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## DEBATE

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### TARGETED KILLING: THE CASE OF ANWAR AL-AULAQI

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In April 2010, U.S. officials announced that Anwar Al-Aulaqi, a Muslim cleric and dual U.S.-Yemeni citizen, was added with the approval of the White House to a list of suspected terrorists that the CIA is authorized to kill. In December 2010, United States District Court Judge John Bates dismissed a suit brought by Mr. Al-Aulaqi's father which challenged the constitutionality the order without judicial review. Judge Bates held that Al-Aulaqi's father lacked standing and that the decision was unreviewable under the political question doctrine.

West Point Professor John C. Dehn argues that while the addition of Al-Aulaqi to the CIA's kill list may be controversial, it is not presumptively unlawful or unconstitutional and thus Bates's disposition was correct. Dehn goes on to contend that Judge Bates's discussion of the political question doctrine was unnecessary given his standing decision and vague in its application. Dehn posits that Supreme Court precedent clearly allows for judicial review of executive war measures, and suggests that a "probable cause" standard for targeted killing is the most prudent and workable one available.

Professor Kevin Jon Heller of Melbourne Law School argues in rebuttal that despite any international law issues raised by Judge Bates's opinion, the crux of the holding in *Al-Aulaqi* is that executive power is nearly unbounded in making the determination at issue. Further, Heller points out that the solutions to the standing issue identified by the court are "illusory" given that unlike Al-Aulaqi, most American citizens on the "kill list" have no idea they are on it. Heller ultimately concludes that Judge Bates's opinion forecloses judicial review of such determinations while claiming that it does no such thing. Targeted individuals thus might turn themselves in only to find their status unreviewable as a political question.

## OPENING STATEMENT

*A Proposal for Judicial Review of Lethal War Measures*John C. Dehn<sup>†</sup>

## INTRODUCTION

Department of Justice statistics for 2003 to 2005 report 1095 arrest-related homicides by law enforcement officers in the United States. CHRISTOPHER J. MUMOLA, BUREAU OF JUSTICE STATISTICS, U.S. DEP'T OF JUSTICE, NO. NCJ 219534, SPECIAL REPORT: ARREST-RELATED DEATHS IN THE UNITED STATES, 2003–2005, at 1 (2007), *available at* <http://bjs.ojp.usdoj.gov/content/pub/pdf/ardus05.pdf>. The report also states that while three-quarters of these deaths involved the attempted arrest of suspected violent felons, only “9% [of the victims] would have been charged with the murder or attempted murder of a law enforcement officer, 17% would have been arrested for assaulting an officer, and 2% would have been charged with obstruction of police activity or resisting arrest.” *Id.* at 2. And yet, related FBI statistics for that period indicate that up to 1081 (98.7%) of these homicides were lawful. FED. BUREAU OF INVESTIGATION, CRIME IN THE UNITED STATES 2005, EXPANDED HOMICIDE DATA TABLE 13 (2005), *available at* [http://www2.fbi.gov/ucr/05cius/offenses/expanded\\_information/data/shrtable\\_13.html](http://www2.fbi.gov/ucr/05cius/offenses/expanded_information/data/shrtable_13.html). Thus, almost all of these “extrajudicial killings” of U.S. citizens (or others presumably entitled to Bill of Rights protections) may have been lawful in the specific context in which they occurred.

I mention these statistics not to minimize the grave issues at stake in this Debate, but to place them in context. Notwithstanding the intense focus on the Anwar Al-Aulaqi case, the extrajudicial use of lethal force is sometimes a necessary aspect of domestic law enforcement, and is often an essential aspect of armed conflict and national defense. It is not presumptively inconsistent with the Constitution and laws of the United States. The threshold issue in the lawsuit involving

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Anwar Al-Aulaqi's potential targeted killing is whether the executive branch may target him for attack without ex ante judicial review. *Al-Aulaqi v. Obama*, No. 10-1469, 2010 U.S. Dist. LEXIS 129601 (D.D.C. Dec. 7, 2010). In my view, the answer is a conditional "yes." Anwar Al-Aulaqi is a dual Yemeni-U.S. citizen, currently believed to be in Yemen. He is also a self-professed member of al-Qaeda in the Arabian Peninsula (AQAP) orchestrating violent attacks against the United States, its allies, and interests. Just as the Constitution allows law enforcement officers a measure of discretion in the use of lethal force domestically, it grants the President and his subordinates (likely greater) discretion to use lethal force in defense of the nation abroad. This is a separate question from whether the Constitution permits or requires judicial review of the exercise of that discretion and the appropriate legal framework or standard for such a review. These latter topics are the proper focus of this Debate.

The targeted killing of nonstate actors in acts of national self-defense not involving armed conflict, or beyond active battlefields in an extant armed conflict or occupation, involves difficult and contested issues of international law. Significant constitutional questions further complicate matters in Anwar Al-Aulaqi's case. Although a lawyerly "it depends" response is unsatisfying, the legality of Al-Aulaqi's targeted killing, if it occurs, will depend upon its precise context.

While Judge Bates's decision to dismiss the case brought on behalf of Anwar Al-Aulaqi was correct, this Opening Statement will explain why his discussion of the political question doctrine was potentially overbroad. It will then briefly offer some thoughts about the constitutional standard that should govern any judicial review of the killing of a U.S. citizen in armed conflict. I reserve the discussion of the international legal framework for my Closing Statement.

## I. THE CONTEXT OF THE CASE

The complaint filed by Nasser Al-Aulaqi, Anwar's father, portrays the (alleged) impending attack on Al-Aulaqi as an illegitimate act of national self-defense against an individual. Complaint for Declaratory and Injunctive Relief at 2, *Al-Aulaqi*, 2010 U.S. Dist. LEXIS 129601 (No. 10-1469). It asserts that any targeted killing of Al-Aulaqi would occur "outside of armed conflict" because "[t]he United States is not at war with Yemen, or within it." *Id.* Thus, "both the Constitution and international law prohibit targeted killing except as a last resort to protect against concrete, specific, and imminent threats of death or serious physical injury." *Id.*

The Government's motion to dismiss primarily frames the case as involving an executive-branch decision to target an individual in the context of a congressionally authorized, armed conflict. To maintain flexibility, the Government asserts that any unconfirmed targeting of AQAP is either within the scope of the post-September 11, 2001, Authorization for the Use of Military Force (AUMF) or is supported by "other legal bases under U.S. and international law . . . including the inherent right to national self-defense." Opposition to Plaintiff's Motion for Preliminary Injunction and Motion to Dismiss at 4-5, *Al-Aulaqi*, 2010 U.S. Dist. LEXIS 129601 (No. 10-1469). Therefore, the requested relief would involve the judiciary in executive branch assessments of "whether a particular threat to national security is imminent and whether reasonable alternatives . . . to the use of lethal military force" exist. *Id.* at 19.

## II. WAR AND THE JURISDICTION OF THE FEDERAL COURTS

The jurisdiction of federal courts extends to the review of executive war measures in appropriate cases. Indeed, the mere existence of a substantial body of Supreme Court precedent addressing such matters undermines broad claims that executive actions in armed conflict are inappropriate for judicial review. *See generally* John C. Dehn, *The Commander-in-Chief and the Necessities of War: A Conceptual Framework*, TEMP. L. REV. (forthcoming 2011) (providing a collection and analysis of key precedent). This jurisdiction has traditionally included the ability to review whether the executive has properly identified specific individuals or objects as being within the scope of congressionally authorized hostilities.

For example, early in our nation's history, the Supreme Court found that general grants of admiralty jurisdiction included the power to review maritime captures of suspected enemy ships and property. *See, e.g., The Amiable Nancy*, 16 U.S. (3 Wheat.) 546, 557-58 (1818) ("The jurisdiction of the district court to entertain this suit, by virtue of its general admiralty and maritime jurisdiction, and independent of the special provisions of the prize act of the 26th of June 1812 . . . has been so repeatedly decided by this court, that it cannot be permitted again to be judicially brought into doubt."). Grants of habeas corpus jurisdiction have also permitted judicial review of some detentions and military commissions. *See, e.g., Hamdan v. Rumsfeld*, 548 U.S. 557 (2006); *Rasul v. Bush*, 542 U.S. 466 (2004); *Ex parte Quirin*, 317 U.S. 1 (1942); *Ex parte Milligan*, 71 U.S. (4 Wall.) 2 (1866). In *Boumediene v. Bush*, the Court held that in some circumstances the Constitution not

only permits but requires judicial review of a suspected enemy's indefinite detention in the absence of an adequate substitute. 553 U.S. 723, 795 (2008). Clearly then, courts are not precluded from providing an appropriate remedy by the fact that a case involves executive branch actions in armed conflict.

A case must also be justiciable, meaning appropriate for judicial review. Justiciability doctrines include requirements that plaintiffs have standing to assert their claims, that a case be sufficiently developed or "ripe" for review, and that the subject matter not involve a "political question." A political question is a matter constitutionally committed to the discretion of one or both of the elected branches. See *Al-Aulaqi v. Obama*, No. 10-1469, 2010 U.S. Dist. LEXIS 129601 (D.D.C. Dec. 7, 2010) (citing *Baker v. Carr*, 369 U.S. 186, 217 (1962), for six circumstances to which the political question doctrine applies).

In *Al-Aulaqi*, Judge Bates found that the plaintiff lacked standing to bring the various claims he asserted, and that the case involved a political question. While Judge Bates's decisions regarding the various standing issues were sound, his analysis of the political question doctrine seemed both unnecessary and imprecise. It was unnecessary because, having found that the plaintiff lacked standing on all claims, analysis of the political question doctrine merely provided alternate grounds for the decision. The analysis was imprecise because Judge Bates did not clearly indicate whether he believed that the case involved an extant armed conflict or a separate, discrete act of national defense. Most of the language in the opinion indicated the latter. Such distinctions are important to the proper application of the political question doctrine.

Judge Bates ultimately concluded that the D.C. Circuit's en banc opinion in *El-Shifa Pharmaceutical Industries Co. v. United States*, 607 F.3d 836 (D.C. Cir. 2010), *cert. denied*, No. 10-328 (U.S. Jan. 18, 2011), prevented his review of "the merits of the President's [alleged] decision to launch an attack on a foreign target" even when the foreign target "happens to be a U.S. citizen." *Al-Aulaqi*, 2010 U.S. Dist. LEXIS 129601, at \*122-23. *El-Shifa* involved President Clinton's decision to attack a Sudanese pharmaceutical plant in response to the 1998 U.S. embassy bombings in Kenya and Tanzania. *El-Shifa*, 607 F.3d at 836. President Clinton stated that the attack was "consistent with the War Powers Resolution" and part of "a necessary and proportionate response to the imminent threat of further terrorist attacks against U.S. personnel." *Id.* at 838 (quoting William J. Clinton, Letter to Congressional Leaders Reporting on Military Action Against Terrorist Sites in Afghanistan and Sudan, 2 PUB. PAPERS 1464 (Aug. 21, 1998)). Ac-

ording to the court in *El-Shifa*, “[i]f the political question doctrine means anything in the arena of national security and foreign relations, it means the courts cannot assess the merits of the President’s decision to launch an attack on a foreign target . . . .” *Id.* at 844.

Read carefully, however, it is clear that *El-Shifa* involved a one-off use of force against a *wholly* foreign threat identified by the executive branch. It did not involve the review of the executive’s prosecution of an armed conflict authorized by Congress. The former use of force, applied to entirely foreign threats, is typically a political question. It is a matter constitutionally committed to Congress by the Declare War Clause, and arguably committed to the President as Commander-in-Chief in response to an actual or imminent attack. See *The Prize Cases*, 67 U.S. (2 Black) 635, 670 (1863) (“Whether the President in fulfilling his duties, as Commander in-chief . . . has met with such armed hostile resistance . . . as will compel him to accord to them the character of belligerents, is a question to be decided by *him* . . . .”). The latter use of force is not typically a political question. It involves review of executive conduct for compliance with congressional authorization and other applicable law. In Anwar Al-Aulaqi’s case, identification of AQAP as an independent, imminent threat to the nation would arguably be a political question. Identifying AQAP as being within the scope of the armed conflict authorized by the AUMF is not, nor is the determination that Al-Aulaqi is a targetable member of that organization.

Ironically, the attempt to portray Anwar Al-Aulaqi’s case as arising outside of armed conflict likens it to *El-Shifa*, placing it more firmly in the realm of a political question. The Government’s assertion that the case involves hostilities related to armed conflict is equally ironic because it makes the case more susceptible to the precedent supporting judicial review. Judge Bates’s opinion mistakenly included all completed and prospective extraterritorial armed attacks under the same political question umbrella, thereby shielding them from judicial review. *Al-Aulaqi v. Obama*, No. 10-1469, 2010 U.S. Dist. LEXIS 129601, \*135 (D.D.C. Dec. 7, 2010). While *ex ante* review of an unexecuted targeting decision in war is both legally and practically problematic, it is unclear why it would be improper after such force is used, particularly when a U.S. citizen has been targeted.

### III. JUDICIAL REVIEW, WAR MEASURES AGAINST U.S. CITIZENS, AND EXECUTIVE DISCRETION

The most difficult aspect of any judicial review of executive conduct in war should not be whether to inquire at all, but rather, what

standards should govern review of the executive's actions. When a plurality of the Supreme Court considered the constitutional rights of alleged citizen-enemy Yassar Hamdi in *Hamdi v. Rumsfeld*, 542 U.S. 507 (2004), the results of its *Mathews v. Eldridge* due process balancing inquiry were quite deferential to the executive. See *Mathews v. Eldridge*, 424 U.S. 319 (1976) (setting forth a balancing test to determine whether an individual has received due process). While upholding Hamdi's basic due process rights to "notice of the factual basis for his classification [and indefinite detention], and a fair opportunity to rebut the Government's factual assertions before a neutral decision-maker," the Court suggested that the nature and exigencies of war may justify relaxed rules of evidence and burdens of proof, potentially including a presumption in favor of the government. *Hamdi*, 542 U.S. at 533.

Other Supreme Court precedent firmly supports the idea that the government may properly identify a U.S. citizen as an enemy subject to war measures. In *The Prize Cases*, residents of confederate states claimed that the Constitution required that they be treated as loyal citizens until "convicted of having renounced their allegiance and made war against the Government by treasonably resisting its laws." 67 U.S. at 672. The Court responded by finding it "a proposition never doubted, that the belligerent party who claims to be sovereign, may exercise both belligerent and sovereign rights." *Id.* at 673. It thereafter refused to find that U.S. citizenship afforded any individual enemy an exemption from actions permitted by the laws of war. The Court has maintained this approach in cases such as *Hamdi v. Rumsfeld*, 542 U.S. 507 (2004), *Ex parte Quirin*, 317 U.S. 1 (1942) (as to petitioner Haupt), and *Juragua Iron Co., Ltd. v. United States*, 212 U.S. 297 (1909).

Importantly, the Court did not believe that the executive's determinations regarding who could be subjected to war measures were unreviewable political questions. Unlike Judge Bates, the Court readily found "judicially manageable standards" and did not believe it "axiomatic that courts must . . . decline to assess whether a particular individual's . . . activities threaten national security." *Al-Aulaqi v. Obama*, No. 10-1469, 2010 U.S. Dist. LEXIS 129601, \*124 (D.D.C. Dec. 7, 2010). It reviewed the captures for compliance with applicable law, including the laws of war. *Prize Cases*, 67 U.S. at 667-68.

In the domestic law enforcement context, the deference due police officers and magistrates faced with uncertain situations is captured in the common legal standard, "probable cause." This standard requires "a practical, common-sense decision whether, given all the circumstances . . . there is a fair probability" that a certain circumstance exists. *Illinois v. Gates*, 462 U.S. 213, 238 (1983). To use lethal

force against a citizen domestically, the Constitution requires that a law enforcement officer have probable cause to believe that a “suspect poses a threat of serious physical harm, either to the officer or to others.” *Tennessee v. Garner*, 471 U.S. 1, 11 (1985).

The Supreme Court has adopted a similar standard for using potentially lethal force in the fog of war. In *Talbot v. Seeman*, Chief Justice Marshall stated that the initial legality of a prize capture (which could include the use of force) depended upon whether “there [was] probable cause to believe the vessel met with at sea, [was] in the condition of one liable to capture.” 5 U.S. (1 Cranch) 1, 31-32 (1801). Liability to capture, in this context, required probable cause to believe that the vessel was within the scope of congressionally authorized war measures. See, e.g., *Little v. Berreme*, 6 U.S. (2 Cranch) 170, 178 (1804) (finding a seizure to be illegitimate because clearly inconsistent with congressional authorization). In a proper case brought by Anwar Al-Aulaqi or his estate, judicial review applying a probable cause standard could serve the same purpose—to ensure executive actions are reasonably within the permissible scope of hostilities that the AUMF has authorized, or were otherwise supported by applicable law.

Whether used to review government conduct on the “mean streets” of a U.S. city, on the high seas of days gone by, or in executing modern, asymmetric warfare, the probable cause standard allows for prudent discretion while preserving judicial oversight to prevent an abuse of that discretion. Perhaps the premeditated targeting of a U.S. citizen deserves a higher standard. But we would do well to remember the Supreme Court’s admonition in *Illinois v. Gates* that “[f]inely tuned standards such as proof beyond a reasonable doubt or by a preponderance of the evidence, useful in formal trials, have no place in the magistrate’s [probable cause] decision.” 462 U.S. at 235. Such standards may have even less of a place in executive targeting decisions in armed conflict.



## REBUTTAL

*Judge Bates's Infernal Machine*Kevin Jon Heller<sup>†</sup>

## INTRODUCTION

My thanks to Professor Dehn for his fascinating contribution to this discussion. Unfortunately, I have to decline his invitation to provide the international law rebuttal. Judge Bates never discusses international law in his opinion, except for the de rigueur citation to Common Article 3 of the Geneva Conventions *see Al-Aulaqi v. Obama*, No. 10-1469, 2010 U.S. Dist. LEXIS 129601, at \*29-30 (D.D.C. Dec. 7, 2010), and I have discussed the international law approach to Anwar Al-Aulaqi's targeted killing elsewhere. *See, e.g.*, Kevin Jon Heller, *Let's Call Killing al-Awlaki What It Is—Murder*, OPINIO JURIS (Apr. 8, 2010, 10:34 PM), <http://opiniojuris.org/2010/04/08/lets-call-killing-al-awlaki-what-it-is-murder/>.

Indeed, the international law analysis is relatively straightforward. Is there an armed conflict between the United States and al-Qaeda in the Arabian Peninsula (AQAP) in Yemen? No—the “combat” is not even close to being sufficiently protracted or intense. *See, e.g.*, Andreas Paulus & Mindia Vashakmadze, *Asymmetrical War and the Notion of Armed Conflict: A Tentative Conceptualization*, 91 INT'L REV. RED CROSS 95, 116 (2009). Is AQAP or Anwar Al-Aulaqi connected to the noninternational armed conflicts in Afghanistan and Pakistan? No—the Government did not even make that claim in *Al-Aulaqi*. *Al-Aulaqi*, 2010 U.S. Dist. LEXIS 129601, at \*8-9. International humanitarian law thus does not govern the targeting of Anwar Al-Aulaqi, because that targeting would not take place in the context of armed conflict. Does that mean that Anwar Al-Aulaqi cannot be targeted with lethal force? Not at all—it simply means that the international human rights law standard applies, which requires the use of lethal force against an individual to be “absolutely necessary.” JAN RÖMER, KILLING IN A GRAY AREA BETWEEN HUMANITARIAN LAW AND HUMAN RIGHTS 102 (2010). Not coincidentally, this human rights law standard is the same standard that the plaintiff in the case, Nasser Al-Aulaqi, advocated. Com-

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plaint for Declaratory and Injunctive Relief at 2-3, *Al-Aulaqi*, 2010 U.S. Dist. LEXIS 129601 (No. 10-1469).

Instead of dwelling on international law issues, I want to focus on the following claim, buried at the end of Judge Bates's opinion:

Contrary to plaintiff's assertion, in holding that the political question doctrine bars plaintiff's claims, this Court does not hold that the Executive possesses unreviewable authority to order the assassination of any American whom he labels an enemy of the state. Rather, the Court only concludes that it lacks the capacity to determine whether a specific individual in hiding overseas, whom the Director of National Intelligence has stated is an operational member of AQAP, presents such a threat to national security that the United States may authorize the use of lethal force against him.

*Al-Aulaqi*, 2010 U.S. Dist. LEXIS 129601, at \*139 (internal quotation marks and citation omitted). This is, I believe, a profoundly disingenuous statement. Properly understood, the opinion does *exactly* what Judge Bates claims that it does not.

## I. STANDING

Let's begin with the standing issue. Anwar Al-Aulaqi is not the plaintiff in the case; his father is. Judge Bates thus dedicates the bulk of his opinion to demonstrating that Nasser Al-Aulaqi does not have either "next friend" or "third party" standing to challenge the targeted killing of his son. His analysis, however disquieting, is almost certainly correct—particularly given the significant evidence (recounted by Judge Bates) that Anwar Al-Aulaqi has no interest in bringing a legal challenge to his inclusion in the Joint Special Operations Command's (JSOC) kill list. *Id.* at \*47-48.

That said, Judge Bates does identify two ways in which—if he wanted to—Anwar Al-Aulaqi might obtain standing to bring the kind of legal challenge at issue in the case. First, he could surrender to American authorities and express "a desire to vindicate his constitutional rights in U.S. courts." *Id.* at \*29. Second, and more interestingly, he could conceivably remain in hiding and use videoconferencing to challenge his targeted killing:

[I]t is possible that Anwar Al-Aulaqi would not even need to emerge from "hiding" in order to seek judicial relief. The use of videoconferencing and other technology has made civil judicial proceedings possible even where the plaintiff himself cannot physically access the courtroom. . . . There is no reason why—if Anwar Al-Aulaqi wanted to seek judicial relief but feared the consequences of emerging from hiding—he

could not communicate with attorneys via the Internet from his current place of hiding.

*Id.* at \*34, n.4. Both “solutions” to the standing problem, however, are illusory. The first would have the practical effect of preventing the government from killing Anwar Al-Aulaqi because, as Judge Bates rightly points out, both international and domestic law prohibit the use of lethal force against captured combatants. *Id.* at \*29-30. But turning himself in to the authorities would *not* permit Anwar Al-Aulaqi to challenge the Executive’s “authority to order the assassination of any American whom he labels an enemy of the state.” *Id.* at \*39 (citation omitted). As Judge Bates acknowledges, if Anwar Al-Aulaqi turned himself in, “the present action—which seeks to prevent defendants from unlawfully killing him—would likely be deemed moot.” *Id.* at \*76. Managing to avoid assassination is not the same as challenging the government’s right to assassinate in the first place.

Even more problematically, both solutions “work” only because Anwar Al-Aulaqi is *aware* that he is on the JSOC kill list. According to the *Washington Post*, there are at least *three other* American citizens on that list. Dana Priest, *U.S. Playing a Key Role in Yemen Attacks*, WASH. POST, Jan. 27, 2010, at A1. There is no indication that they are aware of their status—and nothing in Judge Bates’s opinion requires the government to inform them that they have been targeted for death before actually killing them. Those targeted American citizens, therefore, *cannot* avoid being killed by turning themselves in or by challenging their status via videoconference. Indeed, Judge Bates’s decision provides the government with an incentive *not* to inform American citizens that they have been targeted, because as long as they are unaware of their status, they can be killed with impunity. *See also id.* (noting that the Obama Administration has reserved the right to add more people to the JSOC kill list in the future).

## II. POLITICAL QUESTION

At least Judge Bates attempts, however futilely, to find exceptions to the standing problem. His conclusion that the political question doctrine would prohibit consideration of Nasser Al-Aulaqi’s constitutional claims *even if* he had standing to bring them is far more categorical:

Because decision-making in the realm of military and foreign affairs is textually committed to the political branches, and because courts are functionally ill-equipped to make the types of complex policy judgments that would be required to adjudicate the merits of plaintiff’s claims, the Court finds that the political question doctrine bars judicial resolution of this case.

*Al-Aulaqi*, 2010 U.S. Dist. LEXIS 129601, at \*140. This statement cannot be reconciled with Judge Bates's insistence that he is *not* holding that "the Executive possesses 'unreviewable authority to order the assassination of any American whom he labels an enemy of the state.'" *Id.* at \*139 (citation omitted). The problem, of course, is that Judge Bates identifies *no* situation in which "the Executive's unilateral decision to kill a U.S. citizen overseas" *would* be judicially reviewable. *Id.* at 136. His analysis is as categorical as his conclusion:

[T]here are no judicially manageable standards by which courts can endeavor to assess the President's interpretation of military intelligence and his resulting decision—based on that intelligence—whether to use military force against a terrorist target overseas. Nor are there judicially manageable standards by which courts may determine the nature and magnitude of the national security threat posed by a particular individual.

*Id.* at \*123-24 (citation omitted). That statement—and there are many more like it in the opinion—would seem to preclude any U.S. citizen overseas from ever challenging her inclusion on the JSOC kill list. Indeed, nothing in the opinion indicates that the executive's unilateral decision to kill an American citizen *inside* the United States would be any less a political question. A domestic targeted killing would seem to be an even more flagrant violation of the Fourth and Fifth Amendments, but it is precisely such constitutional claims that the political question doctrine prohibits courts from reaching, as *Al-Aulaqi* itself demonstrates. See Complaint for Declaratory and Injunctive Relief, *supra*, at 9-10 (summarizing the plaintiff's Fourth and Fifth Amendment claims). Moreover, reviewing the propriety of killing an American citizen inside the United States who is alleged to be part of al-Qaeda would require precisely the same kind of second-guessing (concerning the interpretation of military intelligence, the determination of the threat the individual poses, etc.) that Judge Bates says is impermissible when the American citizen is overseas. Perhaps I am missing something, but I have yet to hear anyone explain why the political question issue would be any different in the context of a domestic targeted killing, however unlikely that scenario might be. After all, Judge Bates says that the doctrine applies to both foreign policy *and* national security concerns. *Al-Aulaqi*, 2010 U.S. Dist. LEXIS 129601, at \*130-31.

It is also worth noting, even if the issue is not directly relevant to my argument, that in at least one important respect Judge Bates misstates the nature of Nasser Al-Aulaqi's prayers for relief. Judge Bates claims that resolving the "particular questions posed by plaintiff" would require him to determine: (1) whether Anwar Al-Aulaqi is affi-

liated with AQAP, (2) whether AQAP is part of the United States' armed conflict with al-Qaeda, (3) whether Al-Aulaqi poses a "concrete, specific, and imminent threat to life and physical safety," and (4) whether the United States could reasonably use nonlethal force to address that threat. *Id.* at \*120 (citations omitted). As Judge Bates's earlier recitation of the prayers for relief makes clear, however, Nasser Al-Aulaqi did *not* ask the court to make those factual determinations. *Id.* at \*15-16 (citations omitted). On the contrary, Nasser Al-Aulaqi's prayers were carefully worded to make clear that he was only asking the court to make a *legal* determination concerning the appropriate standard for the targeted killing of an American citizen. Consider the first prayer for relief, which sought a declaration that

outside of armed conflict, the Constitution prohibits Defendants from carrying out the targeted killing of U.S. citizens, including Plaintiff's son, except in circumstances in which they present concrete, specific, and imminent threats to life or physical safety, and there are no means other than lethal force that could reasonably be employed to neutralize the threats.

Complaint for Declaratory and Injunctive Relief, *supra*, at 11. The prayer for relief did *not* ask the court to conclude that Anwar Al-Aulaqi is outside of armed conflict. It did not ask the court to conclude that Anwar Al-Aulaqi fails to present "a concrete, specific, and imminent threat." It did not ask the court to conclude that nonlethal force is available. It simply asked the court to hold, as a matter of law, that killing Anwar Al-Aulaqi outside of armed conflict would not be legal *unless* he poses such a threat and such force is necessary. In other words, even if the lawsuit succeeded, it would still be up to the executive to determine whether AQAP is part of the "armed conflict" with al-Qaeda and, if so, whether Anwar Al-Aulaqi poses the requisite threat in circumstances in which the use of nonlethal force is not a reasonable option.

#### CONCLUSION

Judge Bates's opinion, in short, makes it impossible for an American citizen to challenge her inclusion on the JSOC kill list. To have standing and avoid mootness the issue by surrendering herself to U.S. authorities, the targeted citizen must discover her status and convince a federal judge to let her bring her challenge via videoconference. But even if she succeeds in establishing standing and avoiding mootness, she will then have her challenge dismissed as posing a political question.

The best an American citizen targeted for death can do, therefore, is hope to find out about her status on the JSOC kill list so she

can turn herself in before she is killed. Perhaps that is fair—although the idea that an American citizen should be forced to choose between death and potentially indefinite detention simply because the executive has decided she is a terrorist hardly seems consistent with any coherent notion of citizenship. Regardless, there is no question that, despite his protestations, Judge Bates has indeed held that the executive possesses “unreviewable authority to order the assassination of any American whom he labels an enemy of the state.” *Al-Aulaqi*, 2010 U.S. Dist. LEXIS 129601, at \*139 (citation omitted). Judge Bates can pretend that, because Nasser Al-Aulaqi’s case is nonjusticiable, “the serious issues regarding the merits of the alleged authorization of the targeted killing of a U.S. citizen overseas must await another day.” *Id.* at \*6-7. Sadly, if later courts adopt his reasoning, that day will never come.

## CLOSING STATEMENT

*The Legal Framework of “Targeted Killing”*

John C. Dehn

## INTRODUCTION

I thank Professor Heller for his interesting comments. It seems we agree that Judge Bates’s application of the political question doctrine was overbroad. We disagree on the subject of whether the executive may deliberately target a U.S. citizen who has become part of a foreign organization posing a threat to her country without either notice or ex ante judicial review unless “absolutely necessary.” His precise views on the constitutional issues and case law that I discussed earlier are unclear.

An essential basis for Professor Heller’s view is his firm opinion that international humanitarian law (IHL) could not possibly govern Al-Aulaqi’s targeting. Nevertheless, IHL might very well apply. Its applicability depends upon the relationship of AQAP or Al-Aulaqi to the hostilities of AUMF-covered entities currently in armed conflict with the United States. I will reach no firm conclusion here about whether Al-Aulaqi is a legitimate target. I will simply explain the circumstances under which IHL might apply to any potential attack. If AQAP and its activities are independent from AUMF-covered entities, the legal framework governing an armed attack is less clear. I am unable to fully address those issues here.

Commentators make two primary legal objections to the targeted killing of nonstate actors outside of conflict zones. Some emphasize the violation of the sovereign territory of the “host state”—a state not party to the relevant armed conflict in which a nonstate party to the conflict is located. These commentators assert that such attacks violate *jus ad bellum*: the rules regulating the use of force between states. Others, like the plaintiff in *Al-Aulaqi*, argue that armed attacks permitted by IHL, *jus in bello*, are geographically confined to conflict zones (and possibly immediately adjacent areas from which the parties draw support). Outside of those zones, they say, international human rights law governs the use of lethal force unless or until a sufficiently intense and sustained armed conflict develops in that location.

These views are inconsistent with traditional understandings of both *jus in bello* and *jus ad bellum*. I will discuss each in turn.

I. THE FUNCTIONAL APPLICABILITY OF IHL (*JUS IN BELLO*)

Some commentators have questioned the existence of a legally cognizable “armed conflict” between the United States and al-Qaeda from the perspective of international law. These commentators offer various arguments about the sporadic nature of hostilities or the disorganized nature of al-Qaeda and associated groups. In *Hamdi v. Rumsfeld*, a plurality of the Supreme Court found that the AUMF authorized use of the war powers of the U.S. government against the groups it identified. 542 U.S. 507, 518 (2004). In *Hamdan v. Rumsfeld*, the Court determined that the conflict with al-Qaeda was a noninternational armed conflict. 548 U.S. 557, 628-31 (2006). Thus, whatever the substantive international law on this subject, the AUMF and Supreme Court decisions interpreting it have established in U.S. law the existence of an armed conflict and the authority to exercise belligerent powers—such as armed attacks and preventive detentions.

A key question, then, is whether AQAP or Al-Aulaqi are sufficiently associated with those hostilities to make Al-Aulaqi a legitimate target under IHL. Contrary to what Professor Heller suggests, the Government argued that AQAP “is either part of al-Qaeda, or is an associated force, or cobelligerent, of al-Qaeda that has directed attacks against the United States in the noninternational armed conflict between the United States and al-Qaeda.” Opposition to Plaintiff’s Motion for Preliminary Injunction and Memorandum in Support of Defendants’ Motion to Dismiss, *supra*, at 5. There is no doubt that a substantial part of this armed conflict is occurring in both Afghanistan and Pakistan. The extent to which it may exist elsewhere is a subject of much debate.

Most of the *jus in bello* that regulates hostilities (as opposed to occupation) applies functionally, rather than territorially, to what early commentators called the “belligerent intercourse” of the adverse parties and their armed forces. See, e.g., H.W. HALLECK, ELEMENTS OF INTERNATIONAL LAW AND LAWS OF WAR 153 (J.B. Lippincott & Co. 1878) (1866). At the very least, *jus in bello* was understood to govern the actions *inter se* of parties to a conflict wherever those actions occurred. Thus, applicable conventional and customary IHL governs the detention and interrogation of an adversary, whether that detention occurs at Bagram Airfield, Afghanistan; Guantanamo Bay, Cuba; or in so-called “black sites” in Eastern Europe. Similarly, IHL regulates armed attacks between those parties no matter where they occur. The key to the applicability of IHL is not the location of the attack, but the status of the attacker and target. For IHL to apply, both must be members



of parties to, or sufficiently associated with the ongoing hostilities of, an armed conflict.

Professor Heller seems intuitively to understand the functional application of IHL when the target of an attack is the U.S. military. In his recent commentary on the potential military-commissions trial of an alleged USS Cole attacker, he first claims that no armed conflict existed between the United States and al-Qaeda at the time of the attack (October 12, 2000). Kevin Jon Heller, *Military Commissions to Resume Work (But Still Won't Apply Real Law)*, OPINIO JURIS (Jan. 21, 2011), <http://opiniojuris.org/2011/01/21/military-commissions-to-resume-work-but-still-doesnt-use-real-law/>. (I note that I am quite sympathetic to this view.) Professor Heller later cites with approval related commentary that, if an armed conflict had existed, the Cole attack would not be a war crime “because a warship is a legitimate target during an armed conflict.” *Id.* Note that the claim is not that the attack would not have been a war crime because IHL would not apply to the attack. Rather, the claim is that the attack would be *consistent* with IHL because the USS Cole was a legitimate target. Yemen and its ports were no more a conflict zone in any (assumed *arguendo*) armed conflict with al-Qaeda at that time than they are today. Thus, Professor Heller appears to accept the functional rather than territorial applicability of IHL, at least in some circumstances. If this assessment is inaccurate, I ask Professor Heller to clarify whether he believes IHL permits a nonstate actor’s attack on a *state’s* military forces, equipment, or installations beyond existing battlefields or conflict zones. Perhaps he could assess a hypothetical Taliban attack on the Manas Airbase in Kyrgyzstan (which supports U.S. operations in Afghanistan) or Central Command Headquarters in Florida.

The proper focus of analysis, then, is not whether the United States is in an armed conflict with AQAP *in Yemen*. It is whether AQAP is part of or sufficiently associated with al-Qaeda or other AUMF-covered groups such that its activities may be considered part of that armed conflict. In my view, this requires more than ideological alignment. It requires coordinated activity. In such cases, IHL governs who, by their status or conduct, may be targeted.

## II. THE DIFFICULTY OF DETERMINING TARGETABLE STATUS

When a nonstate armed force organizes loosely, disperses geographically, and retains civilian appearance—all to avoid detection—its adversary’s ability to distinguish between legitimate and unlawful targets becomes complicated. An attacker must endeavor to deter-

mine whether an individual is (1) a targetable member of a nonstate organized armed force; (2) a targetable civilian currently taking a direct part in the hostilities of such a force; or (3) a civilian protected from attack, even if indirectly supporting such hostilities. The precise scope of these categories is unclear even in international armed conflict. But these difficulties do not prevent a state in an armed conflict with a nonstate actor from exercising its right and duty to identify and attack its enemy.

In 2009, the International Committee of the Red Cross published interpretive guidance for these categories. See INT'L COMM. OF THE RED CROSS, INTERPRETIVE GUIDANCE ON THE NOTION OF DIRECT PARTICIPATION IN HOSTILITIES UNDER INTERNATIONAL HUMANITARIAN LAW (2009). It provides that

[c]ivilians lose protection against direct attack for the duration of each specific act amounting to direct participation in hostilities, whereas members of organized armed groups belonging to a non-State party to an armed conflict cease to be civilians . . . and lose protection against direct attack, for as long as they assume their continuous combat function.

*Id.* at 17. Clearly, these categories are functional, not territorial. The proximity of individuals to an active battlefield, or to the location of an actual or attempted attack, is certainly relevant to the determination of their targetable status. It is not determinative. Were it otherwise, parties to an armed conflict could send or incorporate forces beyond active conflict zones to carry out acts of hostilities covertly while immunizing them from attack.

Parties to a conflict are obligated to take “[a]ll *feasible* precautions . . . in determining whether a person is a civilian and, if so, whether that civilian is directly participating in hostilities.” *Id.* (emphasis added). And “where individuals go beyond spontaneous, sporadic, or unorganized direct participation in hostilities and become members of an organized armed group belonging to a party to the conflict, IHL deprives them of protection against direct attack for as long as they remain members of that group.” *Id.* at 72 (citation omitted).

Ultimately, a state must make a good-faith inquiry leading to a reasonable belief (or might we say, “probable cause”) that it may target an individual based on either status (membership in an organized armed group) or conduct (currently active, direct participation in hostilities). The question of whether that attack may take place in a “host state” is governed by the *jus ad bellum*.

### III. *JUS AD BELLUM* AND ATTACKS IN “HOST STATES”

States have long been obligated to prevent their territory from being used for staging attacks against foreign peoples and powers. The Supreme Court has stated that the principle of neutrality requires states to prevent their territory from being used for “any participation in a public, private or civil war”—in modern terms, any participation in international or noninternational armed conflict. *The Three Friends*, 166 U.S. 1, 52 (1897). States violating this principle potentially face reprisals from, or a war with, a state harmed by such use. *Id.* at 63.

These principles underlie the neutrality acts of the United States. The Neutrality Act of 1794 provided

[t]hat if any person [should] within the territory or jurisdiction of the United States begin or set on foot or provide or prepare the means for any military expedition or enterprise . . . against the territory or dominions of any foreign prince or state with whom the United States are at peace . . . [that person] shall upon conviction be adjudged guilty of a high misdemeanor . . . .

Neutrality Act of 1794, ch. 50, § 5, 1 Stat. 381, 384. That Congress authorized the President to use the armed forces to suppress certain persistent violations of this Act demonstrates the well-understood importance of controlling and preventing such conduct. *See id.* at §6. A law prohibiting similar violations of the United States’ neutrality obligations remains in effect to this day. *See* 18 U.S.C. § 960 (2006).

Traditionally, aggrieved states have the right to “take such acts as are necessary in neutral territory to counter the activities of enemy forces . . . making unlawful use of that territory” when a host state is “unable or unwilling” to do so. DEP’T OF THE NAVY, THE COMMANDER’S HANDBOOK ON THE LAW OF NAVAL OPERATIONS ch. 7.3 (2007); *see generally* Ashley S. Deeks, “Unwilling or Unable”: Toward a Normative Framework for Extraterritorial Self-Defense (Jan. 31, 2011) (unpublished manuscript) (on file with author). Some commentators claim that restrictions on the use of force between states in Article 2(4) of the United Nations Charter, as interpreted by the International Court of Justice, have virtually eliminated this right. *See* Mary Ellen O’Connell, *Unlawful Killing with Combat Drones*, in SHOOTING TO KILL: THE LAW GOVERNING LETHAL FORCE IN CONTEXT (Simon Bronitt ed., forthcoming), available at <http://ssrn.com/abstract=1501144>. Others have argued that the resort to force in such circumstances is consistent with the inherent right of self-defense preserved in Article 51 of the Charter and other principles of international law, such as state responsibility. *See, e.g.*, Michael D. Banks, *Addressing State (Ir-)Responsibility: The Use of Military Force as Self-Defense in International*

*Counter-Terrorism Operations*, 200 MIL. L. REV. 54, 57 (2009). Still others argue that standoff attacks against a nonstate actor in a host state do not implicate the Charter's limits on the use of force between states. See, e.g., Chris Jenks, *Law from Above: Unmanned Aerial Systems, Use of Force, and the Law of Armed Conflict*, 85 N.D. L. REV. 649, 661-62 (2009). A meeting of experts in 2003 was unable to reach a consensus on the continued existence of this longstanding right, or the precise circumstances under which IHL would govern its exercise. See Jakob Kellenberger, President, Int'l Comm. of the Red Cross, Address at the 27th Annual Round Table on Current Problems of International Humanitarian Law (Sept. 4, 2003), in INTERNATIONAL HUMANITARIAN LAW AND OTHER LEGAL REGIMES: INTERPLAY IN SITUATIONS OF VIOLENCE 7-8 (2003).

Suffice it to say, in this limited space, that the current state of the law on this topic is not as clear as Professor Heller and others would have us believe. Furthermore, objections to the use of armed force in weakly governed states, such as Somalia or Yemen, but not in developed nations, like England or France, are misleading. A state contemplating its approach to defeating a nonstate armed force may certainly consider the governing capacity of a host state when deciding whether that state is "unable or unwilling" to prevent continued hostilities by that force.

#### CONCLUSION

Judges and scholars continue to debate the precise contours of international law and its relationship to our Constitution's allocation of war powers. I have necessarily presented only a brief analysis of these issues in this Debate. For a more thorough treatment of relevant international legal issues in general agreement with this analysis, see Robert Chesney, *Who May Be Killed? Anwar al-Awlaki as a Case Study in the International Legal Regulation of Lethal Force*, Y.B. OF INT'L HUMANITARIAN L. (forthcoming 2011), available at <http://ssrn.com/abstract=1754223>. For analysis of potentially appropriate judicial review, see Richard Murphy & Afsheen John Radsan, *Due Process and Targeted Killing of Terrorists*, 31 CARDOZO L. REV. 405 (2009).

At bottom, the United States' apparent understanding of relevant international law has a strong historical basis. Its assertion of unreviewable executive power over targeting decisions finds less historical support. I do not possess sufficient information about the activities of AQAP or Anwar Al-Aulaqi to discern either's relationship to an extant

armed conflict. Nor can I assess whether Al-Aulaqi's status or activities permit direct attack under IHL. In my view, however, the Constitution permits somewhat deferential judicial review of these matters in an appropriate case.

## CLOSING STATEMENT

*Two U.S. Fictions Concerning IHL*

Kevin Jon Heller

I greatly appreciate Professor Dehn's Closing Statement, because it crystallizes our disagreement about how to analyze whether IHL authorizes the targeted killing of Anwar Al-Aulaqi. Before addressing that issue, however, I want to note that he and I substantially agree about the targeting rules of IHL in noninternational armed conflict (NIAC). We both agree that a member of an organized group involved in a NIAC is targetable at will as long as she continues to assume a continuous combat function in the group. We both agree that a civilian who directly participates in a NIAC is targetable for the duration of her participation in hostilities. And—perhaps most importantly—we both agree that those rules apply functionally, not territorially. I categorically reject the idea that an individual who is otherwise a legitimate target under IHL is somehow immunized from attack simply because she is not located on or near the traditional battlefield. Indeed, I have specifically criticized the ACLU and CCR for taking that position in *Al-Aulaqi*. See Kevin Jon Heller, *The ACLU/CCR Reply Brief in Al-Aulaqi (and My Reply to Wittes)*, OPINIO JURIS (Oct. 9, 2010, 9:10 PM), <http://opiniojuris.org/2010/10/09/the-acluCCR-reply-brief-in-al-aulaqi-and-my-reply-to-wittes/>.

Professor Dehn and I part ways, however, concerning the scope of the armed conflict between the United States and al-Qaeda. Professor Dehn claims that he wants to determine “the circumstances under which IHL might apply to any potential attack”—*IHL*, not U.S. law. Yet when he examines the conflict between the United States and al-Qaeda, he simply dismisses IHL's definition of armed conflict in favor of the idiosyncratic position the Supreme Court adopted in *Hamdan*:

[i]n *Hamdan v. Rumsfeld*, the Court determined that the conflict with al-Qaeda was a noninternational armed conflict. Thus, *whatever the substantive international law on this subject*, the AUMF and Supreme Court decisions interpreting it have established in United States law the existence of an armed conflict and the authority to exercise belligerent powers—such as armed attacks and preventive detentions.

(emphasis added) (citation omitted). It should go without saying that the Supreme Court does not have the authority to unilaterally determine whether, *as a matter of IHL*, the United States is involved in a NIAC with al-Qaeda. Rather, IHL has an accepted test—first articu-

lated by the International Criminal Tribunal for the Former Yugoslavia in the *Tadić* case—to determine the existence and scope of an armed conflict. According to *Tadić*, a NIAC exists only insofar as there is “protracted armed violence between governmental authorities and organised armed groups or between such groups within a State.” *Prosecutor v. Tadić*, Case No. IT-94-1-I, Decision on Defence Motion for Interlocutory Appeal on Jurisdiction, ¶ 70 (Int’l Crim. Trib. for the Former Yugoslavia Oct. 2, 1995). Determining the existence and scope of a NIAC thus requires a factual analysis of (1) the organization of the armed groups involved in the hostilities and (2) the duration and intensity of the conflict. A NIAC exists only if the armed groups are sufficiently organized and the hostilities are of a sufficient duration and intensity. *See, e.g.*, Paulus & Vashakmadze, *supra*, at 106.

As Professor Dehn is no doubt aware, the Court in *Hamdan* did not apply the *Tadić* test. Indeed, the Court did not even address whether the hostilities between the United States and al-Qaeda amounted to an armed conflict. Instead, it simply assumed the existence of an armed conflict between the two and then determined that the conflict was noninternational. *Hamdan v. Rumsfeld*, 548 U.S. 557, 628-31 (2006). Professor Dehn nevertheless relies on *Hamdan* instead of *Tadić* for the scope of the armed conflict between the United States and al-Qaeda, ignoring the fact that more than 110 states have ratified the Rome Statute, which essentially adopts the *Tadić* test, *see* Rome Statute of the International Criminal Court, art. 8(2) (f), July 17, 1998, 2187 U.N.T.S. 90, and that the International Committee of the Red Cross (ICRC) has specifically endorsed the test. INT’L COMM. OF THE RED CROSS, HOW IS THE TERM “ARMED CONFLICT” DEFINED IN INTERNATIONAL HUMANITARIAN LAW? 5 (2008), *available at* <http://www.icrc.org/eng/resources/documents/article/other/armed-conflict-article-170308.htm>. If Professor Dehn accepts the ICRC’s targeting rules that apply in NIAC, why does he not accept the ICRC’s definition of NIAC itself?

The answer, of course, is that the *Tadić* test does not produce the answer that Professor Dehn wants: namely, that there is a global NIAC between the United States and al-Qaeda such that, according to his Closing Statement, any member of al-Qaeda who is “sufficiently associated with those hostilities” is a legitimate target under IHL. I know of no non-American IHL scholar and no state other than the United States that believes the sporadic acts of terrorism committed around the world by groups that call themselves “al-Qaeda” are sufficiently protracted and intense to qualify as a global NIAC. Moreover, although a sufficient analysis is beyond the scope of this Closing State-

ment, I think it is highly unlikely that al-Qaeda qualifies as an organized armed group at the global level. In particular, it is difficult to argue that there is a global al-Qaeda that possesses “a command structure and disciplinary rules and mechanisms within the group” or “speak[s] with one voice” concerning issues relevant to the group, two critical organizational factors the ICTY identified in *Haradinaj*. *Prosecutor v. Haradinaj*, Case No. IT-04-84-T, Judgment, ¶ 60 (Int’l Crim. Trib. For the Former Yugoslavia Apr. 3, 2008).

To be clear, that there is no global NIAC between the United States and al-Qaeda under IHL does not mean that there are no localized NIACs between the United States and specific al-Qaeda groups. I fully accept that the United States is currently engaged in NIAC with the al-Qaeda groups operating in Afghanistan (either directly or as part of the NIAC between the United States and the Taliban) and Pakistan. Individuals who exercise a continuous combat function in *those groups* and civilians who directly participate in *those conflicts* are clearly legitimate military targets under IHL—even if they are located outside of the traditional battlefield.

Contrary to Professor Dehn’s assertion, then, whether Al-Aulaqi is a legitimate military target depends on whether he is sufficiently associated with the specific NIACs in Afghanistan and Pakistan, not whether he is sufficiently associated with the global NIAC the United States has invented to rationalize its actions. Is Al-Aulaqi a legitimate target? I don’t believe so—but, as one who is by no means an expert on al-Qaeda, I could be convinced otherwise. I based my Opening Statement’s (perhaps overly) categorical denial of such a link between Al-Aulaqi and NIACs in Afghanistan and Pakistan on the Government’s own claims in the case, which attempt to tie Al-Aulaqi to acts of terrorism in Saudi Arabia, Korea, Yemen, and the United States, but allege no connection between Al-Aulaqi (or AQAP) and the al-Qaeda groups fighting in Afghanistan or Pakistan. Opposition to Plaintiff’s Motion for Preliminary Injunction and Memorandum in Support of Defendants’ Motion to Dismiss, *supra*, at 6-9. In the absence of such a connection, not even the functional IHL approach to targeting renders Al-Aulaqi a legitimate military target, much less one who is targetable at any time because he has assumed a “continuous combat function” in one of those groups.

It may well be that the government has not alleged such a link because it erroneously believes that Al-Aulaqi is targetable at any time as long as he a member of any al-Qaeda group anywhere. Yet the government appears to be concerned that courts will reject its claim that



al-Qaeda is a global organized armed group, because it regularly describes AQAP as “an organized armed group that is either part of al-Qaeda or, alternatively, is an organized associated force, or *cobelligerent*, of al-Qaeda.” *Eg., id.* at 8 (emphasis added).

The idea that the doctrine of cobelligerency applies to nonstate actors involved in a noninternational armed conflict, however, finds no more support in IHL than the idea that the United States is involved in a global NIAC with al-Qaeda. Cobelligerency is a concept that applies exclusively in international armed conflict (IAC); it refers to a situation in which a state fights “in association with one or more belligerent powers.” MORRIS GREENSPAN, *THE MODERN LAW OF LAND WARFARE* 531 (1959). Conservative scholars in the United States, most notably Curtis Bradley and Jack Goldsmith, have nevertheless claimed that the principles of cobelligerency can be analogically applied to NIAC, treating organized armed groups as if they were states and considering them “cobelligerents” with other organized armed groups if they fail to remain neutral in armed conflicts between those groups and the United States. *See, e.g.,* Curtis A. Bradley & Jack L. Goldsmith, *Congressional Authorization and the War on Terrorism*, 118 *HARV. L. REV.* 2047, 2112-13 (2005). Even worse, at least one federal judge—Judge Bates, no less!—has held that “the government has the authority to detain members of associated forces as long as those forces would qualify as co-belligerents under the law of war.” *Hamlibly v. Obama*, 616 F. Supp. 2d 63, 75 (D.D.C. 2009) (internal quotation marks omitted).

The problem is that neither Bradley and Goldsmith nor Judge Bates has ever bothered to explain *how* or *why* an IHL concept that applies exclusively to states in IAC can be applied to nonstate actors in NIAC. Bradley and Goldsmith cite no state practice (other than the United States’) for the existence of a customary rule permitting the targeting or detention of individuals who are not members of organized armed groups and who are not directly participating in hostilities. Nor do they cite any *opinio juris* (other than the United States’) in defense of that rule. They simply claim that because the situations are “analogous,” cobelligerency “should” apply in both kinds of conflict. Bradley & Goldsmith, *supra*, at 2113.

Bradley and Goldsmith, of course, are professors. There is nothing wrong with academics ignoring the *lex lata* in favor of the *lex ferenda*. But there is something profoundly wrong with a federal judge doing the same. Here is Judge Bates’s explanation in *Hamlibly* of why cobelligerency applies in NIAC:

Like many other elements of the law of war, co-belligerency is a concept that has developed almost exclusively in the context of international

armed conflicts. However, there is no reason why this principle is not equally applicable to non-state actors in non-international conflicts.

*Hamli*, 616 F. Supp. at 74 n.16. There are actually numerous reasons why cobelligerency does not apply to nonstate actors in NIAC. The most important, of course, is the complete absence of state practice or *opinio juris* supporting the existence of such a customary rule. The United States cannot simply rummage through the rules of IHL in IAC, applying the rules it likes to NIAC and refusing to apply the rules it doesn't. Can you imagine how the government would react if a federal judge dismissed a murder charge against a member of al-Qaeda because he decided that "there is no reason why" the privilege to kill enjoyed by lawful combatants in an IAC "is not equally applicable to non-state actors in non-international armed conflicts"?

Fortunately, not all federal judges are as credulous as Judge Bates. In *Al-Bihani v. Obama*, the D.C. Circuit categorically rejected—albeit in dicta—the idea that, as a matter of IHL, cobelligerency applies in NIAC:

[Al-Bihani] points to the international laws of co-belligerency to demonstrate that the brigade should have been allowed the opportunity to remain neutral upon notice of a conflict between the United States and the Taliban. . . . But even if Al-Bihani's argument were relevant to his detention and putting aside all the questions that applying such elaborate rules to this situation would raise, the laws of co-belligerency affording notice of war and the choice to remain neutral have only applied to nation states. The 55th clearly was not a state, but rather an irregular fighting force present within the borders of Afghanistan at the sanction of the Taliban. *Any attempt to apply the rules of co-belligerency to such a force would be folly, akin to this court ascribing powers of national sovereignty to a local chapter of the Freemasons.*

*Al-Bihani v. Obama*, 590 F.3d 866, 873 (D.C. Cir. 2010) (emphasis added). Why the different outcome? I don't think it is too cynical to suggest that the D.C. Circuit scrutinized the cobelligerency argument far more carefully than Judge Bates because the habeas petitioner, not the government, invoked cobelligerency in *Al-Bihani*. The D.C. Circuit's dicta nevertheless reminds us that it is "folly" for *either* side to rely on the cobelligerency argument.

Professor Dehn concludes his Closing Statement by claiming that the "United States' apparent understanding of relevant international law has a strong historical basis." As the preceding discussion of NIAC indicates, nothing could be further from the truth. It is no accident that the United States claims the interpretation of the AUMF is "informed" by the laws of war, not limited by them. *See, e.g.*, Harold Hongju Koh, Legal Advisor, U.S. Dep't of State, Speech at the Annual

Meeting of the American Society of International Law: The Obama Administration and International Law (Mar. 25, 2010), *available at* <http://www.state.gov/s/1/releases/remarks/139119.htm>. If IHL limited the AUMF, the government would not be able to maintain either the fiction that the United States is involved in a global NIAC with al-Qaeda or the fiction that cobelligerency applies to nonstate actors in NIAC. And without those fictions, the government would find it much more difficult to justify its position that the laws of war entitle it to kill Al-Aulaqi.

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Preferred Citation: John C. Dehn & Kevin Jon Heller, Debate, *Targeted Killing: The Case of Anwar Al-Aulaqi*, 159 U. PA. L. REV. PENNUMBRA 175 (2011), <http://www.pennumbra.com/debates/pdfs/TargetedKilling.pdf>.