seek redress through the very legal system that he eschews echoes the logic of outlawry law, which withdraws the law's protections from those who refuse to submit to its obligations.[20] This Note accepts that the exigencies of twenty-first century terrorism may require authorizing the use of lethal force against citizens outside of a geographically circumscribed arena of warfare, but also recognizes that the Constitution demands that such targets be afforded a meaningful opportunity to submit to the legal process. My project is to reconcile these premises, using outlawry principles to construct a practicable alternative to executive carte blanche and to existing proposals for limited judicial review of targeting decisions.

I. WHEREFORE OUTLAWRY?

This Part details this Note's most basic premise, a rejection of the Obama Administration's position that it affords targets due process. It then describes problems with existing proposals for judicial review. These proposals either fail to protect the prospective target's right to engage in the legal process, or advocate for what I argue is the wrong kind of judicial scrutiny, wherein the judiciary is forced to measure the threat that the target allegedly poses to national security.

A. Due Process Requires Judicial Process

The controversy over the legality of targeted killings has its roots in the profound confusion over whether terrorism is properly treated as a crime or as war,[21] and whether the government's counterterrorism strategies are therefore circumscribed by the rules of law enforcement or the laws of armed conflict.[22]

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20. A similar principle underlies the fugitive disentitlement doctrine, invoked by the courts to bar the fugitive from suing for appeal while he is in flight. *See* Smith v. United States, 94 U.S. 97 (1876); *see also* Ortega-Rodriguez v. United States, 507 U.S. 234, 242 (1993) (observing that the Supreme Court has upheld the doctrine "consistently and unequivocally").

21. *See* GABRIELLA BLUM & PHILLIP HEYMANN, LAWS, OUTLAWS AND TERRORISTS: LESSONS FROM THE WAR ON TERRORISM 145 (2010) (describing targeted killing operations as a special pressure point in the controversy over whether to treat terrorism as a crime or as war).

22. *See* David Kretzmer, *Targeted Killing of Suspected Terrorists: Extra-Judicial Executions*

The realities of twenty-first century international terrorism do not fit into this binary framework.[23] This is well reflected in the facts of Awlaki's death, far removed from any battlefield.

But rather than conceding that its current targeted killing policy denies targets due process and justifying this denial on the grounds of wartime exigency, the Obama Administration has chosen to redefine due process.[24] In a

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or Legitimate Means of Defence?, 16 EUR. J. INT'L L. 171, 174, 186 (2005) (observing that the debate over the legitimacy of targeted killings reflects a more fundamental disagreement as to the applicable legal regime, and proposing a "mixed" model that incorporates elements of the law enforcement model under international human rights law (IHRL) and the armed conflict model under international humanitarian law (IHL)). Nils Melzer has laid out criteria for lawful targeted killing under the law enforcement paradigm and the hostilities paradigm, respectively, but does not treat the distinction as fully reducible to the difference between IHRL and IHL. *See* NILS MELZER, TARGETED KILLING IN INTERNATIONAL LAW (2008). The law enforcement/armed conflict binary has been used to argue for and against the legitimacy of targeted killings. *Compare* Kenneth Anderson, *Targeted Killing and Drone Warfare: How We Came To Debate Whether There Is a 'Legal Geography of War,'* HOOVER INST. 4 (Apr. 2011), http://media.hoover.org/sites/default/files/documents/FutureChallenges_Anderson.pdf (stating that the law enforcement paradigm properly applies, rendering targeted killing unlawful), *with* Shane Reeves & Jeremy Marsh, *Bin Laden and Awlaki: Lawful Targets*, HARV. INT'L REV. WEB PERSP. (Oct. 26, 2011, 4:23 PM), http://hir.harvard.edu/bin-laden-and-awlaki-lawful-targets (arguing that lethal force may be used against alleged terrorists, irrespective of their citizenship, under a conventional understanding of the armed conflict paradigm).

23. *See* John Fabian Witt, *The Legal Fog Between War and Peace*, N.Y. TIMES, June 10, 2012, http://www.nytimes.com/2012/06/11/opinion/the-legal-fog-between-war-and-peace.html ("[O]ur arguments about targeted killings are playing out at a historic juncture in which the categories of war and peace, which the modern world thought it had carefully separated, are collapsing into each other."). *See generally* Noah Feldman, *Choices of Law, Choices of War*, 25 HARV. J.L. & PUB. POL'Y 457, 457 (2002) (arguing that the four criteria that underlie the "intuitive distinction" between crime and war demonstrate that international terrorism can be characterized as either). But it is unclear whether the binary has ever accurately reflected reality. Although it is always tempting to see the novelty in a contemporary predicament, this Note is partial to the importance of also recognizing the familiar. As early as 1943, Georg Schwarzenberger observed that thinkers have been aware of the fundamental problems with the peace/war distinction since the emergence of international law. Rejecting the assumption that peace is the norm and war an "event," Schwarzenberger argued, "[I]t is impossible to find an objective criterion which distinguishes the status of war both from the status of peace and from the status mixtus." Georg Schwarzenberger, *Jus Pacis ac Belli? Prolegomena to a Sociology of International Law*, 37 AM. J. INT'L L. 460, 466-68, 473 (1943). For a description of how this *status mixtus* affected killing practices during the Civil War, see *infra* text accompanying notes 136-140.

24. The Administration's legal obfuscation threatens to create problems that extend beyond the targeting context, and is best contrasted with Justice Thomas's dissent in *Hamdi v. Rumsfeld*. Despite opposing judicial protections for detainees, Justice Thomas steered clear of muddling the definition of due process: "Undeniably, Hamdi has been deprived of a serious interest, one actually protected by the Due Process Clause. Against this, however, is

March 5, 2012, speech, Attorney General Eric Holder alluded to Judge Bates's ruling in *Al-Aulaqi v. Obama* as clear support for the proposition that due process "does not require judicial approval before the President may use force abroad against a senior operational leader of a foreign terrorist organization . . . even if that individual happens to be a U.S. citizen."[25] The Attorney General's claim mischaracterized Judge Bates's decision and contradicted an array of significant legal precedents.

To begin, Judge Bates did not rule on the due process implications of the government's secret killing operations. Judge Bates dismissed the case for lack of jurisdiction, and expressly recognized in doing so that his decision marked the first time that an American court had, on political question grounds, refused to hear a citizen's claim that government action abroad had violated his constitutional rights.[26]

Moreover, despite recognizing the inherent difficulty of demarcating where due process begins and ends,[27] the Supreme Court has insisted that courts play a meaningful role in protecting the individual from arbitrary government action, even in wartime.[28] At minimum, this protection includes notice and an

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the Government's overriding interest in protecting the Nation." *Hamdi*, 542 U.S. 507, 598 (2004) (Thomas, J., dissenting).

25. Eric Holder, U.S. Attorney Gen., Remarks at Northwestern University School of Law (Mar. 5, 2012), http://www.justice.gov/iso/opa/ag/speeches/2012/ag-speech-1203051.html. Commentators have compiled a large body of legal and historical evidence dismantling the Attorney General's interpretation of due process. This Section will only briefly summarize the legal and historical arguments in favor of focusing on the practical considerations that militate against a definition of due process that turns on a presumptive distinction between innocents and combatants. These practical considerations play a crucial role in my discussion of some of the requirements for legitimate twenty-first century outlawry proceedings in Part V, *infra*.

26. Al-Aulaqi v. Obama, 727 F. Supp. 2d 1, 49 (D.D.C. 2010) ("The significance of Anwar Al-Aulaqi's U.S. citizenship is not lost on this Court. Indeed, it does not appear that any court has ever—on political question doctrine grounds—refused to hear a U.S. citizen's claim that his personal constitutional rights have been violated as a result of U.S. government action taken abroad.").

27. Dent v. West Virginia, 129 U.S. 114, 123 (1889) ("As we have said on more than one occasion, it may be difficult, if not impossible, to give to the terms 'due process of law' a definition which will embrace every permissible exertion of power affecting private rights and exclude such as are forbidden.").

28. *See* Stephen J. Schulhofer, *Checks and Balances in Wartime: American, British and Israeli Experiences*, 102 MICH. L. REV. 1906, 1916 (2004). Schulhofer rejects the George W. Bush Administration's attempt to establish that the President's powers as Commander-in-Chief have traditionally been beyond judicial scrutiny, observing that

> judicial decisions consistently reflected two judgments: that even under wartime conditions, protection against the risk of unjust incarceration required the robust

opportunity for a hearing before the individual is deprived of life, liberty, or property.[29]

The Court's affirmation of these principles in the detainment context has served as a natural starting point for discussing judicial scrutiny of targeted killings.[30] In *Hamdi v. Rumsfeld*,[31] a plurality deferential to the Executive nonetheless concluded: "Whatever power the United States Constitution envisions for the Executive in its exchanges with other nations or with enemy organizations in times of conflict, it most assuredly envisions a role for all three branches when individual liberties are at stake."[32] In upholding the habeas rights of a noncitizen Guantanamo Bay detainee in *Boumediene v. Bush*,[33] the Court further stated that "[w]ithin the Constitution's separation-of-powers structure, few exercises of judicial power are as legitimate or as necessary as the responsibility to hear challenges to the authority of the Executive to imprison a person."[34] Indeed, the only exercise of judicial power more legitimate or necessary would seem to be the judiciary's responsibility to hear challenges to the President's authority to kill a person.[35]

> procedural safeguards of the Bill of Rights; and that threats to national security, even when convincing, could be less important than the dangers of overreaching by a well-intentioned but overzealous executive branch.

Id.

29. *See* Mullane v. Cent. Hanover Bank & Trust Co., 339 U.S. 306, 313 (1950) ("Many controversies have raged about the cryptic and abstract words of the Due Process Clause but there can be no doubt that at a minimum they require that deprivation of life, liberty, or property by adjudication be preceded by notice and opportunity for hearing appropriate to the nature of the case.").

30. *See, e.g.*, Richard Murphy & Afsheen John Radsan, *Due Process and Targeted Killing of Terrorists*, 31 CARDOZO L. REV. 405 (2009) (extending *Boumediene v. Bush* to the targeted killing context to argue for judicial review after an attack). The detention cases have also been used to argue that due process does not clearly demand the trappings of a full court proceeding when national security is at stake, *see* Holder, *supra* note 25, but this is not the same as dismissing judicial process entirely.

31. 542 U.S. 507 (2004) (plurality opinion).

32. *Id.* at 536 (concluding that a citizen-detainee has a right to know the factual basis for his detention and to receive a fair hearing before a neutral decisionmaker); *see also id.* at 596-97 (Thomas, J., dissenting) (observing that "the plurality's due process would seem to require notice and opportunity to respond" before the government bombed a target).

33. 553 U.S. 723 (2008).

34. *Id.* at 797.

35. *See* Note, *Due Process Rights and the Targeted Killing of Suspected Terrorists: The Unconstitutional Scope of Executive Killing Power*, 44 VAND. J. TRANSNAT'L L. 1353, 1369-70 (2011) (using the *Mathews* test to argue that the courts must be involved in checking the Executive's excesses).

Although Attorney General Eric Holder suggested that the President's targeted killing policy satisfies the separation of powers because the President would "regularly inform[]" Congress of his use of lethal force,[36] *legislative* oversight is not sufficient to fulfill constitutional due process guarantees.[37] As Alexander Hamilton declared in a 1787 speech to the New York Assembly, "The words '*due process*' have a precise technical import, and are only applicable to the process and proceedings of the courts of justice; they can never be referred to an act of legislature."[38] Additional authority from the preconstitutional and Founding eras supports the position that the phrase "due process of law" at the time of the Fifth Amendment's ratification referred specifically to judicial procedures.[39]

Yet the government characterizes the extrajudicial targeting of alleged terrorists as a well-supported modern practice. The Obama Administration claims that lethal force is no more categorically prohibited against a twenty-first century American terrorist, allegedly responsible for the mass murder of civilians, than it was against Admiral Isoroku Yamamoto, mastermind of the Pearl Harbor attack in World War II.[40] But this claim cannot survive on the delusion that identical risks and rules govern the execution of these two targets—the naval commander of a country that has formally declared war on the United States, and a citizen whose crimes the American government will not detail and whose death warrant the government will not admit it has

36. *See* Holder, *supra* note 25.

37. *See* Nathan Freed Wessler, *In Targeted Killing Speech, Holder Mischaracterizes Debate over Judicial Review*, ACLU (Mar. 5, 2012, 7:34 PM), http://www.aclu.org/blog/national-security/targeted-killing-speech-holder-mischaracterizes-debate-over-judicial-review (arguing that our system of checks and balances demands that the courts play some role in deciding whether the government's decision to kill its own citizens is constitutional).

38. Alexander Hamilton, Remarks on an Act for Regulating Elections, New York Assembly (Feb. 6, 1787), *in* 4 THE PAPERS OF ALEXANDER HAMILTON 34, 35 (Harold C. Syrett ed., 1962).

39. For example, in several early state statutes—including a 1785 Virginia statute of frauds, a 1797 Massachusetts statute on escheat, and a 1797 Vermont statute on prison discipline—the phrase "due process of law" appears to have functioned as shorthand for judicial proceedings. Ryan C. Williams, *The One and Only Substantive Due Process Clause*, 120 YALE L.J. 408, 443-44 (2010). Similarly, several federal treaties and statutes adopted shortly after the ratification of the Constitution guaranteed "due process *and trial*," again indicating a judicial definition of due process. *See id.* at 444-45 & n.148 (emphasis added).

40. *See, e.g.*, Jeh Charles Johnson, Gen. Counsel, U.S. Dep't of Def., Dean's Lecture at Yale Law School: National Security Law, Lawyers, and Lawyering in the Obama Administration (Feb. 22, 2012) (transcript available at http://www.lawfareblog.com/2012/02/jeh-johnson-speech-at-yale-law-school).

signed.[41]

In a February 22, 2012, speech, Pentagon General Counsel Jeh Johnson ignored the risks and rules altogether, when he announced that "in the conflict against an *unconventional* enemy such as al Qaeda, we must consistently apply *conventional* legal principles."[42] Specifically, he ignored the fact that unconventional enemies such as Awlaki are not clearly legitimate targets of lethal force under conventional legal principles. Traditionally, legitimate targets are uniformed and participate in hostilities on a defined battlefield. The killing of alleged militants like Awlaki, in contrast, makes for a number of complications, including possible error in identifying the target.[43] For example, in 2004, the CIA detained German citizen Khaled el-Masri for months in Afghanistan before conceding that it had seized the wrong man.[44] The error points to plain practical problems with arguing the sufficiency of rigorous internal executive review.

Professors Richard Murphy and Afsheen Radsan sum up the problem simply: "In the real world, intelligence is sometimes faulty. Mistakes occur, and peaceful civilians are at risk. The law's method for preventing the government from harming people based on mistaken facts is to insist on reasonable or 'due' process."[45]

B. Proposed Models of Judicial Review

Accepting that due process requires judicial process necessarily opens the door to subjecting the government's targeting determinations to varying degrees of judicial scrutiny. With an eye on the fallibility of government intelligence, this Section offers a brief critique of some existing proposals for limited judicial review of unilateral executive targeting determinations.

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41. *See* Kevin Jon Heller, *The Folly of Comparing al-Awlaki to General Yamamoto*, OPINIO JURIS (Oct. 1, 2011, 8:29 AM), http://opiniojuris.org/2011/10/01/the-folly-of-comparing-al-awlaki-to-admiral-yamamoto. This criticism holds however understandable the desire to avoid rewarding terrorists who violate the laws of war. For a discussion of how outlawry resolves the dilemma, see *infra* Section III.C.

42. Johnson, *supra* note 40.

43. BLUM & HEYMANN, *supra* note 21, at 79.

44. Scott Shane, *U.S. Approval of Killing of Cleric Causes Unease*, N.Y. TIMES, May 13, 2010, http://www.nytimes.com/2010/05/14/world/14awlaki.html.

45. Afsheen John Radsan & Richard Murphy, *The Evolution of Law and Policy for CIA Targeted Killing*, 5 J. NAT'L SECURITY L. & POL'Y 439, 463 (2012).

1. *Civil Action*

In 2009, Professors Murphy and Radsan used the due process model that emerged from the Court's detainment decisions as a basis for arguing that *Bivens*-style private civil actions could enable targets to challenge the legality of their placement on the kill list *after* an attack.[46] The proposal conceded that the role for the courts under such a schema would be "vanishingly small," but deserves mention for offering a form of limited judicial scrutiny designed to establish executive accountability with minimal harm to national security.[47]

Yet in the wake of Awlaki's killing, ex post review of the Executive's targeting determinations is unsatisfactory for obvious reasons. The strategy assumes that the target would be alive to bring such a challenge or that a next friend would be able to bring an unmooted claim.[48] Certainly, the adequacy of an ex ante approach has been directly called into question by Nasser al-Aulaqi's failure to obtain standing to challenge his son's targeting in 2010. Although whether the approach proves entirely unavailing ex post, in the wake of the target's death, remains to be seen,[49] under Judge Bates's interpretation of the political question doctrine, the "vanishingly small" role that civil action offers the judiciary appears to vanish to nothing.

2. *Trial in Absentia*

A full trial stands in dramatic contrast to ex post review and its minimal protections. Although commencing a capital trial against an absent defendant has no basis in the common law tradition,[50] the idea of trying prospective

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46. Murphy & Radsan, *supra* note 30, at 410.

47. *Id.* at 450.

48. Professors Murphy and Radsan anticipated this criticism, and acknowledged additional hurdles to *Bivens*-style actions, such as the state-secrets privilege. *Id.* at 443. They went so far as to predict that courts might be inclined to treat targeted killings as a political question. *Id.* at 444. But their response was to focus their attention on advocating for a robust form of "independent, intra-executive" review to offset the resulting limitations on the judicial role. *Id.* at 445; *see also* Afsheen John Radsan & Richard Murphy, *Measure Twice, Shoot Once: Higher Care for CIA-Targeted Killing*, 2011 U. ILL. L. REV. 1201 (proposing rigorous independent executive review in conducting drone killings).

49. On July 18, 2012, the ACLU and the Center for Constitutional Rights filed a new lawsuit seeking damages for the deaths of Awlaki, Khan, and Awlaki's sixteen-year-old son. *See* Press Release, ACLU, Rights Groups File Challenge to Killings of Three Americans in U.S. Drone Strikes (July 18, 2012), http://www.aclu.org/national-security/rights-groups-file-challenge-killings-three-americans-us-drone-strikes.

50. More specifically, the practice of outlawry left no room for trial in absentia at English

targets in absentia in the United States has gained some traction as the most rigorous possible form of pre-targeting review.[51]

But the idea has also been panned as "wildly impracticable"[52] and "time-wasting."[53] It is not merely that a full trial implicates all of the concerns that have long buttressed arguments for trying terrorists through military tribunals rather than in civilian courts.[54] Trials conducted in absentia have the added distinction of forcing the government to build a court case against a defendant who has yet to be successfully apprehended.[55] This magnifies the problems

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common law. James G. Starkey, *Trial* in Absentia, 53 ST. JOHN'S L. REV. 721, 722-23 (1979). Historically, the Supreme Court's concern has been whether such a trial *violates* due process, namely by denying the defendant his constitutional right to be present at his own trial. *See, e.g.*, Snyder v. Massachusetts, 291 U.S. 97, 107-08 (1934) (concluding that due process requires the defendant's presence only to the extent that his absence would thwart a fair and just hearing). Much like outlawry, rather than regarded as a paragon of process, trial in absentia has suffered criticisms for its "totalitarian imagery." Starkey, *supra*, at 742. Trial in absentia and outlawry suffer the same potential legal problem—a lack of clearly expressed intent on the part of the would-be defendant to waive the constitutional right in question. *See infra* Section IV.B.

51. *See, e.g.*, Juan Cole, *Al-'Awlaqi Should Have Been Tried in Absentia*, INFORMED COMMENT, (Oct. 1, 2011), http://www.juancole.com/2011/10/al-awlaqi-should-have-been-tried-in-absentia.html.

52. Radsan & Murphy, *supra* note 48, at 1239.

53. Editorial, *Justifying the Killing of an American*, N.Y. TIMES, Oct. 11, 2011, http://www.nytimes.com/2011/10/12/opinion/justifying-the-killing-of-an-american.html.

54. *See* Harvey Rishikof, *Is It Time for a Federal Terrorist Court? Terrorists and Prosecutions: Problems, Paradigms, and Paradoxes*, 8 SUFFOLK J. TRIAL & APP. ADVOC. 1, 8 (2003) (laying out the five critical ways in which military commissions differ from federal trials, and the George W. Bush Administration's argument that these differences allowed the government "to safeguard classified information, provide security for court personnel, remain flexible as the war evolved, and accommodate the broad range of evidence gathered"). For example, in the targeting context, one concern is that the evidentiary bar in federal court would be "impossibly high." David Byman, *Do Targeted Killings Work?*, FOREIGN AFF., Mar.-Apr. 2006, at 95.

55. The fact that other countries have tried terrorists in absentia with seeming success does not alone support initiating similar proceedings in the United States. For example, a Yemeni court tried Awlaki in absentia in November 2010, while his father's lawsuit was pending in D.C. district court. *See Anwar al-Awlaki Charged in Yemen with Crimes Against Foreigners*, TELEGRAPH (London), Nov. 2, 2010, http://www.telegraph.co.uk/news/uknews/terrorism-in-the-uk/8104321/Anwar-al-Awlaki-charged-in-Yemen-with-crimes-against-foreigners.html. Awlaki was eventually sentenced to ten years in prison. Jake Tapper, *The U.S. Case Against Awlaki*, ABC NEWS (Sept. 30, 2011, 10:40 AM), http://abcnews.go.com/blogs/politics/2011/09/the-us-case-against-awlaki. But the Yemeni judiciary has also been described as weak and dependent, and the country faces recurring allegations of unfair trials. Bureau of Democracy, Human Rights & Labor, *Country Reports on Human Rights Practices for 2011: Yemen*, U.S. DEP'T OF ST. 9-10 (2011), http://www.state.gov/documents/organization/186667.pdf. For

associated with a normal federal trial, which involves everything from a civilian grand jury to a standard of proof beyond a reasonable doubt.

The national security concerns that arise out of a public trial suggest that the court should be permitted to assess the evidence in camera.[56] This model offers the accused important procedural protections like notice, but otherwise suffers all of the problems I attribute to secret killing courts.

3. A Targeted Killing Court

Commentators have clamored around proposals for the creation of a special targeted killing court.[57] The court would exist "beyond the executive echo chamber,"[58] but its accelerated, closed-door procedures would preclude many of the problems associated with normal trials.

David Byman is among those who have argued in this vein for an elaborate system of target-vetting procedures, both within the executive branch and in the form of judicial review.[59] His judicial model contains two possible prongs. A Justice Department official insulated from the executive branch could vet the secret intelligence used to identify targets.[60] Additionally, the Chief Justice of the Supreme Court could create a court "capable of rapid action if necessary,"

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another example, consider the tainted terrorism trials stirring controversy in Algeria. *See Algeria: Long Delays Tainting Terrorism Trials*, HUM. RTS. WATCH (June 18, 2012), http://www.hrw.org/news/2012/06/18/algeria-long-delays-tainting-terrorism-trials.

56. *See, e.g.*, David Husband, *The Targeted Killing of Al-Awlaki*, HARV. NAT'L SECURITY J. ONLINE (Nov. 26, 2011, 5:08 PM), http://harvardnsj.org/2011/11/the-targeted-killing-of-al-awlaki.

57. *See, e.g.*, MICHAEL IGNATIEFF, THE LESSER EVIL: POLITICAL ETHICS IN AN AGE OF TERROR 134 (2004); Murphy & Radsan, *supra* note 30, at 449; Editorial, *The Power To Kill*, N.Y. TIMES, Mar. 10, 2012, http://www.nytimes.com/2012/03/11/opinion/sunday/the-power-to-kill.html; Editorial, *When the Government Kills*, L.A. TIMES, July 29, 2012, http://articles.latimes.com/2012/jul/29/opinion/la-ed-drone-killings-lawsuit-20120729.

58. Editorial, *Justifying the Killing of an American*, *supra* note 53.

59. Byman, *supra* note 54, at 95.

60. *Id.* at 111. This is distinguishable from proposals for a procedure entirely internal to the executive branch. *See, e.g.*, Carla Crandall, *Ready . . . Fire . . . Aim! A Case for Applying American Due Process Principles Before Engaging in Drone Strikes*, 24 FLA. J. INT'L L. 55 (2012) (advocating for the creation of a prestrike review tribunal that resembles combatant status review tribunals). A special executive court with exclusive killing oversight has been likened to the Star Chamber, a seventeenth-century English venue for death panels deployed against the King's political enemies and religious dissenters. *See* Ryan Patrick Alford, *The Rule of Law at the Crossroads: Consequences of Targeted Killing of Citizens*, 2011 UTAH L. REV. 1203, 1223-24, 1249; Doug Mataconis, *There Really Is a Death Panel*, OUTSIDE THE BELTWAY (Oct. 6, 2011), http://www.outsidethebeltway.com/there-really-is-a-death-panel.

much like the FISA court, which is authorized under the Foreign Intelligence Surveillance Act to conduct ex parte review of the government's wiretapping requests.[61]

In theory, establishing a special court to review targeting determinations is a logical compromise between no trial and full trial. By giving the judiciary the power to substantively assess whether lethal force against a particular citizen is well founded, the court would offer prospective targets the benefits of ex ante, case-by-case review and ostensibly serve as a major check on the Executive's use of lethal force. But a closer examination reveals that a secret killing court is the worst of both worlds: it affords the prospective target insufficient protections while limiting the judiciary to discharging a responsibility that falls outside of its purview.

On the first point, a secret killing court would be subject to all of the criticisms levied at the FISA court, whose closed doors and sealed records make for an inscrutable process by which government requests for surveillance warrants are granted seemingly as a matter of course.[62] In the targeting realm, however, this opacity would translate into due process denial: ex parte court proceedings shrouded in secrecy would preclude an accused terrorist from laying claim to the opportunity to contribute to the decision that may lead to his killing.[63]

For example, the Obama Administration refused to concede Awlaki was a target even when moving to dismiss the lawsuit filed by Awlaki's father. This secrecy rendered impracticable the two avenues of redress that Judge Bates suggested were available to a target willing to challenge his placement on the government's kill list: peacefully surrendering to an embassy, in which case the government would be barred from killing him as a matter of domestic and international law,[64] or challenging his placement on the target list using videoconferencing technology.[65] Both "solutions" to the standing problem are illusory for targets as a general matter because they require the target to be aware of his target status.[66] Although that information was leaked in the high-

61. Byman, *supra* note 54, at 111. For a brief discussion of the FISA court, see *infra* Subsection III.B.1.

62. *See, e.g.*, Orin S. Kerr, *Updating the Foreign Intelligence Surveillance Act*, 75 U. CHI. L. REV. 225 (2008); Jeremy D. Mayer, *9-11 and the Secret FISA Court: From Watchdog to Lapdog?*, 34 CASE W. RES. J. INT'L L. 249 (2002). It is not clear that the rate at which the court issues warrants suggests rubber-stamping. *See infra* Section III.B.

63. *See supra* text accompanying note 29.

64. Al-Aulaqi v. Obama, 727 F. Supp. 2d 1, 17 (D.D.C. 2010).

65. *Id.* at 18 n.4.

66. Dehn & Heller, *supra* note 17, at 185 (Heller, Rebuttal). For a discussion of practical realities

profile case of this particular radical cleric, neither option is clearly available to future citizen-targets so long as the Executive is permitted to formally keep its kill list a secret, and in the secret court context, submit its evidence for review strictly in camera.

In 2008, former federal judge and then-Attorney General Michael Mukasey summed up further problems with leaving difficult national security decisions to the judiciary: "Judges decide particular cases, and they are limited to the evidence and the legal arguments presented in those cases. They have no independent way, or indeed authority, to find facts on their own, and they are generally limited by the parties' presentations of background information and expert testimony."[67] These limitations would be a special curse in ex parte killing-court proceedings. The judiciary would be left without a meaningful avenue for questioning the reliability or accuracy of the government's evidence. Indeed, such questioning is already difficult in detainment cases where the terror suspect is present and equipped with a defense team.[68] Even if counsel were appointed to represent the absent defendant,[69] as in a public trial in absentia, it is unclear what value this would add in the way of challenging the government's narrative. The court's role would necessarily be limited to analyzing whether, given the Executive's presentation of its case, the prospective target poses enough of a national security threat to warrant execution.

The great irony of such a system is that it would amount to assigning the judiciary a task over which the Executive rightfully has exclusive domain. The system would thereby undermine, not promote, the proper balance of

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that could preclude the surrender of the accused despite notice, see *infra* Subsection V.B.4.

67. Michael Mukasey, U.S. Attorney Gen., Remarks at the American Enterprise Institute (July 21, 2008), http://www.justice.gov/archive/ag/speeches/2008/ag-speech-0807213.html; *see also* WILLIAM REHNQUIST, ALL THE LAWS BUT ONE: CIVIL LIBERTIES IN WARTIME 205 (1998) ("Judicial inquiry, with its restrictive rules of evidence, orientation towards resolution of factual disputes in individual cases, and long delays, is ill-suited to determine an issue such as 'military necessity.'").

68. *See, e.g.*, Latif v. Obama, 666 F.3d 746 (D.C. Cir. 2011) (conceding that a court conducting detainee habeas proceedings must have the authority to assess the sufficiency of the government's evidence, but affording the government's evidence a rebuttable "presumption of regularity").

69. Kevin Heller suggests that this might be a suitable alternative if the government "has reason to believe that notifying the target of his status will cause him to disappear." Kevin Jon Heller, *The Washington Post on Al-Aulaqi*, OPINIO JURIS (Sept. 6, 2010, 10:52 AM), http://opiniojuris.org/2010/09/06/the-washington-post-on-al-aulaqi. But while this is a practical response to the government's resistance to publicizing the CIA's list of American targets, it does not translate into a legitimate legal substitute for notice. *See infra* Subsection V.B.3.

powers.[70] For despite insisting on *some* amount of judicially enforced protection against government interference with fundamental individual liberties,[71] the courts have also recognized the need for judicial restraint when it comes to substantively reviewing the content of the Executive's national security assessments.[72] The courts have likewise deferred to the Executive's legal and policy arguments in cases that turn on evaluating foreign intelligence.[73]

The judiciary's longstanding tradition of declining to review the Executive's assessments of what constitutes a national security threat presents a formidable challenge to any proposal that places the substance of target status determinations in the hands of the courts. Although this Note will argue that courts have a critical role to play in negotiating the line between national security and individual rights, in the targeting context, that role properly takes

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70. I do not explore the institutional damage that could result from requiring judges to assess the substance of executive targeting determinations, but Benjamin Wittes has voiced compelling concerns about the long-term consequences of "judicializing intelligence and . . . implicating federal judges in the dirtiest work of the intelligence community." Benjamin Wittes, *Thoughts in Response to Spencer Ackerman #2*, LAWFARE (Oct. 2, 2011, 10:01 PM), http://www.lawfareblog.com/2011/10/thoughts-in-response-to-spencer-ackerman-2.

71. *See supra* Section I.A.

72. *See, e.g.*, Holder v. Humanitarian Law Project, 130 S. Ct. 2705, 2711 (2010) ("[R]espect for the Government's factual conclusions is appropriate in light of the courts' lack of expertise with respect to national security and foreign affairs, and the reality that efforts to confront terrorist threats occur in an area where information can be difficult to obtain, the impact of certain conduct can be difficult to assess, and conclusions must often be based on informed judgment rather than concrete evidence.").

73. *See* Chi. & S. Air Lines, Inc. v. Waterman S.S. Corp., 333 U.S. 103, 111 (1948) ("[E]ven if courts could require full disclosure, the very nature of executive decisions as to foreign policy is political, not judicial. Such decisions are wholly confided by our Constitution to the political departments of the government, Executive and Legislative . . . ."). Although *Waterman* has been described as an old case, *see* Air Line Pilots' Ass'n Int'l v. Dep't of Transp., 446 F.2d 236, 240 (5th Cir. 1971), the above-quoted language remains an influential articulation of the Executive's distinct powers. For example, in *People's Mojahedin Organization of Iran v. U.S. Department of State*, 182 F.3d 17 (D.C. Cir. 1999), the D.C. Circuit relied on *Waterman* to hold that whether the activities of a designated terrorist organization threatened national security amounted to a political judgment outside the court's purview. *See id.* at 23; *see also* Americo R. Cinquegrana, *The Walls (and Wires) Have Ears: The Background and First Ten Years of the Foreign Intelligence Surveillance Act of 1978*, 137 U. PA. L. REV. 793, 803-04 (1989) (citing the decisions of four federal courts of appeals that accepted a foreign intelligence exception to the warrant requirement, often based on the potential negative impact of judicial interference). In *United States v. U.S. District Court*, 407 U.S. 297 (1972), the Supreme Court ruled that the Fourth Amendment required the government to obtain a warrant to conduct domestic security surveillance, but emphasized that the decision concerned strictly the surveillance of domestic organizations without significant foreign connection. *Id.* at 308-09, 321-22.

the form of procedural, not substantive, appraisals of when due process has been denied.

II. A BRIEF HISTORY OF OUTLAWRY

The practice of outlawry has been wrongly equated with the denial of due process. But characterizing outlawry as a lawless edict unilaterally imposed by the king—"hang[ing] someone out to dry by decree"[74]—overlooks the evolution and centuries-long use of outlawry as a court-issued legal judgment.

In this Part, I explore outlawry as a mechanism for administering justice to untried fugitives at English common law, in the American colonies, and in the individual states. I do not argue that outlawry was consistently fair in practice; rather, I seek to show that at various points in history its legal validity as a court-issued judgment was predicated on the observation of compelling procedural principles. The evidence suggests that, in its best form, outlawry does not amount to punishment at the cost of process—its lawful use *requires* due process.[75]

A. Theory and Procedure at English Common Law

Historically, to be declared an outlaw was to be cast outside the law's protection.[76] Among the oldest of weapons at English common law, outlawry was a legal remedy that conditioned the accused felon's rights on his willingness to submit himself to the law.[77] A fugitive of justice who denied the law's authority was in turn denied the law's protections with respect to both his property and physical person.[78]

In its oldest forms, outlawry was the harshest of judgments. Before the Conquest, no one could be held responsible for injuring or killing an outlaw.[79]

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74. *Id.*

75. Professor May makes a similar observation in his work on the procedural values enshrined in the Magna Carta and their implications for for international law and Guantanamo detention policies. May, *Magna Carta*, *supra* note 9, at 95, 101. A focus on procedural justice, rather than substantive justice, also informs this Note, but in the context of domestic law and specifically in the form of outlawry.

76. 3 WILLIAM BLACKSTONE, COMMENTARIES *319.

77. Richards, *supra* note 1, at 298.

78. 12 THE NEW AMERICAN CYCLOPAEDIA: A POPULAR DICTIONARY OF GENERAL KNOWLEDGE 615 (George Ripley & Charles A. Dana eds., New York, D. Appleton & Co. 1869) [hereinafter THE NEW AMERICAN CYCLOPAEDIA].

79. WRIGHT, *supra* note 3, at 214; Frederick Pollock, *Anglo-Saxon Law*, 8 ENG. HIST. REV. 260

This was because the fugitive's flight constituted an act of war: "He who breaks the law has gone to war with the community; the community goes to war with him."[80] Under this logic, an individual "rebelli[ng] against the organic law of the state . . . certainly cannot complain if those who are intrusted with the maintenance of the social order and welfare declare that he has forfeited the benefits and privileges of the law to which he refuses to submit."[81]

Two practical factors explain the severity of outlawry in the later Anglo-Saxon period: the challenges of obtaining specific evidence of the offense in question, and the difficulties associated with compelling accused and suspected persons to submit themselves to the legal process.[82] Frederick Pollock and Frederic Maitland also noted that in England, outlawry was originally reserved for the worst crimes.[83] As outlawry ceased to be punishment and was reduced to mere process, it was extended, and eventually restricted, to minor offenses.[84]

This distinction between outlawry as punishment and outlawry as process is a critical one, and useful for assessing what aspects of outlawry would prove effective in the modern counterterrorism context. Outlawry as a judgment for capital crimes was fundamentally different in form and function from outlawry against parties to lesser crimes and civil actions.[85] In misdemeanor cases, outlawry was a sanction for contempt of court, and in civil cases, it was primarily a means for compelling court appearance; in neither instance did the judgment of outlawry itself function as a conviction.[86] In cases of treason or felony, however, outlawry was a substantive punishment for criminals who fled judgment, particularly for those who displayed violent resistance to the legal process or persistent contempt of court.[87] Their flight amounted to a confession of guilt for the crime charged, and in their absence they were outlawed and subject to execution without trial.[88] He who was outlawed on a

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(1893).

80. 1 FREDERICK POLLOCK & FREDERIC WILLIAM MAITLAND, THE HISTORY OF ENGLISH LAW BEFORE THE TIME OF EDWARD I 449 (The Lawbook Exchange, Ltd. 1996) (2d ed. 1898).

81. 12 THE NEW AMERICAN CYCLOPAEDIA, *supra* note 78, at 615.

82. Pollock, *supra* note 79, at 260.

83. 1 POLLOCK & MAITLAND, *supra* note 80, at 450.

84. *Id.* at 450 n.2.

85. Richards, *supra* note 1, at 298-99.

86. *See* Nathan Levy, Jr., *Mesne Process in Personal Actions at Common Law and the Power Doctrine*, 78 YALE L.J. 52, 81 (1968).

87. 1 POLLOCK & MAITLAND, *supra* note 80, at 49.

88. Richards, *supra* note 1, at 298. Henry Bracton distinguished true outlawry from presumptive outlawry: true outlawry involved flight after a felonious breach of the peace in the form of assault or homicide, while presumptive outlawry was flight from legal action, however

capital crime or sentenced to death was also instantly "attainted" – the effects of which included corruption of the blood as well as forfeiture of estate.[89]

As all punishment and no process, early outlawry presented great potential for misuse.[90] The passage of the Magna Carta in 1215 did not instantly transform outlawry into a fair or consistently effective practice,[91] but it ushered in a new era of judicial outlawry by providing that a person could be outlawed only by the lawful judgment of his peers or by the "law of the land."[92] The due process norms embodied in the "law of the land" provision were "designed to secure the subject against the arbitrary action of the crown and place him under the protection of the law."[93] As a formal stripping of the right to this process, a judgment of outlawry could henceforth be lawfully rendered by a court only in accordance with established judicial procedures.

English outlawry proceedings varied according to place and time period, but they generally involved certain basic procedural prerequisites: charges,

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minor the offense. 2 HENRY BRACTON, ON THE LAWS AND CUSTOMS OF ENGLAND 356-57 (George E. Woodbine ed., Samuel E. Thorne trans., Harvard Univ. Press 1968) (1554).

89. 4 BLACKSTONE, *supra* note 76, at *374.

90. Before the passage of the Magna Carta, individuals who presented a political threat to the Crown could be arbitrarily declared outlaws and have their property confiscated. King John notoriously abused outlawry for his own financial gain and to eliminate his enemies under the pretense of process. *See* JAMES CLARKE HOLT, MAGNA CARTA 109 (2d ed. 1992); Ifor W. Rowlands, *King John and Wales*, *in* KING JOHN: NEW INTERPRETATIONS 273, 286 (S.D. Church ed., 1999).

91. For example, by the mid-fourteenth century, outlawry had deteriorated in large part because of the ease and regularity with which outlaws eluded the law. *See* E.L.G. Stones, *The Folvilles of Ashby-Folville, Leicestershire, and Their Associates in Crime, 1326-1347*, 7 TRANSACTIONS ROYAL HIST. SOC., FIFTH SERIES 117, 132 (1957) (attributing the fourteenth-century legal system's failures in bringing "notorious felons" to justice to police inefficiency and the Crown's lax issuance of pardons). Although Edward I instituted trailbaston commissions in 1304, sending royal justices to local counties ostensibly to effectuate the law, the commissions were unpopular and viewed as, among other things, a corrupt means for the Crown to exact profit. *See* MICHAEL PRESTWICH, EDWARD I, at 286-87 (2d ed. 1997).

92. Magna Carta ch. 29, *reprinted and translated in* A.E. DICK HOWARD, MAGNA CARTA: TEXT AND COMMENTARY 43 (1964); *see* WRIGHT, *supra* note 3, at 214-15.

93. Dent v. West Virginia, 129 U.S. 114, 123 (1889). The Supreme Court has recognized "the law of the land" provision as the predecessor of Fifth Amendment "due process." *Id.* at 123-24; *see also* Hurtado v. California, 110 U.S. 516, 533 (1884) ("Due process of law is process according to the law of the land." (quoting Walker v. Sauvinet, 92 U.S. 90, 93 (1875))). For an account of the English barons' attempt to protect themselves from the King's arbitrary use of outlawry, see F.M. Powicke, Per Iudicium Parium vel per Legem Terrae, *in* MAGNA CARTA COMMEMORATION ESSAYS 96, 103 (Henry Elliot Malden ed., 2d prtg. 2006), which explains that "the thirty-ninth clause [of the Magna Carta] was intended to lay stress not so much on any particular form of trial as on the necessity for protection against the arbitrary acts of imprisonment, disseisin, and outlawry in which King John had indulged."

notice, successive summonses, and the suspect's repeated failures to appear. Before Bracton's time in the thirteenth century, outlawry proceedings began with either the indictment of the accused felon or an "appeal" brought by an aggrieved party.[94] If the accused did not appear before the King's justices upon indictment, the justices would assess evidence of his guilt and accordingly direct that he be "exacted" and outlawed.[95] The appealed individual was required to appear in county court to avoid a similar fate.[96]

The exacting process required a court to issue a writ of *capias ad respondendum* in the county where the prosecution commenced, instructing the sheriff to take the individual into custody.[97] If the accused was not found in the jurisdiction, the court would issue a writ of *exigi facias*, requiring the sheriff to summon the accused at five successive court proceedings.[98] Under thirteenth-century law, no man could be declared an outlaw until he was demanded at five successive county courts.[99]

Changes to outlawry proceedings over time suggest some sensitivity to outlawry's fairness as a legal judgment. For example, murder, arson, rape, maiming, and larceny were among the thirteenth-century felonies that warranted outlawry and execution.[100] But in response to the increasing use of common law imprisonment in the case of misdemeanors, a 1295 statute stipulated that private citizens could not kill prison escapees as presumptive outlaws,[101] signaling an interest in meting out punishment proportionate to the underlying crime. By the fourteenth century, no longer were private citizens permitted to kill the outlaw upon sight.[102] During the fifteenth century,

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94. 2 POLLOCK & MAITLAND, *supra* note 80, at 581. The initial summons in an appeal generally involved no writ. *Id.*

95. *Id.* at 581-82.

96. *Id.*

97. Richards, *supra* note 1, at 302.

98. *Id.*

99. 1 POLLOCK & MAITLAND, *supra* note 80, at 539. Often the accused failed to appear. Susan Stewart, *Outlawry as an Instrument of Justice in the Thirteenth Century*, *in* OUTLAWS IN MEDIEVAL AND EARLY MODERN ENGLAND: CRIME, GOVERNMENT AND SOCIETY, c. 1066-c. 1600, at 37, 41 (John C. Appleby & Paul Dalton eds., 2009).

100. Stewart, *supra* note 99, at 40.

101. *See* Statutum de Frangentibus Prisonam [Statute of Breaking Prisons], 23 Edw. (1295) (U.K.) ("Concerning prisoners which break prison, our lord and king willeth and commandeth, that none from henceforth that breaketh prison shall have judgement of life or member for breaking of prison only, except the cause for which he was taken and imprisoned did require such judgment . . . ." (spelling modernized)).

102. *See* Ralph B. Pugh, *Early Registers of English Outlaws*, 27 AM. J. LEGAL HIST. 319, 319 (1983).

provisions dictating wider promulgation of the indictment were designed to give the suspect sufficient notice and opportunity to appear.[103]

That a judgment of outlawry was subject to challenge and reversal is perhaps the most powerful evidence of meaningful limits on its lawful use. For example, in the famous 1234 case of Hubert de Burgh, the prison escapee was declared a rebel by the King but had his outlawry declared null on the grounds that he had been neither indicted nor appealed.[104] In general, the severity of outlawry as a punishment and the potential for its abuse "always inclined the Courts to strain every point in favour of the applicant" seeking a reversal of outlawry.[105] For instance, the fact that the defendant was outlawed while outside the country and therefore deprived of notice was a ground for finding error.[106] A sixteenth-century statute took away this ground in cases of treason, but compensated for the deprivation with a one-year grace period during which time the outlaw could surrender, reverse the judgment, and reclaim his right to trial.[107]

In 1879, the Commissioners' Report on the Criminal Code Bill concluded that outlawry had been effectively superseded by extradition and should be abolished.[108] In 1901, Sir Henry Erle Richards penned a plea for the resurrection of the obsolete but still-legitimate practice of outlawry as the only viable means for bringing fugitives accused of high treason to justice where extradition treaties failed.[109]

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103. Sir Richards details several statutes passed during the reigns of Henry V and Henry VI. Richards, *supra* note 1, at 302-03.

104. 1 POLLOCK & MAITLAND, *supra* note 80, at 581.

105. Richards, *supra* note 1, at 300. According to Blackstone, a judgment of outlawry could be reversed for "any irregularity, omission or want of form." 4 BLACKSTONE, *supra* note 76, at *391. The late thirteenth century marked the Crown's attempts to bring outlawry under centralized control, which resulted in fundamental changes to the practice. Melissa Sartore, Outlawry, Governance and Law in Medieval England 239 (2010) (unpublished Ph.D. dissertation, University of Wisconsin-Madison) (on file with University of Wisconsin-Madison). For example, pardons blunted the force of a proclamation of outlawry and increased the importance of imprisonment. *Id.* at 234.

106. *See* Richards, *supra* note 1, at 300.

107. *Id.* The outlaw was entitled to reversal for only a year because if trial by jury were guaranteed irrespective of when he chose to surrender, he would have an incentive to return to the jurisdiction only upon the deaths of the witnesses against him. *Id.* at 301.

108. *Id.* at 303. The English courts kept elaborate records of outlawry from at least the late fourteenth century until 1870. Pugh, *supra* note 102, at 329 & n.76. By another account, 1855 was the last recorded date when an English court rendered a judgment of outlawry. Robert E. Lee, *Only Three States Permit a Man To Be Declared an Outlaw*, DISPATCH (Lexington, N.C.), Dec. 4, 1963, at 2.

109. *See* Richards, *supra* note 1, at 303-04. Outlawry in criminal proceedings was not abolished

B. Judicial Outlawry in the American Colonies and the Individual States

As noted by the Second Circuit a century after the fact, outlawry was exported from England to the American colonies with some vigor.[110] Outlawry enjoyed protracted existence, and rare use,[111] as a weapon of last resort against fugitives in the United States well into the twentieth century. The practice of outlawry in Pennsylvania and North Carolina, among the last states to retain outlawry as a legal sanction,[112] helps illustrate its adaptation for use by a three-branch republic.

A judgment of outlawry in colonial Pennsylvania amounted to a conviction and sentence.[113] If a person indicted of any one of several specified offenses either did not appear in court to answer the indictment or escaped before trial, the indictment was removed to the state supreme court.[114] If the person failed to appear for trial, the court could outlaw him and declare him attainted of the crime for which he was indicted, which had the legal effect of a verdict.[115] A fugitive indicted and outlawed for treason or other specified crimes could be lawfully executed.[116] The execution was not conducted by just any vigilante; it was rather the duty of the President of the Pennsylvania Supreme Executive Council to see that a warrant for execution was carried out.[117]

The Executive Council President's refusal to carry out one such warrant in in 1784 set the stage for a major commonwealth controversy. From 1782 through 1784, the Pennsylvania Supreme Court had instituted outlawry proceedings against seventeen members and associates of the Doan family for criminal activities related to aiding the British during the Revolutionary War.[118] Described as the terrorists of their time,[119] the Doans persisted in

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until 1938. Administration of Justice Act, 1938, 1 & 2 Geo. 6, c. 63, § 12 (Eng.).

110. United States v. Hall, 198 F.2d 726, 727 (1952).

111. 12 THE NEW AMERICAN CYCLOPAEDIA, *supra* note 78, at 616.

112. FRANK RICHARD PRASSEL, THE GREAT AMERICAN OUTLAW: A LEGACY OF FACT AND FICTION 107-08 (1993).

113. *Id.* For a description of outlawry proceedings as modified by statute in 1791, see 1 JOHN PURDON, A DIGEST OF THE LAWS OF PENNSYLVANIA, FROM THE YEAR ONE THOUSAND SEVEN HUNDRED TO THE TENTH DAY OF JULY, ONE THOUSAND EIGHT HUNDRED AND SEVENTY-TWO 623-26 (1824).

114. PURDON, *supra* note 113, at 623, 625.

115. *See id.* at 624.

116. *See* PRASSEL, *supra* note 112, at 107.

117. *See* Gail S. Rowe, *Outlawry in Pennsylvania, 1782-1788 and the Achievement of an Independent State Judiciary*, 20 AM. J. LEGAL HIST. 227, 233 (1976).

118. *Id.* at 230-31.

intimidating any county citizen who attempted to assist their capture.[120]

In 1784, when Aaron Doan was captured, the Pennsylvania Supreme Court issued a death sentence against him despite the efforts of Doan's attorneys to reverse his outlawry.[121] When Executive Council President Dickinson questioned the legality of using outlawry proceedings to deny Doan a jury trial and refused to carry out the warrant for Doan's execution,[122] the supreme court determined that outlawry in general and its application to Doan in particular did not violate the state constitution.[123] Conviction by way of outlawry did not constitute the state depriving the fugitive of a jury trial; the fugitive had denied himself that right by refusing to submit to the proper authorities.[124]

Dickinson remained free to exercise executive prerogative to pardon Doan or grant him reprieve; the legislature could also abolish the use of outlawry in future cases.[125] But the court found that separation-of-powers principles prohibited the court itself from acquiescing to executive pressure by changing the law or refusing to properly apply it to Doan.[126]

In the targeted killing context, the pressures are, of course, reversed: unrestrained executive power takes the form of unilaterally ordering the execution of the accused without a trial rather than impeding it. But the case still provides a useful example of a court's ability to assess the legitimacy of an individual's outlaw status independently and irrespective of the Executive's preferences. According to one scholar, the Doan case allowed for the emergence of "a clearer appreciation and articulation of the separation of powers doctrine" in Pennsylvania in the aftermath of the Revolutionary War.[127]

North Carolina was the last state to declare a fugitive from justice an

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119. A group of county residents who had been subjected to the Doans' "reign of terror" opposed the reversal of Aaron Doan's judgment of outlawry and condemned any effort by either the Council or the Pennsylvania Assembly to help "the two terrorists" escape execution. *Id.* at 242.

120. *Id.* at 231.

121. *Id.*

122. *Id.* at 233.

123. Respublica v. Doan, 1 Dall. 86, 93 (Pa. 1784).

124. *Id.* at 90-91.

125. Rowe, *supra* note 117, at 238.

126. *Id.* In 1787, Dickinson's successor, Benjamin Franklin, pardoned the still-incarcerated Doan, who returned to a life of crime in New Jersey before absconding to Canada. *Id.* at 240.

127. *Id.* at 244. The confusion arising out of the Doan case also persuaded the Pennsylvania legislature to pass a new bill in 1791 that established clearer and more lenient outlawry procedures. JACK D. MARIETTA & G.S. ROWE, TROUBLED EXPERIMENT: CRIME AND JUSTICE IN PENNSYLVANIA, 1682-1800, at 213 (2006).

outlaw executable upon sight.[128] The state statute "empowered and required" judges who received information that a person had committed a felony and had evaded arrest and service of "the usual processes of law" to issue a proclamation demanding the fugitive's surrender.[129] In contrast with outlawry proceedings in Pennsylvania, which charged the Executive Council President with enforcing a warrant for an outlaw's execution, the North Carolina statute enabled private citizens to seek out the outlaw and kill him if he persisted in resisting surrender.[130]

The law was put into practice well into the twentieth century. In 1960, escaped prison inmate Robert Tyson, wanted for murder and rape, was formally outlawed. He committed suicide before he could be captured.[131] In 1962, a court declared Jack Harvey Davis an outlaw after he sawed his way out of a prison cell.[132] In 1975, a superior court judge proclaimed a judgment of outlawry against Morrey Joe Campbell, who was charged with murder and assault.[133] In 1975, Arthur Parrish was outlawed in connection with a gruesome grocery store murder.[134] The criminal outlawry statute was declared unconstitutional by a federal court for specific procedural deficiencies in 1976 but was not formally repealed until 1997.[135]

C. Extrajudicial Outlawry in the United States

The many procedural safeguards upon which outlawry's lawfulness had been predicated since the time of the Magna Carta were most conspicuously discarded during the American Civil War. Extrajudicial execution in wartime resembled the brutal caricature of outlawry that now persists in the popular and legal imagination. The following review of its legacy in American history

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128. PRASSEL, *supra* note 112, at 107.

129. Act of Mar. 1, 1866, ch. 62, § 1, 1866 N.C. Sess. Laws 125, 125 (repealed 1997).

130. *Id.*; *see Nation: The Outlaws of 1970*, TIME, Apr. 20, 1970, http://www.time.com/time/magazine/article/0,9171,944011,00.html. It bears noting that the history of North Carolina's outlawry law is racially fraught. The statute was enacted specifically in response to the activities of the Lowry gang after the Civil War. *See id.* at 108. That said, the state constitution recognized outlawry as a sanction subject to legal process: "No person shall be . . . outlawed, or exiled, or in any manner deprived of his life, liberty, or property, but by the law of the land." N.C. CONST. art. I, § 19.

131. *See* PRASSEL, *supra* note 112, at 107.

132. *See This Is the Law: Outlaws . . .* , DISPATCH (Lexington, N.C.), Nov. 5, 1975, at 2.

133. *See id.*

134. Tiede, *supra* note 6.

135. *See infra* Part V.

serves two functions: it helps explain how outlawry became so widely reviled in the modern era and offers a critical glimpse of what twenty-first century outlawry must *not* be – death by fiat.

According to historian Stephen Ambrose, the Union's official position during the war was that the Southern states had never successfully seceded, which meant that from the Union perspective, traditional rules of warfare did not protect Confederate soldiers.[136] Their engagement in hostilities amounted to rebellion.[137] By another account, the lack of a command presence in states like Missouri meant that the Confederate forces in those regions consisted of guerrilla bands waging "independent war" against the Union,[138] which helped Union leaders justify a practice of immediate execution of those civilians suspected of involvement in hostilities.[139] Volatile battle conditions undermined the formation of any consistent military policy, but the Union stance was clear in one respect: as outlaws, active guerrillas were to be regularly executed when captured in arms rather than taken alive as prisoners of war.[140]

Pursuant to orders promulgated during the Civil War by President Lincoln's first General-in-Chief, Henry Halleck, extrajudicial outlawry was used to justify the execution of Confederate guerrillas even when capture was feasible or the guerrillas were willing to surrender.[141] In an 1862 order, General Halleck declared that "every man who enlists in [a guerrilla band], forfeits his life and becomes an outlaw."[142] It was left to the field officers to distinguish the outlaw from the noncombatant.[143] The soldiers' recurring attempts to justify the Union's policy of executing captured Confederates, who in Missouri were little more than civilians in arms, suggest lurking doubts as to the policy's moral and legal legitimacy.[144]

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136. *See* STEPHEN E. AMBROSE, HALLECK: LINCOLN'S CHIEF OF STAFF 129 (1962).

137. *Id.*

138. MICHAEL FELLMAN, INSIDE WAR: THE GUERRILLA CONFLICT IN MISSOURI DURING THE AMERICAN CIVIL WAR 112 (1989).

139. *Id.* at 168.

140. *Id.* at 123.

141. *See id.* Although the practice was neither official nor uniform, "in general and whenever they wished, Union troops shot or hanged their captives, as did their guerrilla foes." *Id.* at 168.

142. *Id.* at 88 (citation omitted).

143. *Id.*

144. *Id.* at 123. The Union field officers "fully understood the vagueness of the line between civilian and guerrilla and brought conflicting hopes and fears to bear on just who the enemy was, and how he was to be treated." *Id.* at 113. Michael Fellman's description of the Union quandary over the appropriate treatment of hostile Confederate civilians suggests some profound parallels with the ongoing controversy over the Obama Administration's policy of

The end of the Civil War heralded the American movement toward actively abolishing outlawry.[145] The Virginia legislature repealed the state's outlawry statutes,[146] the Alabama Supreme Court declared the judgment of outlawry repugnant to the state constitution,[147] and Texas used the declaration of rights in its new constitution to prohibit outlawry permanently.[148]

But the uncomfortable legacy of Civil War outlawry includes a significant historical twist. The same General Halleck who promulgated the orders upon which Confederate guerrillas were killed as outlaws—without the involvement of the courts—eventually commissioned legal scholar Francis Lieber to write a uniform set of instructions for the conduct of soldiers in the field and the treatment of civilian guerrillas.[149] The result was the enormously influential Lieber Code, signed by Abraham Lincoln as the first modern codification of the laws of war,[150] and which later shaped the Hague and Geneva Conventions.[151] The Code included a ban on outlawry in times of both war and peace, and it helped set the weight of moral law against outlawry by characterizing the practice as fundamentally inhumane:

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targeting citizens:

> [L]imited in their military means; torn between softs and hards; uncertain about the appropriateness and effectiveness of all imaginable policies; their soldiers pinned down in their posts in a countryside dominated by guerrillas, making their men as much the hunted as the hunters; diffused by their own ambivalences and uncertainties, Union military authorities would never construct a satisfactory policy to respond to this guerrilla war.

Id. at 97.

145. PRASSEL, *supra* note 112, at 106.

146. VA. CODE ANN. § 19.2-10 (2008).

147. Dale County v. Gunter, 46 Ala. 118, 139 (1871). The Alabama Supreme Court focused on the implications of denying the outlaw the ability to bring action for redress of injuries, as the result was "if not inconsistent with the letter of our bill of rights," nevertheless inconsistent with its spirit. *Id.* In the modern context, provisions for the reversal of outlawry upon the fugitive's surrender would mitigate this problem. *See infra* Section V.B.4.

148. TEX. CONST. art. I, § 20.

149. AMBROSE, *supra* note 136, at 128.

150. LESLIE C. GREEN, THE CONTEMPORARY LAW OF ARMED CONFLICT 36 (3d ed. 2008). For evidence that the Lieber Code also marked the first time military commissions were definitively granted jurisdiction to try law-of-war violations, and an extended discussion of military commissions as General Halleck's creative legal solution to combating Confederate guerrillas, see Gideon M. Hart, *Military Commissions and the Lieber Code: Toward a New Understanding of the Jurisdictional Foundations of Military Commissions*, 203 MIL. L. REV. 1 (2010).

151. RICHARD SHELLY HARTIGAN, LIEBER'S CODE AND THE LAW OF WAR 1 (1983).

> The law of war does not allow proclaiming either an individual belonging to the hostile army, or a citizen, or a subject of the hostile government, an outlaw, who may be slain without trial by any captor, any more than the modern law of peace allows such intentional outlawry; on the contrary, it abhors such outrage.[152]

I argue this prohibition on outlawry should be understood in the context of the extrajudicial outlawry that likely helped inspire it – that is, as a response to the Union's dubious policy of treating captured civilians suspected of hostilities as outlaws subject to extrajudicial execution. Put differently, the ban on outlawry enshrined in the Lieber Code and adopted by so many international conventions should be construed not as a ban on the court-issued outlawry that emerged after centuries of evolving English practice, but instead as an uncontroversial ban on extrajudicial assassination and other practices that can be severed from outlawry.

III. THE CASE FOR OUTLAWRY-BASED TARGETED KILLING

The extrajudicial outlawry that was employed during the Civil War and formed a basis for later international bans on outlawry is clearly not the kind of outlawry that this Note proposes to revive. As Part II explained, outlawry saw evolution before obsolescence. Through formal charges, notice, successive summonses, and provisions for surrender, outlawry became a mechanism for administering a unique blend of process and punishment: no process in excess of what the accused needed to choose whether to submit to the law, and no punishment in excess of what would have been warranted by his legal conviction. This Part will argue that this is the proper formula for judicial review in the targeted killing context.

In declining to rule on the merits of Awlaki's prospective killing, Judge

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152. FRANCIS LIEBER, U.S. WAR DEP'T, General Orders No. 100, INSTRUCTIONS FOR THE GOVERNMENT OF ARMIES OF THE UNITED STATES IN THE FIELD, art. 148 (1863) [hereinafter LIEBER CODE], *reprinted in* THE LAWS OF ARMED CONFLICTS: A COLLECTION OF CONVENTIONS, RESOLUTIONS AND OTHER DOCUMENTS 3, 18-19, 21 (Dietrich Schindler & Jiri Toman eds., 3d rev. ed. 2004); *see also* Memorandum from W. Hays Parks, Special Assistant for Law of War Matters to the Judge Advocate Gen. of the Army, to the Office of the Judge Advocate Gen. of the Army, Executive Order 12333 and Assassination (Nov. 2, 1989), http://www.hks.harvard.edu/cchrp/Use%20of%20Force/October%202002/Parks_final.pdf (describing Article 148 as the first description of what constitutes assassination conducted by the U.S. military). The phrase "without trial by any captor" seems to allude specifically to the practice of *posse comitatus*, which this Note argues need not be associated with outlawry. *See infra* Section IV.A.

Bates acknowledged the uncomfortable implications of all sides of the targeted killing debate. Taken together, these concerns suggest the appeal of developing a coherent procedural framework that permits but delimits the Executive's use of lethal force against alleged citizen-terrorists in an age of nontraditional and possibly infinite war. Using the "perplexing[] questions"[153] that Judge Bates raises but does not answer in his decision as a framing device, this Part makes a three-part argument for employing outlawry principles to construct that much-needed framework of limited judicial review.

A. Outlawry Provides Properly Limited Judicial Process in the Form of Access to the Courts

> *Can the Executive order the assassination of a U.S. citizen without first affording him any form of judicial process whatsoever, based on the mere assertion that he is a dangerous member of a terrorist organization? How can the courts . . . make real-time assessments of the nature and severity of alleged threats to national security, determine the imminence of those threats, 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?*[154]

At a conceptual level, modern-day outlawry proceedings amount to an uncommonly straightforward death-eligibility process. In a departure from the legal norm, the death eligibility of the prospective target would turn not on his proven guilt but instead on his apparent recalcitrance, as evidenced by his failure to respond to the measures taken by each of the three branches. As a threshold matter, Congress would need to craft the outlawing process. In the case of a particular prospective target, the Executive could then initiate the process, while the courts would be charged with ensuring adherence to the process.

In more concrete terms, under an outlawry statute, the Executive would be able to exercise its traditional prosecutorial discretion in deciding whether and when to bring a special category of charges against suspected citizen-terrorists.[155] Once the government has fulfilled, at minimum, the procedural

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153. Al-Aulaqi v. Obama, 727 F. Supp. 2d 1, 8 (D.D.C. 2010).

154. *Id.* at 9.

155. Theoretically, the government could exaggerate the threat posed by a prospective target. But outlawry proceedings are not unique in affording executive intelligence a significant degree of deference. As discussed in Subsection I.B.3, evidence offered by the government is allowed a presumption of regularity even in full criminal proceedings.

protections outlined in Part V, *infra*, a suspect's failure to submit himself to legal authorities would empower a court to issue a judgment of outlawry against him.

Meanwhile, the judiciary would hold the power to declare a citizen an "outlaw" based on a *procedural* definition of a legitimate target of lethal force: a suspect who refuses to submit to the legal process, as defined by a set of procedural requisites specified under statute, or perhaps left to the courts' design. This form of judicial review is most notable for what it would *not* involve: outlawry proceedings would not compel the judiciary to make real-time assessments of the threat posed by individual targets, to determine when the use of military force against such threats is justified, or to demand from the Executive comprehensive proof that use of lethal force is warranted.

From a civil libertarian viewpoint, a defining feature of outlawry proceedings might be the constructive preservation of the choice of legal process. Outlawry would avoid rubber-stamping the Executive's targeted killing decisions by forcing the Executive to observe a number of critical basics, like issuing notice and formal charges. The target would be thereby afforded a role in precluding his own killing, and the target and the public provided some basis for alleging trumped-up charges of terrorist involvement.

Concedely, outlawry offers the prospective target highly circumscribed protections. Not trial, but the right to trial.[156] Not individualized notice, but centralized notice.[157] Not express waiver, but implied waiver.[158] As such, outlawry is unlikely to actually fully satisfy the civil libertarians, and is vulnerable to a criticism made of counterterrorism laws more generally: guilty of providing "too narrow a band of remedies focused on process."[159]

But the narrow focus on process under outlawry law is appropriate given the judiciary's characteristically modest role in reviewing the other branches' exercise of power when it comes to national security issues.[160] After surveying two centuries of case law, Professors Samuel Issacharoff and Richard Pildes conclude that "the courts have developed a process-based, institutionally-oriented (as opposed to rights oriented) framework for examining the legality

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156. *See infra* Section IV.B.

157. *See infra* Subsection V.B.3.

158. *See infra* Section IV.B.

159. Judith Resnik, *Detention, the War on Terror, and the Federal Courts*, 110 COLUM. L. REV. 579, 635 (2010).

160. *See* Samuel Issacharoff & Richard H. Pildes, *Between Civil Libertarianism and Executive Unilateralism: An Institutional Process Approach to Rights During Wartime*, 5 THEORETICAL INQUIRIES L. 1, 7 (2004).

of governmental action in extreme security contexts."[161] They further explained: "The American courts have neither endorsed unilateral executive authority nor taken it as their role to define directly the substantive content of rights in these contexts."[162] Instead, the courts have focused on ensuring "that the right institutional process supports the tradeoff between liberty and security at issue."[163]

This view lays the bricks for interpreting the judiciary's narrow process focus as outlawry's great strength. Outlawry posits that in the targeting context, the right institutional process for striking a balance between liberty and security is one that resists either being hostage to the suspect's unwillingness to participate, or giving in to the Executive's claim to unilateral power. The right process turns instead on the conditional authorization of lethal force from all three branches of government. From an institution-oriented perspective, outlawry principles derive their primary value not from the substance of the protections afforded the prospective target, but from the trilateral institutional endorsement required for a legitimate targeted killing.

B. Outlawry Brings Targeted Killing in Line with Other Government Counterterrorism Operations Subject to Limited Judicial Review

> *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 . . . judicial scrutiny is prohibited when the United States decides to target a U.S. citizen overseas for death?*[164]

When understood as one piece in a multifaceted counterterrorism strategy, unilateral executive killing power is not a mere anomaly. It is incompatible with the existing regime of limited judicial review of the government's counterterrorism activities.[165] In this Section, I examine judicial review in the context of wiretapping and detainment to show that outlawry appropriately

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161. *Id.* at 6.

162. *Id.* at 44.

163. *Id.* at 44-45.

164. Al-Aulaqi v. Obama, 727 F. Supp. 2d 1, 8 (D.D.C. 2010).

165. The existing regime is itself far from perfect, and a critique of it goes beyond the scope of this Note. However, it is worth noting the interrelated effects of the government's various counterterrorism policies. Illegalizing indefinite detainment, for example, would strengthen an outlawry-based targeted killing schema by making surrender a more viable option for the would-be fugitive. For a general discussion of the viability of surrender, see *infra* Subsection V.B.4.

offers prospective targets of lethal force more robust protection.

Like judicial review in the context of secret surveillance, execution upon outlawry requires that a court issue authorization ex ante, and further, only upon the individual's failure to submit to the legal process. But like judicial review in the context of detention, outlawry proceedings are adversarial and present the individual the opportunity to refute the charges against him in court.

1. Judicial Review in the Context of Wiretapping

Judicial review of secret government surveillance requests takes place ex ante and ex parte. To intercept the communications of a citizen or permanent resident abroad, the government must submit an application for a surveillance warrant before a judge of the secret court established by the Foreign Intelligence Surveillance Act (FISA).[166] The FISA court grants the application if there is probable cause to believe that one of the parties to the communication in question is a foreign power or agent thereof, and that the targeted location of surveillance is to be used by the foreign power or an agent of the foreign power.[167] The Attorney General may authorize a wiretap in an emergency without obtaining authorization from the court, provided he submits an application within seven days.[168]

The FISA court approves the vast majority of applications it receives,[169] which has yielded two opposing interpretations of the robustness of the process.[170] On the one hand, it has been argued that the court acts as a rubber stamp on the Executive's requests for intrusive surveillance warrants.[171] On the other hand, it may be that a rigorous process of internal executive review ensures that a carefully winnowed crop of well-founded requests reaches the court.[172]

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166. Foreign Intelligence Surveillance Act of 1978 (FISA), Pub. L. No. 95-511, 92 Stat. 1783. Congress amended FISA after warrantless wiretapping conducted by the National Security Agency caused public outcry in 2005. FISA Amendments Act of 2008, Pub. L. No. 110-261, 122 Stat. 2436 (codified in scattered sections of 50 U.S.C.A. (2008)).

167. FISA § 105(a) (codified at 50 U.S.C. § 1805(a) (2006)).

168. 50 U.S.C.A. § 1805(e).

169. The court approved each of the 1,506 electronic surveillance requests submitted by the DOJ in 2010. Letter from Ronald Weich, U.S. Assistant Attorney Gen., to Harry Reid, Senate Majority Leader (Apr. 29, 2011), http://www.fas.org/irp/agency/doj/fisa/2010rept.pdf.

170. Note, *Shifting the FISA Paradigm: Protecting Civil Liberties by Eliminating Ex Ante Judicial Approval*, 121 HARV. L. REV. 2200, 2206 (2008).

171. *See* David G. Savage & Henry Weinstein, *Court Widens Wiretapping in Terror Cases*, L.A. TIMES, Nov. 19, 2002, http://articles.latimes.com/2002/nov/19/nation/na-wiretap19.

172. *See* Editorial, *The Power To Kill*, *supra* note 57 ("[T]he FISA court works with great speed

In either case, a statute that forces the government to move for a judgment of outlawry would allow for a more rigorous form of judicial review than would ex parte FISA proceedings. Such a system would not only place the courts in a position to authorize the outlawry and execution of a fugitive terrorist, but also offer the courts a list of objective parameters for assessing whether the accused has been afforded a meaningful opportunity to respond to the government's charges.

2. Judicial Review in the Context of Detainment

A counterintuitive consequence of the current lack of judicial check on the government's targeted killing strategy is that the government can kill any alleged terrorist with impunity, citizenship notwithstanding, but is restricted in its ability to detain him. Perversely, as long as premeditated lethal force has no legal consequences, while detainment poses legal complications, the government has an incentive to treat the elimination of suspected terrorists as the less messy alternative.[173] The government has issued statements that suggest a policy of heightened caution about the use of lethal force against citizens, but that caution is entirely at the President's discretion and hardly reassuring to the misidentified target.

By requiring formal charges and judicial authorization before the government may kill a target, outlawry offers to repair the perverse asymmetry between reviewable detention and unreviewable use of lethal force. Outlawry notably also provides ex ante protections, which preclude the problems that stem from attempts to model targeted killing procedures too closely upon ex post judicial review of detention decisions.[174]

C. Outlawry Provides Coherent Principles for Legitimating and Limiting the Government's Use of Lethal Force

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

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and rarely rejects a warrant request, partly because the executive branch knows the rules and does not present frivolous or badly argued cases.").

173. *See* Becker & Shane, *supra* note 19 ("[T]he administration's very success at killing terrorism suspects has been shadowed by a suspicion: that Mr. Obama has avoided the complications of detention by deciding, in effect, to take no prisoners alive.").

174. *See supra* Subsection I.B.1.

numerous terrorist attacks against the United States?[175]

Striking a balance between process and punishment, outlawry guarantees prospective targets important protections without categorically eliminating any of the government's options for dealing with suspected terrorists who refuse to acknowledge their own legal sovereign. Outlawry should thus appeal to those who have argued the fundamental injustice of banning the use of lethal force against terrorist leaders. Such a ban selectively grants terrorists the very procedural protections that are denied as a matter of course to their law-abiding, uniformed counterparts on the battlefield, who are unequivocally legitimate targets under the laws of war.[176] It thus amounts to "rewarding" terrorists who resort to hiding among civilian populations and who in other ways defy domestic and international laws.[177]

Outlawry offers a disciplined means of dismantling this distorted incentive structure. The accused citizen-terrorist *must* choose between submitting to the legal process and flouting it. The terrorist-in-hiding who has chosen to flout the law is subject to the same lethal consequences of donning an enemy uniform on a battlefield.[178]

Yet outlawry's use need not facilitate the unbridled expansion of government power. In this sense, an outlawry-based approach to targeting policy contrasts sharply with the government's piecemeal and unrestrained approach to justifying its killing program. For instance, in a recent speech, John Brennan, the President's top counterterrorism adviser, cited the nontraditional nature of the war against Al Qaeda—as manifested, for example, in the fact that terrorists avoid uniform—as justification for the government's

175. Al-Aulaqi v. Obama, 727 F. Supp. 2d 1, 8 (D.D.C. 2010).

176. *See, e.g.*, Ilya Somin, *Admiral Yamamoto and the Justification of Targeted Killing*, VOLOKH CONSPIRACY (May 13, 2011, 6:16 PM), http://volokh.com/2011/05/13/admiral-yamamoto-and-the-justification-of-targeted-killing ("If it is moral and legal to individually target uniformed enemy military officers, surely the same goes for leaders of terrorist organizations. It cannot be the case that law and morality give the latter greater protection than the former.").

177. *See* Alston Report, *supra* note 10, ¶ 60 (acknowledging the difficulty of defining "direct participation" in hostilities in such a way that protects civilians but does not reward an enemy hiding among civilians); *see also* Mark B. Baker, *Terrorism and the Inherent Right of Self-Defense (A Call To Amend Article 51 of the United Nations Charter)*, 10 HOUS. J. INT'L L. 25, 26 (1987) (observing that terrorists often engage in acts forbidden by the laws that govern in wartime).

178. In law enforcement terms, interpreting the suspect's flight as a constructive waiver of his trial rights prevents him from escaping the consequences of a guilty verdict while waging violence against the state. *See infra* Section IV.B.

adoption of an expansive definition of "imminence" to assess terror threats.[179] But Brennan made no mention of the other side of the coin: the difficulties associated with correctly identifying a terrorist who has avoided the conventional markers of combatant activity, and whether the United States must take extra precautions to ensure that its attacks are directed strictly at hostile forces.[180]

Outlawry, meanwhile, is a dual-use framework that not only permits but just as importantly restricts the Executive's use of lethal force against its citizens.[181] The resulting balance between process and punishment is key to outlawry's constitutionality, as the next Part explains.

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179. John O. Brennan, Assistant to the President for Homeland Sec. & Counterterrorism, Prepared Remarks at the Woodrow Wilson International Center for Scholars: The Ethics and Efficacy of the President's Counterterrorism Strategy (Apr. 30, 2012) (transcript available at http://www.wilsoncenter.org/event/the-efficacy-and-ethics-us-counterterrorism-strategy).

180. For a brief discussion of the purpose of distinction (to protect civilians), see Laurie R. Blank, *After "Top Gun": How Drone Strikes Impact the Law of War*, 33 U. PA. J. INT'L L. 675, 689-94 (2012). Blank explains that "[i]dentifying who or what can be targeted is one of the most fundamental issues during conflict." *Id.* at 689. For a discussion of how Brennan's expansive definitions of imminent threat and proportional response undermine their usefulness in constraining executive power, see Amos Guiora & Laurie Blank, *Targeted Killing's 'Flexibility' Doctrine that Enables US To Flout the Law of War*, GUARDIAN (London), Aug. 10, 2012, http://www.guardian.co.uk/commentisfree/2012/aug/10/targeted-killing-flexibility-doctrine-flout-law-war. *See also* Press Release, Professor Philip Alston, Statement of U.N. Special Rapporteur on U.S. Targeted Killings Without Due Process, ACLU (Aug. 3, 2010), http://www.aclu.org/national-security/statement-un-special-rapporteur-us-targeted-killings-without-due-process (condemning the United States's "expansive and open-ended interpretation of the right to self-defence").

181. This restrictive quality, among other things, distinguishes outlawry from recurring proposals for the "citizenship-stripping" of prospective American targets. *See, e.g.*, Greg Sargent, *Here's How Joe Lieberman's Citizenship-Stripping Bill Would Work*, WASH. POST (May 5, 2010, 11:52 AM), http://voices.washingtonpost.com/plum-line/2010/05/how_liebermans_citizen-strippi.html. The Supreme Court ruled in *Afroyim v. Rusk*, 387 U.S. 253 (1967), that Congress cannot expatriate a citizen on the grounds that certain acts created a presumption that he intended to relinquish his citizenship. But outlawry is not the same as expatriation and infers waiver only if myriad procedural standards to ensure clear intent have been met. Citizenship stripping, meanwhile, not only does nothing to overcome the due process problems posed by the government's targeting program, it also does great harm by perpetuating the myth that citizenship alone poses a constraint on the President's killing powers. *See* Section V.C.

IV. THE CONSTITUTIONALITY OF MODERN-DAY OUTLAWRY

I have shown that outlawry enjoyed extensive use on both sides of the Atlantic and have offered practical arguments for resurrecting outlawry in the targeting context. But according to Professor Juan Cole, "The problem with declaring al-'Awlaqi an 'outlaw' by virtue of being a traitor or a terrorist is that this whole idea was abolished by the US constitution."[182] This Part focuses on establishing the opposite: judicial outlawry is not inherently inconsistent with the letter and spirit of the Constitution.

Since outlawry entails punishment as well as process, here I examine concerns about whether outlawry would violate the Fifth and Eighth Amendments. The fact that this punishment would be imposed on named individuals without a trial, in turn, would appear to raise questions about whether outlawry violates prohibitions on attainder.

A. Cruel and Unusual Punishment

The outlawry and execution of a narrowly defined category of terrorists would not constitute cruel and unusual punishment. This position finds support in the general principles guiding the Supreme Court's assessments of Eighth Amendment claims, as well as in existing precedent governing the use of lethal force against fleeing felons in the United States.

The Court's past approach to determining whether capital punishment violates the Eighth Amendment provides a helpful framework for analyzing the constitutionality of outlawry. In its 1976 decision in *Gregg v. Georgia*,[183] the Court looked to history and precedent to determine that capital punishment for murder was not a per se violation of the constitutional prohibition on cruel and unusual punishment.[184] The *Gregg* Court noted that the death penalty endured in cases of murder both at English common law and in the individual states. Capital punishment persisted even as the rules governing its imposition—much like those governing outlawry in criminal proceedings—became increasingly restricted, first due to the ever-narrowing category of murders punishable by death, and then through the adoption of laws allowing juries the discretion to grant mercy.[185] This historical evidence formed part of the basis for the Court's decision to uphold capital punishment.

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182. Cole, *supra* note 51.

183. 428 U.S. 153 (1976).

184. *Id.* at 176.

185. *Id.* at 176-77.

Similarly, the use of outlawry in states such as Pennsylvania in the late eighteenth century suggests that outlawry enjoyed acceptance as a practicable legal sanction around the time of the Constitution's drafting. Other evidence supports this observation. In a private letter written in 1794, Alexander Hamilton advocated for an outlawry bill and treason prosecutions in response to the violent Pennsylvanian protest of the federal excise tax during the Whiskey Rebellion. He reasoned, "A law regulating a peace process of outlawry is also urgent; for the best objects of punishment will fly, and they ought to be compelled by outlawry to abandon their property, homes, and the United States."[186] The Federalists eventually instead supported a military response to quell the rebellion.[187] Two years later, in 1796, a bill to regulate proceedings in cases of outlawry reached the floor of the U.S. House of Representatives.[188]

Further, although outlawry per se has been largely dormant in most of the United States over the last century, numerous federal courts have determined that a common law rule authorizing the use of deadly force against a fleeing felon does not violate the Eighth Amendment.[189] Arrest, not execution, was the objective in these cases. However, the courts' tradition of upholding the constitutionality of the resort to lethal force at least begins to suggest that similar force might be acceptable under narrow circumstances in the counterterrorism context.

The principle of proportionality has figured prominently in the Supreme Court's approach to determining whether a punishment accords with the Eighth Amendment.[190] At base, the punishment must not be excessive in either of two respects: it must not involve "unnecessary and wanton infliction of pain," and it must not be grossly disproportionate to the crime.[191]

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186. Letter from Alexander Hamilton to Rufus King (Oct. 30, 1794), *reprinted in* 10 THE WORKS OF ALEXANDER HAMILTON 77 (Henry Cabot Lodge ed., 1904).

187. CHRISTIAN G. FRITZ, AMERICAN SOVEREIGNS: THE PEOPLE AND AMERICA'S CONSTITUTIONAL TRADITION BEFORE THE CIVIL WAR 184 (2008).

188. 4 ANNALS OF CONG. 271 (Jan. 28, 1796).

189. *See* Mattis v. Schnarr, 404 F. Supp. 643, 650 (E.D. Mo. 1975) (observing that thirty-four states authorized the use of deadly force to effectuate the arrest of a fleeing felon), *rev'd on other grounds*, 547 F.2d 1007 (8th Cir. 1976), *vacated sub nom.* Ashcroft v. Mattis, 431 U.S. 171 (1977); Cunningham v. Ellington, 323 F. Supp. 1072, 1075 (W.D. Tenn. 1971) (holding that an officer's use of necessary means, including deadly force, to effect the arrest of a defendant in flight was not punishment under the Eighth Amendment). *See generally* James O. Pearson, Jr., Annotation, *Modern Status: Right of Peace Officer To Use Deadly Force in Attempting To Arrest Fleeing Felon*, 83 A.L.R.3d 174 (1978) (listing cases that support the broad rule that officers may use deadly force where necessary to effect the arrest of a felon).

190. *See, e.g.*, *Gregg*, 428 U.S. at 175-76.

191. *Id.* at 173.

The outlawry and execution of fugitives who flee legal responsibility for the death of innocent civilians need not be excessive in either sense. Historically, the risk of authorizing use of force disproportionate to the underlying crime has been a major source of the courts' concerns about the propriety of using lethal force to effectuate arrests, especially in light of the growing number of lower-grade felonies created by legislation over time.[192] But execution upon outlawry need not implicate concerns of proportionality if drone strikes are properly restricted to a particular category of accused terrorists.[193] Modern-day protocol for reversal of outlawry would also mitigate concerns about the severity of the judgment.[194]

Of course, historical evidence and precedent can only go so far in establishing that a particular practice accords with the Eighth Amendment. After all, the question of what constitutes cruel and unusual punishment "is not fastened to the obsolete but may acquire meaning as public opinion becomes enlightened by a humane justice."[195] Significantly, however, outlawry has proven capable of evolving along with mores. Indeed, moral concerns about outlawry appear to have often centered on practices either associated with extrajudicial outlawry or easily excised from judicial outlawry proceedings. For example, as discussed in Part I, in its earliest form a judgment of outlawry permitted—indeed, obliged—every man to slay the outlaw upon encountering him. But in the thirteenth century, this "barbaric justice" was abolished in England, even as outlawry itself remained in force.[196] Further supporting the proposition that private-citizen action need not be associated with outlawry is evidence that the practice of allowing private citizens to pursue fugitives actually outlived outlawry in the United States. At common law, *posse comitatus* referred to the power of authorities to request assistance

192. *See, e.g.*, Reneau v. State, 70 Tenn. 720, 721-22 (1879); *see also* Jones v. Marshall, 528 F.2d 132, 133-34 (2d Cir. 1975) (observing that the common law rule allowing an officer to kill a person fleeing arrest for a felony evolved when only crimes involving force or violence, punishable by death and forfeiture, were felonies); Beech v. Melancon, 465 F.2d 425, 426-27 (6th Cir. 1972) (McCree, J., concurring) (voicing constitutional concerns with any statute permitting lethal force against the "fleeing income tax evader, antitrust law violator, selective service delinquent, or other person whose arrest might be sought for the commission of any one of a variety of other felonies of a type not normally involving danger of death or serious bodily harm").

193. *See infra* Part V.

194. Sir Richards specifically cited reversibility of outlawry as a grounds for rejecting the proposition that "to condemn any person without trial is contrary to the principles of justice." Richards, *supra* note 1, at 304.

195. *Gregg*, 428 U.S. at 171 (quoting Weems v. United States, 217 U.S. 349, 378 (1910)).

196. 2 POLLOCK & MAITLAND, *supra* note 80, at 577.

from citizens in pursuing a criminal, with the civilians in pursuit using such force as deemed necessary to effectuate the arrest.[197] On the Western frontier, use of this power was interpreted as an authorization for manhunts.[198] A regime that empowers only government agents to execute a legal outlaw would preclude the public violence implicit in this kind of private-citizen action.

B. Due Process

Whether modern outlawry proceedings could meet constitutional due process demands is a holistic inquiry, intertwined with many of the considerations that are relevant to determining whether execution upon outlawry constitutes cruel and unusual punishment.[199] But to begin the analysis, it is worth noting that critics who allege that the government's targeted killing policy violates the Constitution's due process guarantees have not reached consensus on what protections would have sufficed in the case of Anwar al-Awlaki. Some commentators have pointed out that Awlaki was not provided formal notice or charged.[200] Still others have focused on the government's refusal to confirm the existence and contents of the CIA's kill list and the targets' lack of opportunity to surrender.[201] Many legal experts and ex-military officers have argued that, as a general matter, terror suspects must be afforded the same rights as ordinary criminal suspects in the form of a public trial in a federal court, irrespective of citizenship.[202]

Outlawry's legitimacy as a legal judgment is predicated on fulfilling the first two sets of demands, for criminal proceedings and for the kind of notice

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197. 1 BLACKSTONE, *supra* note 76, at *344. For a discussion of the federal prohibition on *posse comitatus* as a form of military enforcement of domestic law, see *infra* note 243.

198. PRASSEL, *supra* note 112, at 109.

199. *See* Rochin v. California, 342 U.S. 165, 169 (1952) (declaring that regard for the requirements of the Due Process Clause "inescapably imposes upon this Court an exercise of judgment upon the whole course of the proceedings [resulting in a conviction] in order to ascertain whether they offend those canons of decency and fairness which express the notions of justice of English-speaking peoples even toward those charged with the most heinous offenses" (quoting Malinski v. New York, 324 U.S. 401, 416-17 (1945))).

200. *See, e.g.*, David Cole, *Killing Our Citizens Without Trial*, N.Y. REV. BOOKS, Nov. 24, 2011, http://www.nybooks.com/articles/archives/2011/nov/24/killing-our-citizens-without-trial.

201. *See, e.g.*, Dan Markel, *Quintessentially American: Suing the Lethal Presidency*, PRAWFSBLAWG (July 18, 2012, 2:21 PM), http://prawfsblawg.blogs.com/prawfsblawg/dan_markel.

202. *See, e.g.*, Daphne Eviatar, *9/11 Masterminds Could Face Trial in Federal Court*, WASH. INDEP. (Oct. 21, 2009, 6:00 AM), http://washingtonindependent.com/64590/911-masterminds-could-face-trial-in-federal-court.

that would allow the prospective target to submit to those proceedings.[203] However, outlawry law rejects the assumption built into the third demand—that due process requires a full trial. Outlawry posits instead that at the heart of due process lies the *choice* of trial. As the Supreme Court noted in 1894, it is axiomatic under our jurisprudence that due process gives the affected parties "*an opportunity* to be heard respecting the justice of the judgment sought."[204] And as the Pennsylvania Supreme Court declared in the case of Aaron Doan, outlawry does not deprive the accused of this opportunity to be heard: given adequate procedures for notice, the accused may claim his right to trial by surrendering to the legal process.[205]

Modern practice confirms that the choice of trial, not trial itself, is the essence of due process. Approximately ninety-five percent of felony convictions in the United States are the consequence of individuals waiving their right to trial in favor of a plea bargain.[206] An effective waiver "is ordinarily an intentional relinquishment or abandonment of a known right."[207] The modern guilty plea meets this standard as an affirmative admission of wrongdoing and an express waiver of trial rights.[208]

Whether outlawry is consistent with due process, in contrast, turns on the legitimacy of interpreting the suspected terrorist's failure to surrender as an intentional waiver (or perhaps forfeiture) of his trial rights.[209] Although current Supreme Court jurisprudence militates against such an interpretation in ordinary circumstances,[210] it seems reasonable to suggest a more flexible approach to waiver warrants consideration in the extraordinary counterterrorism context. After all, "[i]t is waiver of rights that permits the system of criminal justice to work at all."[211] Extending this truism to citizens

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203. *See infra* Section V.B.

204. Marchant v. Pa. R.R. Co., 153 U.S. 380, 387 (1894) (emphasis added) (quoting Hoger v. Reclamation Dist., 111 U.S. 701, 708 (1884)).

205. *See supra* Section II.B.

206. *See* Office of Justice Programs, *Compendium of Federal Justice Statistics, 2000*, U.S. DEP'T OF JUSTICE 53 (2000), http://bjs.ojp.usdoj.gov/content/pub/pdf/cfjs00.pdf.

207. Johnson v. Zerbst, 304 U.S. 458, 464 (1938).

208. Note, *The Guilty Plea as a Waiver of "Present but Unknowable" Constitutional Rights: The Aftermath of the* Brady *Trilogy*, 74 COLUM. L. REV. 1435, 1436 (1974).

209. Flight and a guilty plea are also distinct in the sense that one is a gamble and the other a bargain. The harsher sanction in the case of nonappearance is arguably the cost of attempted flight.

210. *Cf.* Aetna Ins. Co. v. Kennedy, 301 U.S. 389, 393 (1937) ("[A]s the right of jury trial is fundamental, courts indulge every reasonable presumption against waiver.").

211. *See* Michael E. Tigar, *The Supreme Court, 1969 Term—Foreword: Waiver of Constitutional*

who are accused of crimes so serious as to warrant their killing would allow the criminal justice system to work in the targeting setting.

In the targeting setting, flight could be interpreted as a kind of constructive waiver. The constructive waiver, whereby a criminal defendant may waive a constitutional right by his conduct rather than by express request, arose out of *Illinois v. Allen*,[212] in which the Supreme Court ruled that a defendant could lose the right to be present at his own trial through his disruptive behavior.[213] The *Allen* Court's ruling was motivated in part by its rejection of the idea that "the accused be permitted by his disruptive conduct indefinitely to avoid being tried on the charges brought against him."[214] In *Taylor v. United States*,[215] the Court extended the theory of the constructive waiver by holding that a defendant had effectively waived his right to be present at trial by fleeing from noncapital charges after trial had commenced. In so ruling, the Court found it "wholly incredible" that the defendant did not know the trial would continue in his absence.[216]

The Court, on the other hand, has declined to permit trials to proceed when the defendant is absent from the start, based on the heightened risk that the defendant has not made a "knowing and voluntary waiver of the right to be present."[217] But one commentator has argued for eliminating the "talismanic significance" ascribed to the commencement of trial.[218] The reasoning is simple: "A defendant who is informed that his trial will be held at a certain time and place and declines an invitation to participate would seem to have little standing to complain."[219] This is the very logic implicit in the claim that Awlaki should have been granted a full trial in absentia.

Outlawry takes this logic a step further. An alleged citizen-terrorist whose status as an outlaw is well promulgated worldwide could be presumed to know that his refusal to surrender to authorities would cost him the benefit of a trial. Additionally, interpreting the outlaw's refusal to appear for trial as a constructive waiver of his right to trial accords with the logic of *Allen* and

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Rights: Disquiet in the Citadel, 84 HARV. L. REV. 1, 8 (1970).

212. 397 U.S. 337 (1970).

213. For an extended discussion of various types of waiver and inconsistencies in the Court's approach to analyzing the voluntariness underlying waivers, see Tigar, *supra* note 211, at 7-25.

214. *Allen*, 397 U.S. at 346.

215. 414 U.S. 17 (1973).

216. *Id.* at 20.

217. Crosby v. United States, 506 U.S. 255, 261-62 (1993).

218. Starkey, *supra* note 50, at 721, 742-43.

219. *Id.* at 742.

Taylor in that it prevents the putative defendant from indefinitely escaping the sentence for which he would have been eligible under a guilty verdict. The costs of indefinite escape are too high in the case of an alleged terrorist intent on waging war against the state as a fugitive at large.

Importantly, the defendant's mere absence in response to a summons would not be interpreted as a waiver of his due process rights. The waiver would instead be predicated on the satisfaction of rigorous notice requirements and other procedural precautions designed to secure corroboration of the intent to waive.[220]

C. Attainder

A last possible objection to the constitutionality of outlawry requires close analysis of the meaning of the Article I Bill of Attainder Clause[221] and the Article III Attainder of Treason Clause.[222] Although attainder was once the immediate effect of a judgment of outlawry, so too was attainder the "inseparable consequence" of a death sentence.[223] Yet capital punishment has remained alive and well in the United States without implicating attainder. If resurrected, outlawry promises the same.

For most of the twentieth century, the Supreme Court defined an Article I bill of attainder as a law that (1) imposes punishment (2) on specific individuals (3) without a judicial trial.[224] In recent years, litigants have made expansive use of the prohibition—to bring habeas petitions, to invalidate regulatory schemes, and to challenge a state constitutional amendment banning same-sex marriage.[225] Most recently, death warrants issued by the Executive have been described as bills of attainder.[226] On July 18, 2012, the American Civil Liberties

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220. *See infra* Section V.B. For a brief discussion of how this distinguishes outlawry from a system under which expatriation is justified through inferred waiver, see *supra* note 181.

221. *See* U.S. CONST. art. I, § 9, cl. 3; *see, e.g.*, LEANNE FIFTAL ALARID, COMMUNITY-BASED CORRECTIONS 312 (9th ed. 2010) ("Outlawry as a form of punishment is not allowed in the United States by virtue of Article I of the Constitution, which forbids 'bills of attainder.'").

222. *See* U.S. CONST. art. III, § 3, cl. 2.

223. 4 BLACKSTONE, *supra* note 76, at *373.

224. *See* Selective Serv. Sys. v. Minn. Pub. Interest Research Grp., 468 U.S. 841, 846-47 (1984) (citing Nixon v. Adm'r of Gen. Servs., 433 U.S. 425, 468 (1977)); United States v. Lovett, 328 U.S. 303, 315 (1946).

225. *See* Jacob Reynolds, *The Rule of Law and the Origins of the Bill of Attainder Clause*, 18 ST. THOMAS L. REV. 177, 177-78 (2005).

226. Alford, *supra* note 60, at 1210; *see also* Ullmann v. United States, 350 U.S. 422, 452 n.5 (1956) (Douglas, J., dissenting) ("The guarantee of jury trial and the prohibition of Bills of

Union and the Center for Constitutional Rights invoked the Article I provision in their lawsuit for the wrongful deaths of Awlaki, Samir Khan, and Awlaki's teenaged son.[227]

But, broadly speaking, the Executive's current targeted killing policy does not implicate bills of attainder. Article I is devoted to prescribing limits on *Congress's* powers.[228] Former Chief Justice William Rehnquist has described a bill of attainder as a "precise legal term[]" that refers to "a *legislative act* that singled out one or more persons and imposed punishment on them, without benefit of trial."[229]

Irrespective of whether an Executive-issued death warrant constitutes a bill of attainder, an outlawry statute decidedly does not. Bills of attainder were repugnant to the Founders because they amounted to the legislature—or, under the death warrant theory, the President—usurping the courts' role in judging an individual's guilt and determining the appropriate punishment.[230] A federal statute that permits the courts alone to issue a judgment of outlawry and an execution sentence in any individual case would involve no such usurpation.[231]

The Attainder of Treason Clause would seem more likely to pose problems for court-issued outlawry proceedings where the terrorist act is categorized as a crime of treason, since it is located in Article III, which lays out the scope of judicial power. The provision states: "The Congress shall have power to

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Attainder place beyond the pale the imposition of infamy or outlawry by either the Executive or the Congress.").

227. Complaint at 16, Al-Aulaqi v. Panetta, No. 12-cv-01192 (D.D.C. July 18, 2012).

228. *Cf.* Ryan Alford, *Outlawry and Indeterminacy: Mere Formalistic Concerns?*, CATO UNBOUND (June 17, 2011, 2:21 PM), http://www.cato-unbound.org/2011/06/17/ryan-alford/outlawry-and-indeterminacy-mere-formalistic-concerns ("Allowing *the president* to declare a citizen an outlaw, who then effectively has no legal rights and can be killed on sight pursuant to the president's order to do so, dispenses with the centuries of collected wisdom about due process and the rule of law embodied in the U.S. Constitution." (emphasis added)).

229. WILLIAM H. REHNQUIST, THE SUPREME COURT: HOW IT WAS, HOW IT IS 166 (1987) (emphasis added). For example, a 2010 bill that Representative Charles Dent introduced in the House to revoke Awlaki's citizenship represents an overtly problematic congressional attempt to single out an individual for punishment in violation of the Bill of Attainder Clause. H.R. Res. 1288, 111th Cong. (2010); *see supra* note 181.

230. REHNQUIST, *supra* note 229.

231. At the heart of even broad legal interpretations of the Bill of Attainder Clause is the legislature's usurpation of the role of the courts in issuing judgments, a problem not posed by a carefully crafted outlawry statute that reserves the judgment for the judiciary. *See, e.g.*, United States v. Brown, 381 U.S. 437, 442 (1965) (rejecting an overly narrow definition of the Bill of Attainder Clause but describing the Clause as "a general safeguard against . . . trial by *legislature*" (emphasis added)).

declare the punishment of treason, but no attainder of treason shall work corruption of blood, or forfeiture except during the life of the person attainted." But as emphasized by Edward Everett in 1864, the Article III provision merely prohibits the *effect* of an attainder of treason.[232] For instance, the "essence of attainder" was the corruption of the blood, which punished the felon's innocent relatives into perpetuity.[233] Establishing varied forms of punishment for treason, meanwhile, was well within the legislature's powers. Everett observed, "Congress may impose the penalty of fine, or imprisonment, or outlawry, or banishment, or forfeiture, or death, or of death and forfeiture of property, personal and real."[234]

V. UPDATING OUTLAWRY

As discussed in the previous Part, nothing in the Constitution precludes the modern resurrection of outlawry so long as the punitive qualities of the practice are properly balanced with process. This Part uses the theoretical principles underlying outlawry to hammer out specific conditions that must be met for outlawry proceedings to serve as a legitimate check on the Executive's use of lethal force. It then discusses how the practice of outlawry could be adjusted to meet certain legal and practical concerns important to its modern viability.

A. An Approach to Procedural Sufficiency

History makes clear that the outlawry proceedings are not fair and effective simply by virtue of involving the courts. The proceedings must be designed to punish the fugitive in flight only after satisfactory efforts have been made to compel his appearance. Failure to put this tenet into practice would undermine the legitimacy of a modern outlawry regime.

Outlawry law in North Carolina featured significant departures from these common law ideals and offers a helpful sketch of the deficiencies that modern outlawry must avoid. In 1976, a federal district court held that North Carolina's outlawry statute was unconstitutional because it was procedurally deficient under the Due Process Clause of the Fourteenth Amendment in four respects.[235] First, it did not require a probable cause determination by a neutral

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232. 9 FRANK MOORE, THE REBELLION RECORD: A DIARY OF AMERICAN EVENTS, SUPPLEMENT 712 (New York, G.P. Putnam 1868).

233. *Id.* at 712-13.

234. *Id.*

235. Autry v. Mitchell, 420 F. Supp. 967, 970 (E.D.N.C. 1976).

judicial officer.[236] Second, the statute did not require an arrest warrant or grand jury indictment.[237] Third, the statute did not require an arrest warrant or other process to be served and returned, showing that the accused was not to be found within the jurisdiction.[238] Finally, the outlawry proclamation was issued ex parte and did not require notice and an opportunity for the fleeing felon to be heard.[239]

In short, the court enumerated flaws not fatal to outlawry as a legal instrument. In fact, the legitimacy of outlawry at various points in English history and in early Pennsylvania was predicated on protections designed to preclude the very defects that the district court identified. A state legislature intent on preserving outlawry presumably could have tailored the statute to require a probable cause determination, an arrest warrant or indictment, good faith attempts at serving the warrant or indictment, and adequate safeguards designed to ensure notice to the prospective outlaw.

The rest of this Part travels the road not taken by the 1976 North Carolina state legislature. It borrows principles of outlawry from English common law to craft conditions under which alleged citizen-terrorists who refuse to surrender to criminal prosecution may be targeted for death. Again, as emphasized in the previous Part, outlawry proves as restrictive a theoretical framework as it is justificatory. The schema described below avoids the procedural pitfalls of North Carolina's outlawry statute, which was subject to repeated challenge in the 1970s for reasons related to probable cause, notice, cruel and unusual punishment, and arbitrary application.[240]

B. Necessary Conditions for Lawful Modern Outlawry

1. Congressional Authorization

Congress must pass a law to authorize the use of lethal force against terror suspects deemed outlaws. The statute could spell out the processes by which a court may issue a judgment of outlawry, or leave the specifics of their formulation to the judiciary.[241] A practical option might be the creation of a

236. *Id.*

237. *Id.*

238. *Id.*

239. *Id.*

240. *This is the Law: Outlaws . . . , supra* note 132.

241. The Posse Comitatus Act, ch. 263, 20 Stat. 152 (1878) (codified at 18 U.S.C. § 1385 (2006)), prohibits military personnel from being used to enforce domestic law on American soil. But

court specially designated to carry out outlawry proceedings. The relative infrequency with which the government expects to outlaw and execute Americans could also make it more efficient to relegate the proceedings to the D.C. courts.

The legitimacy of a modern outlawry statute would turn in part on how narrowly outlawry-eligible crimes are defined. Recall that at common law, an outlaw could be executed upon a judgment of outlawry on the theory that the outlawry in criminal proceedings amounted to a conviction for the underlying crime.[242] A modern statute must require that a fleeing felon be outlawed only for clearly defined capital crimes. Further, modern outlawry would ideally be reserved for alleged terrorists charged with serious and specific crimes against the United States. In eighteenth-century New York, for instance, outlawry was eventually abolished except for use against fugitives indicted for or convicted of treason.[243] A similar guiding principle would help establish outlawry as an exceptional weapon of last resort.

Like any other category of crime, terrorist acts can be differentiated according to their capital nature; they need not be hazy and ill-defined. For example, under the federal statute 18 U.S.C. § 2339A, which concerns the provision of material support to terrorists, the maximum penalty is fifteen years in prison unless the activity has resulted in a death.[244] On the other hand, the definition of enemy combatant offered by the Combatant Status Review Tribunal under the George W. Bush Administration features exactly the kind of open-ended language that a statute laying out outlawry-eligible crimes must avoid.[245]

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the prohibition does not apply where Congress grants such authority to a branch of the armed forces, establishes general rules for certain types of military assistance, or creates narrowly crafted legislation for particular circumstances. Even if the Act is inapplicable outside the United States, supplemental provisions in 10 U.S.C. §§ 371-381 contain similar prohibitions that likely apply worldwide. CHARLES DOYLE, CONG. RESEARCH SERV., 95-964S, THE POSSE COMITATUS ACT AND RELATED MATTERS: THE USE OF THE MILITARY TO EXECUTE CIVILIAN LAW 46 (2000). In any case, Congress may expressly authorize military involvement in enforcing domestic law. *See, e.g.*, 10 U.S.C. § 375 (2006).

242. *See supra* Section II.A.

243. *See* United States v. Hall, 198 F.2d 726, 728 n.2 (2d Cir. 1952).

244. 18 U.S.C. § 2339A (2006).

245. An enemy combatant is "an individual who was part of or supporting Taliban or Al Qaida forces, or associated forces that are engaged in hostilities against the United States or its coalition partners. This includes any person who has committed a belligerent act or has directly supported hostilities in aid of enemy armed forces." Memorandum from Deputy Sec'y of Def. (July 14, 2006), http://www.defense.gov/news/Aug2006/d20060809CSRTProcedures.pdf.

2. *Formal Charges*

The Obama Administration never initiated prosecution against Awlaki for terrorism. A judgment of outlawry, however, derives its legitimacy from the fugitive's refusal to submit to formal charges.

Requiring the Executive to articulate the conduct that warrants a suspect's status as a death-eligible target serves two important functions. First, it provides the target with a clear statement of his alleged crimes, which he may then choose to repudiate. Second, it keeps the public informed as to what kinds of conduct warrant the targeting of a citizen—information to which every citizen, as a potential target, is entitled.

The facts of the Awlaki case demonstrate the advantages of restricting the use of lethal force to those whose crimes the government is able to articulate and whose ties to designated terrorist groups are well defined. Awlaki used technology to agitate for war. But the question that lingers in the wake of his death is whether and which of his activities made him a legitimate target of lethal force. The Obama Administration claims that Awlaki was an external operations leader who, among other things, directed the 2009 Christmas Day plot to blow up a plane bound for Detroit.[246] But by some reports, Awlaki was merely the confirmed voice and radicalizing force behind an enormous body of work that includes calls for terrorism against the United States.[247] Some scholars have pointed to the lack of available evidence establishing that Awlaki was more than an influential recruiter and motivational force for Al Qaeda in the Arabian Peninsula.[248] Still others have questioned Al Qaeda in the Arabian Peninsula's status as an Al Qaeda "co-belligerent," and whether force against Awlaki was accordingly authorized under the Authorization for Use of Military Force.[249]

As a practical matter, the government should be able to charge alleged

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246. Carol J. Williams, *Awlaki Death Rekindles Legal Debate on Targeting Americans*, L.A. TIMES, Sept. 30, 2011, http://articles.latimes.com/2011/sep/30/world/la-fg-awlaki-due-process-20111001. In 2010, one official described Awlaki as more dangerous than Osama bin Laden. *See* Matthew Cole & Aaron Katersky, *Awlaki: 'The Most Dangerous Man in the World,'* ABC NEWS (Nov. 10, 2010), http://abcnews.go.com/Blotter/awlaki-dangerous-man-world/story?id=12109217.

247. J.M. Berger, *Gone but Not Forgotten*, FOREIGN POL'Y, Sept. 30, 2011, http://www.foreignpolicy.com/articles/2011/09/30/Anwar_al_Awlaki_dead_but_not_forgotten.

248. *See, e.g.*, Bruce Ackerman, *Obama's Death Panel*, FOREIGN POL'Y, Oct. 7, 2011, http://www.foreignpolicy.com/articles/2011/10/07/obamas_death_panel ("Nobody suggests that Awlaki was one of al Qaeda's leading military strategists. His real weapon was his impassioned anti-American sermons . . . .").

249. Pub. L. No. 107-40, 115 Stat. 224 (2001). *See* Cole, *supra* note 200.

terrorists without presenting sensitive intelligence to a civilian grand jury.[250] To file any charges that could lead to the outlawing of the suspect, the government should be forced to meet the standard required of a grand jury indictment—a preponderance of the evidence—before a judge in camera. Here it might be useful to consider the process by which the State Department presently makes formal foreign terrorist organization (FTO) designations. After identifying a prospective FTO, the Bureau of Counterterrorism compiles an administrative record that includes classified information establishing that the statutory requirements for the designation have been satisfied.[251] In outlawry proceedings, such a record would be subject to judicial review.

To avoid being outlawed, the accused could be given a deadline by which to respond to the charges, instead of being granted successive opportunities to appear as part of an elaborate exacting process. Once outlawed, he could then be given a window within which to appeal. For example, by law, an FTO may seek judicial review of its designation in the United States Court of Appeals for the D.C. Circuit within thirty days of the decision's publication in the *Federal Register*.[252] Similarly, an outlaw could be granted a brief grace period, during which time he is safe from targeting and may surrender unharmed.

3. Notice

A secret hit list has no legitimacy under outlawry principles. Notice is essential to due process, and has been, throughout history, critical to outlawry's fair function as a criminal conviction.[253]

Notice is the obvious counterpart to formal charges, which lose purpose if not communicated to the target and the public. The release of the names of citizens on the government's target list not only offers the option of surrender

250. *See, e.g.*, Amanda Schaffer, Comment, *Life, Liberty, and the Pursuit of Terrorists: An In-Depth Analysis of the Government's Right To Classify United States Citizens Suspected of Terrorism as Enemy Combatants and Try Those Enemy Combatants by Military Commission*, 30 FORDHAM URB. L.J. 1465, 1475-76 (2003). Indictments are not considered essential to due process. In *Hurtado v. California*, 110 U.S. 516 (1884), the Supreme Court held that a state's use of an information instead of a grand jury indictment did not constitute a denial of due process of law, with explicit reference to the use of informations at common law. *Id.* at 538.

251. Bureau of Counterterrorism, *Foreign Terrorist Organizations*, U.S. DEP'T OF ST. (Sept. 28, 2012), http://www.state.gov/j/ct/rls/other/des/123085.htm. The Secretary of State makes the designation and gives Congress seven days to block it. *Id.* In contrast, only a court would be able to "designate" an individual an outlaw.

252. *Id.*

253. *See supra* Section II.A.

to the accused before and after they are outlawed,[254] but also informs those who interact with the target that they risk becoming collateral damage. In the face of a secret killing regime, on the other hand, the public is left to hope that the name of a prospective target will be leaked to the press.[255]

In his dissent in *Hamdi*, Justice Thomas dismissed the notion that the government need give terrorists notice and an opportunity to respond before bombing them abroad. He is not alone.[256] Such a requisite is easily caricatured, as in the following statement: "The CIA, before firing a missile, need not and should not invite Osama bin Laden or his lawyer to a hearing to contest whether he is, in fact, a committed member of Al Qaeda."[257] But I challenge this position. Offering an alleged terrorist notice *every time* the government plans a strike against him would of course be self-defeating. But it is far from absurd to demand that the government issue notice of a citizen's prospective and successful addition to a kill list.

Government leaks revealed Awlaki had been added to the CIA's kill list almost two years before he was successfully targeted.[258] I recognize that the government may nonetheless protest the formal release of target names as a compromise of covert operations. But this Note has taken the position that the government's refusal to identify Americans it intends to kill is an unequivocal violation of due process, a fact unchanged by the government's compelling strategic justifications for that denial.

In the age of the Internet, the logistics of providing notice should present few insurmountable hurdles even when the fugitive's whereabouts are unknown. At minimum, like organizations designated as FTOs, the names of citizens facing outlawry and, subsequently, execution should be published on a central government database, at which point global media outlets could be expected to spread the news far and wide. More creative avenues could also be worth pursuing. As Awlaki demonstrated in YouTube video after YouTube

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254. *See supra* Subsection I.B.3.

255. Such leaks are often the confusing product of officials speaking on condition of anonymity. *See, e.g.*, Dana Priest, *U.S. Military Teams, Intelligence Deeply Involved in Aiding Yemen on Strikes*, WASH. POST, Jan. 27, 2010, http://www.washingtonpost.com/wp-dyn/content/article/2010/01/26/AR2010012604239.html (reporting that an anonymous intelligence official had stated that Awlaki was among three U.S. citizens on the CIA's kill-or-capture list—a statement that the source later retracted as a misunderstanding, according to a correction appended to the article).

256. Hamdi v. Rumsfeld, 542 U.S. 507, 597 (2004) (Thomas, J., dissenting).

257. Murphy & Radsan, *supra* note 30, at 446.

258. Priest, *supra* note 255.

video,[259] technology can be used to incite terrorism with unprecedented efficiency. The time is ripe to explore technology's uses as another kind of conduit—a conduit for legal notice in the extraordinary counterterrorism context.

4. Reversal of Outlawry upon Surrender

As Judge Bates recognized in his decision, international and domestic law would have barred the U.S. government from authorizing Awlaki's killing had he peacefully surrendered himself to a U.S. embassy.[260] In this respect, outlawry principles reflect the sensibilities of modern jurisprudence. Because lethal force is warranted specifically when the outlaw rejects the legal system, outlawry principles demand restoration of the appropriate protections to the target who returns within the parameters of that system.[261]

A process that allows the terrorist to surrender and reclaim the right to trial ensures that trial rights are revoked only when necessary. As discussed in Section II.A, since at least the time of Edward VI, an outlaw could seek reversal if he submitted himself to the legal process within a year of the judgment. As described in Section II.B, outlawry was issued against the Doans in early Pennsylvania specifically while they terrorized the countryside. When the threat abates and the terrorist avails himself of the law, so abates the justification for use of lethal force.

Outlawry principles alone cannot resolve the practical problems that might hinder a suspect from communicating his intention to surrender. And it is not clear that the government is obliged to devote resources grossly disproportionate to the likelihood that the surrender option would be exercised in order to resolve all of these issues. But certain steps must be taken to craft sensible surrender protocol and avoid reducing the option of reversal to a sham. To start, after a court declares an American an outlaw, the government could issue a brief list of avenues of surrender and the procedures by which the fugitive could assert each option. Consider Judge Bates's suggestion that Awlaki could surrender himself to the embassy in Sana'a, a seemingly simple option complicated by the fact that hundreds of miles separate Sana'a from the

259. *YouTube Removes Video Sermons by al-Awlaki*, CBS NEWS (Nov. 4, 2010, 11:28 AM), http://www.cbsnews.com/2100-205_162-7021533.html.

260. Al-Aulaqi v. Obama, 727 F. Supp. 2d 1, 17 (D.D.C. 2010).

261. The Obama Administration has conceded the importance of ensuring that its use of lethal force conforms to the principle of necessity as required by the law of war. Brennan, *supra* note 179.

mountains where Awlaki was thought to be hiding.[262] For its part, the government could have prescribed that Awlaki send a message declaring his intent to surrender in advance of his arrival at the consulate and conferred with the consulate to ensure protocols were in place both for receiving Awlaki into custody and protecting itself against duplicity.

C. Additional Considerations and Restrictions

Even with protocol for protections such as notice and surrender firmly in place, resurrecting outlawry raises concerns about opening the door to its overuse and arbitrary application. In particular, the government's already-strident targeting of noncitizen-terrorists prompts two critical questions. First, could outlawry be abused to authorize the execution of large numbers of Americans? Second, why not extend the judicial protections offered by outlawry to noncitizen targets? The answers are related. Simply put, the government must be limited to employing outlawry strictly to fight terrorism abroad. This restriction in turn complicates the attempt to extend outlawry to noncitizens.

With respect to using outlawry to declare large numbers of citizens "death-eligible," a number of checks already exist or could be specially implemented to restrict the practice. Importantly, international humanitarian law and international human rights law already restrict a state's ability to conduct a targeted killing in the territory of another state with which it is not in armed conflict.[263] To conduct drone strikes in foreign territory, the United States has relied heavily on its right to exercise self-defense, as provided under Article 51

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262. Alford, *supra* note 60, at 1255-57. Alford argues that Judge Bates made two other problematic assumptions in addition to presupposing that Awlaki had the notice necessary to challenge his own status as a target: first, that the government would act in accordance with the Constitution after having decided Awlaki was not protected by it; and second, that Alwaki had access to the kind of technology that would enable him to make contact with counsel while hiding in the mountains. *See id.*

263. Alston Report, *supra* note 10, ¶¶ 34-35; *see also* Abraham D. Sofaer, *The Sixth Annual Waldemar A. Solf Lecture in International Law: Terrorism, the Law, and the National Defense*, 126 MIL. L. REV. 89, 106 (1989) (describing territorial sovereignty as a major legal constraint on taking actions against terrorists in foreign countries, but explaining that the national defense may require breach where states fail their obligation to control terrorist activities taking place within their borders). In Pakistan, however, the U.S. government is reportedly operating under the curious assumption that it has tacit consent to conduct its drone strikes, despite the country's public opposition to the program. Adam Entous, Siobhan Gorman & Evan Perez, *U.S. Unease Over Drone Strikes*, WALL ST. J., Sept. 26, 2012, http://online.wsj.com/article/SB10000872396390444100404577641520858011452.html.

of the United Nations Charter,[264] but the government would be unable to deploy this reasoning to outlaw and execute an American accused of a capital offense unrelated to terrorist activity.[265]

Additionally, a statutory provision that prohibits the government from outlawing Americans or executing Americans already declared outlaws on American soil would be consistent with basic principles of law enforcement. Use of lethal force is not presumptively unconstitutional in the domestic law-enforcement context[266]—as discussed in Part II, it has been condoned when necessary to effect the arrest of fleeing felons. But such use must not be premeditated,[267] which eliminates the possibility of domestic outlawry. Moreover, capture would not be strategically infeasible inside the United States in the way it is among hostile forces in foreign territory. Rather than functioning as a last resort, the use of outlawry within the United States would amount to bypassing our wholly adequate criminal justice system.[268]

Finally, this Note does not mean to suggest that citizens alone have a right to due process before being placed on the government's kill list.[269] For over a century, the Supreme Court has upheld the idea that foreign nationals living within American borders are "persons" within the meaning of the Constitution and afforded those rights that the Constitution does not expressly reserve for

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264. The George W. Bush Administration relied on the influential Parks Memorandum to invoke this reasoning and justify targeting individuals who posed a direct threat to American citizens in peacetime. BLUM & HEYMANN, *supra* note 21, at 78. In 2010, State Department Legal Advisor Harold Koh appeared to use similar reasoning to defend the Obama Administration's drone strikes, declaring that a state involved in either "armed conflict or legitimate self-defense" need not provide citizen-targets legal process before using lethal force against them. Harold Hongju Koh, Legal Adviser, U.S. Dep't of State, Keynote Address at the Annual Meeting of the American Society of International Law (Mar. 25, 2010) (transcript available at http://www.state.gov/s/l/releases/remarks/139119.htm). *But see* Michael Lewis, *Why IHL and Not Self-Defense Should Be Considered the Legal Basis for the Awlaki Operation*, LAWFARE (Sept. 30, 2011, 3:41 PM), http://www.lawfareblog.com/2011/09/guest-post-from-mike-lewis-on-awlaki-and-neutrality-law.

265. It is well accepted that the inherent right to self-defense is restricted to what is necessary and proportionate to repel an attack. Baker, *supra* note 177, at 33-34.

266. Dehn & Heller, *supra* note 17, at 176 (Dehn, Opening Statement).

267. MELZER, *supra* note 22, at 423.

268. For a discussion of the government's obligation to exercise due diligence in apprehending a suspect fleeing prosecution, see Bruce A. Green, *"Hare and Hounds": The Fugitive Defendant's Constitutional Right To Be Pursued*, 56 BROOK. L. REV. 439 (1990).

269. The protections of the Due Process Clause are not limited to citizens: "No person shall be . . . deprived of life, liberty, or property, without due process of law." U.S. CONST. amend. V.

citizens.[270] But I discuss outlawry specifically as it applies to citizens since their right to constitutional protections while *outside* the country's borders is much more clearly established than that of noncitizens abroad and in flight.[271] Also, I acknowledge that extending outlawry principles to noncitizens with no allegiance to the United States would implicate theoretical concerns and legal issues not discussed in this Note. Since outlawry is premised on the idea that the lawlessness of those properly subject to a legal system may warrant casting them outside of the system.

That said, selectively protecting Americans from the government's use of lethal force has some troubling implications from a strategic perspective to say nothing of the moral implications. Such an approach gives terrorist organizations added incentive to recruit American followers, by some accounts already an active Al Qaeda undertaking.[272] A coherent counterterrorism strategy would seem to favor establishing roughly equitable legal approaches to incapacitating citizen- and noncitizen-terrorists.

CONCLUSION

In the case of Anwar al-Awlaki, the executive branch used lethal force against an American citizen without initiating criminal prosecution ex ante or disclosing its legal justifications ex post.[273] The Obama Administration's

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270. David Cole, *Are Foreign Nationals Entitled to the Same Constitutional Rights as Citizens?*, 25 T. JEFFERSON L. REV. 367, 370 (2003). But the Supreme Court has also permitted foreign nationals to be treated differently on account of race. *Id.* at 368-69.

271. *See* Jed Rubenfeld, *The End of Privacy*, 61 STAN. L. REV. 101, 151 (2008) ("Our Constitution does not protect people outside this country in the way it protects people inside."); *see also* Al-Maqaleh v. Gates, 605 F.3d 84 (D.C. Cir. 2010) (borrowing a multi-factor analysis from *Boumediene* that includes examination of the citizenship of the detainee, and effectively finding that where the government apprehends an alien abroad and detains him within a theater of war, habeas does not apply); People's Mojahedin Org. of Iran v. U.S. Dep't of State, 182 F.3d 17, 22 (D.C. Cir. 1999) (declaring that a foreign national "without property or presence in this country has no constitutional rights, under the due process clause or otherwise").

272. Robert Miniter, *Was Obama Right To Kill Awlaki?*, DAILY BEAST (Sept. 30, 2011, 4:10 PM), http://www.thedailybeast.com/articles/2011/09/30/anwar-al-awlaki-and-why-president-barack-obama-is-right-to-kill-u-s-citizens.html; *see also* Rick "Ozzie" Nelson & Ben Bodurian, *A Growing Terrorist Threat? Assessing "Homegrown" Terrorism in the United States*, CENTER FOR STRATEGIC & INT'L STUD. (Mar. 2010), http://www.csis.org/files/publication/100304_Nelson_GrowingTerroristThreat_Web.pdf (describing five incidents from 2009, including the recruitment of two dozen young Somali Americans to fight for al-Shabaab, as part of a pattern of rising "homegrown" terrorism).

273. *See* Charlie Savage, *Secret U.S. Memo Made Legal Case To Kill a Citizen*, N.Y. TIMES, Oct. 8,

interpretation of Awlaki's death as a legitimate military measure is disturbing in that it suggests no limits on the Executive's authority to kill as it deems appropriate in the "everywhere and forever war"[274] against terrorism.[275]

But targeted killing advocates insist that the practice is indispensable to defeating a "decentralized, free-scale terrorist network" like Al Qaeda.[276] And the institutionalization of targeted killings is well under way.[277]

According to defense officials, Predator and Reaper drone missiles are as commonplace as modern-day "cannon fire,"[278] and the death toll indicates that their use is not confined to high-value foreign targets.[279] By one estimate, as of July 14, 2012, drone strikes ordered under the Obama Administration had killed a total of between 1,507 and 2,438 people in Pakistan alone, including between 148 and 309 civilians.[280]

The stakes involved in the familiar tradeoff between security and liberty are nowhere higher than in the realm of targeted killings. But this Note declines to

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2011, http://www.nytimes.com/2011/10/09/world/middleeast/secret-us-memo-made-legal-case-to-kill-a-citizen.html.

274. *A Call to Courage: Reclaiming Our Liberties Ten Years After 9/11*, ACLU 9 (Sept. 2011), http://www.aclu.org/files/assets/acalltocourage.pdf.

275. White House officials speaking on condition of anonymity have acknowledged only that Awlaki's citizenship required that the President grant special approval to Awlaki's placement on the CIA's target list. Greg Miller, *Muslim Cleric Aulaqi Is 1st U.S. Citizen on List of Those CIA Is Allowed To Kill*, WASH. POST, Apr. 7, 2010, http://www.washingtonpost.com/wp-dyn/content/article/2010/04/06/AR2010040604121.html.

276. *See* John Yoo, *Assassination or Targeted Killings After 9/11*, 56 N.Y.L. SCH. L. REV. 57, 63-69 (2011).

277. For example, the Obama Administration has reportedly constructed an advanced blueprint called a "disposition matrix" to aid in the continued targeting of terrorists. Greg Miller, *Plan for Hunting Terrorists Signals U.S. Intends To Keep Adding Names to Kill Lists*, WASH. POST, Oct. 23, 2012, http://www.washingtonpost.com/world/national-security/plan-for-hunting-terrorists-signals-us-intends-to-keep-adding-names-to-kill-lists/2012/10/23/4789b2ae-18b3-11e2-a55c-39408fbe6a4b_story.html.

278. Adam Entous, *Special Report—How the White House Learned To Love the Drone*, U.K. REUTERS (May 19, 2010, 3:03 AM), http://uk.reuters.com/article/2010/05/19/uk-pakistan-drones-idUKTRE64H5U720100519.

279. In May 2010, U.S. counterterrorism officials stated that since the summer of 2008, CIA drones had killed approximately 500 foreign militants in Pakistan, of whom 14 were considered top-tier militant targets, and another 25 mid- to high-level targets. *Id.* In August 2011, unidentified CIA agents admitted that since May 2010, drones had killed more than 600 militants. Scott Shane, *C.I.A. Is Disputed on Civilian Toll in Drone Strikes*, N.Y. TIMES, Aug. 11, 2011, http://www.nytimes.com/2011/08/12/world/asia/12drones.html.

280. Peter Bergen & Jennifer Rowland, *Civilian Casualties Plummet in Drone Strikes*, CNN (July 14, 2012, 12:20 PM), http://www.cnn.com/2012/07/13/opinion/bergen-civilian-casualties/index.html.

arbitrarily fix the dividing line somewhere between no process and full due process, and call the result a solution. I argue instead for a theoretically coherent, centuries-old alternative: outlawry proceedings that compel the prospective target to make the choice that will determine the content of his due process rights. This response-contingent model of due process offers government targets the protections to which every citizen is entitled in peacetime, narrowed only as necessitated by the national security demands of an unending war.