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ANWAR AL-AULAQI: TARGETED KILLINGS, EMERGENCY EXECUTIVE POWERS, AND THE PRINCIPLE OF PROPORTIONALITY

INTRODUCTION

Between 2002 and 2009, the United States is believed to have conducted over 50 predator drone strikes between Pakistan, Yemen, and Somalia. Since January 2009, that number has increased to a total of over 300 strikes. The drone strikes reached their peak in 2010, with 121 confirmed strikes, 117 of which took place in Pakistan. The escalation in the number of drone strikes throughout the Middle East has been part of a concerted effort, beginning with the Bush Administration and intensified under the Obama Administration, to target members of al-Qaeda, al-Qa’ida in the Arabian Peninsula (AQAP), and other terrorist groups included in the broader war against terrorism. However, with the increase in attacks emanating from Yemen, the Obama administration has begun shifting its focus to the Arabian Peninsula. As a result, the strikes in Yemen have so far outnumbered those in Pakistan for the first time in 2012.

Although President Obama inherited the drone program, because of the increasing frequency of strikes, his administration has become synonymous with the practice. Beginning in 2010, the Administration took steps to create a targeted kill list, a process described as a “disposition matrix”. The “disposition matrix” begins with the compiling of the names of operatives as well as the building of rosters of terrorist organizations and their affiliates. This task is left to certain government agencies, among them the Central Intelligence Agency (CIA),

3 Id.
5 Id.
6 Id.
The Department of Defense (DOD), the National Security Agency (NSA), and the Joint Special Operations Command (JSOC). Once compiled, the National Counterterrorism Center (NCTC) makes a list based on specific White House criteria and forwards the list to Deputies committee of the National Security Council. The committee then culls the list to individuals who will be targeted. As the final step in the process, President Obama signs off on individuals who will be placed on the targeted capture/kill list.

In 2010, the Obama administration took the unprecedented step of placing Anwar al-Aulaqi, a U.S. citizen, on the targeted kill list. Mr. al-Aulaqi was born in New Mexico in 1971, and served as an imam in California and Virginia. Following his release from a Yemeni prison in 2007, Mr. al-Aulaqi became perhaps the most influential English-speaking advocate of violent jihad against the United States. While Mr. al-Aulaqi had never been accused of carrying out terrorist attacks personally, American authorities believe that he was the main inspiration for Major Nidal Malik Hasan, the Army psychiatrist accused of shooting thirteen people at Fort Hood, Texas, in November 2009, and Umar Farouk Abdulmutallab, who failed to blow up an airplane with a bomb hidden in his underwear in December 2009. In addition, Faisal Shahzad, the man who attempted to set off a car bomb in Times Square in May 2010, cited al-Aulaqi as an inspiration. Counterterrorism officials have claimed that these examples show that Mr. al-

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7 Id.
8 Id.
9 Id.
10 Id.
13 Id.; See also Dana Priest, U.S. military teams, intelligence deeply involved in aiding Yemen on strikes, WASH. POST (Jan. 27, 2010), available at http://www.washingtonpost.com/wp-dyn/content/article/2010/01/26/AR2010012604239_pf.html.
14 Shane & Mekhennet, supra note 11.
Aulaqi had evolved from being merely a propagandist into playing an operational role in AQAP's efforts to carry out terrorist attacks.\footnote{Becker & Shane, \textit{supra} note 10.}

In response to media reports that Mr. al-Aulaqi had been placed on a kill list Nasser al-Aulaqi, Mr. al-Aulaqi's father, filed suit in the United States District Court for the District of Columbia.\footnote{Complaint For Declaratory and Injunctive Relief, Al-Aulaqi v. Obama, 727 F. Supp.2d 1 (D.C. Cir. 2010) (No. 1:10-cv-01469).} The suit claimed that Mr. al-Aulaqi's placement on a kill list violated his Fourth Amendment right to be free from unreasonable seizure, Fifth Amendment right not to be deprived of life without due process, in addition to stating a claim under the Alien Tort Statute for a violation of international law.\footnote{Id. at 9-10.} On December 7, 2010, the complaint was dismissed on standing grounds.\footnote{Al-Aulaqi v. Obama, 727 F.Supp.2d 1, 14-35 (D.C. Cir. 2010).} However, the District Court judge further stated that the case potentially presented a non-justiciable political question.\footnote{See id. at 44-52.}

Mr. al-Aulaqi and his associate Samir Khan, also a U.S. Citizen, were killed by a predator drone strike on September 30, 2011.\footnote{Mark Mazzetti, Eric Schmitt & Robert F. Worth, \textit{Two-Year Manhunt Led to Killing Awlaki}, N.Y. TIMES (Sept. 30, 2011), \url{available at http://www.nytimes.com/2011/10/01/world/middleeast/anwar-alawlaki-is-killed-in-yemen.html?oref=middleeast}.} Less than a month later, Abdulrahman al-Aulaqi, Mr. al-Aulaqi's son and a U.S. citizen born in Colorado, was killed by a separate predator drone strike.\footnote{See id. at 44-52.} While the Obama Administration claims that Mr. al-Aulaqi had taken on an operational role in AQAP, there has been no evidence provided to show that Mr. Khan had taken on a similar role within the organization. According to information in the public domain, the extent of Mr.
Khan’s involvement was limited to his being editor of Inspire, AQAP’s English-language magazine.\textsuperscript{22}

Even more troubling is the killing of Abdulrahman al-Aulaqi. The al-Aulaqi family has claimed that Abdulrahman had left the family home in Sana’a, Yemen, in order to look for his father, when he was killed.\textsuperscript{23} News reports, based on government sources, had originally claimed that the younger al-Aulaqi was in his early twenties and an AQAP militant.\textsuperscript{24} In response to these reports the al-Aulaqi family released Abdulrahman’s official birth certificate from the State of Colorado showing that he was sixteen years of age.\textsuperscript{25} Because the executive program is shrouded in secrecy there is no way to tell whether Abdulrahman al-Aulaqi was targeted or whether he was “collateral damage.”

On July 18, 2012, Mr. al-Aulaqi’s father again filed suit, this time on behalf of his son and grandson, in the U.S. District Court for the District of Columbia.\textsuperscript{26} While the new complaint replaced the ATS claim with a violation of the Bill of Attainder clause, the main thrust of the plaintiff’s argument remained: The placing of an American Citizen on a targeted kill list and his subsequent killing violates the Constitution.\textsuperscript{27}

The current regime is one in which the Executive Branch, and the President specifically, is determining which individuals are being placed on the kill list and targeted without any oversight from the co-equal branches or the possibility of judicial review prior to a strike directed at an American citizen. The constitutional implications of such a state of affairs is

\textsuperscript{22} Mazzetti, Schmitt & Worth, supra note 19.
\textsuperscript{26} Complaint, Al-Aulaqi v. Panetta, No. 1:12-cv-01192-RMC (D.C. Cir. 2012).
\textsuperscript{27} Id. at 1.
troubling: whether the Executive has the authority to operate such a program free from judicial oversight and, if not, whether the “disposition matrix” can withstand Constitutional review. As stated in a New York Times editorial piece following the disclosure of the kill list: “It is too easy to say that this is a natural power of a commander in chief. The United States cannot be in a perpetual war on terror that allows lethal force against anyone, anywhere, for any perceived threat.”

Part I of this article will briefly describe the legal status of targeted killings. The practice of targeted killings is a relatively recent development in both domestic and international law. Its legality is hotly contested both as a matter of American constitutional law and international humanitarian law. Although the Obama administration has attempted to justify the practice under both legal frameworks, its legality remains unclear.

Part II of this article will review the history of presidential powers during an emergency and will address the issue of the extension of the authority to target and kill American citizens to the Executive branch and whether it can be justified under an emergency powers doctrine. Because Israel and the United Kingdom have an extensive history of cases dealing with terrorism and numerous legislative acts concerning emergency powers, they will be the contrast to American jurisprudence concerning emergency powers in the struggle against terrorism.

Part III will address whether the principle of proportionality may be better suited to assist in judicial review with regard to the targeted killing of American citizens who take up arms with a non-state actor against the U.S. Because the citizen’s right not to be deprived of life absent due process represents a significant and fundamental right it is unclear whether the District Court will

once again be able to dismiss the suit on standing. While the Supreme Court has commonly deferred to the foreign policy decisions of the Executive there are significant and troubling constitutional implications involved in the targeting and killing of American citizens absent due process.

The purpose of this paper is to show that, because of the limits on Executive power in the war on terror, and because the right at issue is a fundamental right, the United States Supreme Court will most likely be unable to uphold the Executive's authority to unilaterally place a U.S. citizen on a targeted kill list under a due process balancing or strict scrutiny test and would be better served by applying the principle of proportionality to terrorism cases going forward.

I. The Legal Status of Targeted Killing

In defending the predator drone program members of the Obama administration have consistently referred to the Authorization for the Use of Military Force (AUMF).\textsuperscript{30} Taken at face value, the AUMF would appear to support the conclusion that the drone program is, as an exercise of Executive authority, legal.\textsuperscript{31} When the President acts with either explicit or implied authority from Congress, his power is at its maximum.\textsuperscript{32}


\textsuperscript{31} See generally Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579, 635-637 ("When the President acts pursuant to an express or implied authorization of Congress, his authority is at its maximum, for it includes all that he possesses in his own right plus all that Congress can delegate...A seizure executed by the President pursuant to an act of Congress would be supported by the strongest of presumptions and the widest latitude of judicial interpretation, and the burden of persuasion would rest heavily upon any who might attack it.").

\textsuperscript{32} See id.
The Obama administration has steadily defended their practice of targeted killing under a liberal definition of “imminent” as understood in international law. \(^{33}\) Traditionally, the concept of imminent has been defined as “instant, overwhelming and leaving no choice of means, and no moment of deliberation.” \(^{34}\) However, the administration has argued that the geographic distinction limiting strikes to “hot” battlefields is inapposite when dealing with the terrorist threat. \(^{35}\) Despite these protestations, the idea that the use of lethal force is not limited to “hot” battlefields is far from universally accepted. \(^{36}\)

The international law concept of anticipatory self-defense also requires that the response to an imminent threat be both necessary and proportionate. Congress ought to have been presumed to know this when they inserted the “necessary and appropriate” language into the AUMF. Given the traditional understanding of imminent, there is nothing to suggest that those targeted far from a hot battlefield constitute such a threat or that a drone strike is necessary and appropriate. Furthermore, the language of the AUMF does not seem to cover military action in Yemen or against individuals who are a part of AQAP. \(^{37}\)

Assuming arguendo that the exigencies of the situation require lethal action, there are still domestic law implications. In the limited public comments made by individuals the

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\(^{33}\) Koh, \textit{supra} note 24 (“Of course, whether a particular individual will be targeted in a particular location will depend upon considerations specific to each case, including those related to the imminence of the threat…”); See also John O. Brennan, Assistant to the President for Homeland Security and Counterterrorism, Remarks at Harvard Law School (September 16, 2011) (“Over time, an increasing number of our international counterterrorism partners have begun to recognize that the traditional concept of what constitutes an “imminent” attack should be broadened in light of the modern day capabilities, techniques, and technological innovations of terrorist organizations.”).

\(^{34}\) \textit{MARK W. JANIS \\& JOHN E. NOYES, INTERNATIONAL LAW: CASES AND COMMENTARY} 545 (3rd ed. 2006).

\(^{35}\) Brennan, \textit{supra} note 27 (“The United States does not view our authority to use military force against al-Qa’ida as being restricted solely to ‘hot’ battlefields.”); Johnson \textit{supra} note 24 (“Third: there is nothing in the wording of the 2001 AUMF or its legislative history that restricts this statutory authority to the “hot” battlefields of Afghanistan.”).

\(^{36}\) See Brennan, \textit{supra} note 28 (“Others in the international community – including some of our closest allies and partners – take a different view of the geographic scope of the conflict, limiting it only to the hot battlefields.”).

\(^{37}\) The language of the AUMF allows the president to use necessary and appropriate force against, “those nations, organizations, or persons he determines planned, authorized, committed, or aided the terrorist attacks that occurred on September 11, 2001, or harbored such organizations or persons”. Not only was Yemen not involved in the September 11\textsuperscript{th} attacks, but AQAP as an organization was not conceived until January, 2009.
Administration has superficially addressed what they argue is the process due an American Citizen who might be targeted. Without admitting the existence of a program, Attorney General Eric Holder has laid out the legal justification for targeting a citizen:

Let me be clear: an operation using lethal force in a foreign country, targeted against a U.S. citizen who is a senior operational leader of al Qaeda or associated forces, and who is actively engaged in planning to kill Americans, would be lawful at least in the following circumstances: First, the U.S. government has determined, after a thorough and careful review, that the individual poses an imminent threat of violent attack against the United States; second, capture is not feasible; and third, the operation would be conducted in a manner consistent with applicable law of war principles.38

He further concluded that the Constitution does not require the President to wait to strike until a theoretical end-stage of planning, and that such a delay could put American lives at jeopardy.39

Because of the nature of terrorism, such arguments have gained considerable traction within the international community. However, the Attorney General would go on to conclude that the Constitution guarantees “due process, not judicial process.”40

In a secret legal memorandum written by the Department of Justice’s Office of Legal Counsel government lawyers provided the justification for acting despite an Executive order banning assassinations, a federal law against murder, various aspects of the international laws of war, and the protections in the Bill of Rights, specifically the Fourth and Fifth Amendments.41

The memo was narrowly drawn to the specifics of Mr. Aulaqi’s case and concluded that what is considered reasonable under the Fourth Amendment and what process was due under the Fifth

38 Eric Holder, U.S. Attorney General, Remarks at the Northwestern University School of Law (March 5, 2012).
39 Id.
40 Id.
Amendment was different for al-Aulaqi than an ordinary criminal.\textsuperscript{42} As support for this contention, the memo cited Supreme Court cases allowing for the detention and prosecution of American citizens who have joined an enemy’s forces.\textsuperscript{43} In addition, the memo argues that it would be constitutional to take lethal action in order to curtail an imminent threat to innocent people and that the threat could be imminent even where the enemy leader is not in the midst of launching an attack.\textsuperscript{44}

Because the only evidence of the Administration’s legal reasoning is public statements made by administration officials it is unclear how strong their justifications are. The liberal definition of imminent that they apply does not have widespread acceptance within the international community. Moreover, it is unclear whether the AUMF would cover military action in Yemen or if AQAP is covered under the resolution. If not, the President might be able to rely on his Commander in Chief powers alone.\textsuperscript{45} However, these justifications fail to sufficiently address the deprivation of the due process rights involved in the targeting of American citizens. Most troubling is Attorney General Holder’s conclusion that citizens are entitled to “due process, not judicial process.” Given the most recent Supreme Court cases concerning terrorism this assumption is not especially strong.

II. Emergency Powers and Combating Terrorism – The United States, United Kingdom, and the State of Israel

A. The United States

1. The Civil War and Habeas Corpus

\textsuperscript{42} Id.
\textsuperscript{43} Id.
\textsuperscript{44} Id.
The United States Constitution is relatively ambiguous in its delegation of emergency powers. The sole reference to the authority to take action during an emergency can be found in Article I, Section 9, Clause 2, also known as the Suspension Clause: "The privilege of the writ of habeas corpus shall not be suspended, unless when in cases of rebellion or invasion, the public safety may require it." The power to suspend the writ is clearly delegated to Congress, being found in Article I, and by the text of the Clause the only explicit cases of emergency where the writ can be suspended are in cases of rebellion or invasion. The Constitution does not express what other circumstances, beyond rebellion or invasion, may be defined as an emergency nor does it specify who, or what, determines the extent or duration of an emergency.

The writ has only been suspended four times in American history: during the Civil War; during Reconstruction; following the Spanish-American War in the Philippines; and in Hawaii following the attack on Pearl Harbor. Of the occasions where the writ has been suspended, the former three fall squarely within the rebellion framework while the latter would qualify as an invasion. In this respect all four would qualify as emergencies anticipated by the Framers.

The most controversial of the suspensions of the writ would certainly be Lincoln’s suspension of the writ during the Civil War. By its placement in Article I, the authority to suspend is clearly granted to the Legislative branch. However, at the onset of the Civil War President Lincoln did so in the military distract that encompassed Washington D.C. without prior legislative authorization. It can hardly be argued that the circumstances Lincoln faced did not amount to a rebellion. Insurrection in Maryland had threatened to isolate the Capital from the rest of the Union and Lincoln authorized his military commanders to suspend habeas corpus if

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46 U.S. CONST. art. I, § 9, cl. 2.
48 Id.
necessary. When the writ was suspended not only was the stage set for the first Constitutional battle over the Suspension Clause, but also the President faced the first significant challenge to his power during an emergency in American history.

In *Ex Parte Merryman*, Chief Justice Roger Taney, acting in his capacity as a circuit court judge for the District of Maryland, was asked to determine whether Lincoln had the authority to suspend the writ. In a scathing rebuke to the President’s actions, Chief Justice Taney opinion stated that:

> These great and fundamental laws, which congress itself could not suspend, have been disregarded and suspended, like the writ of habeas corpus, by a military order, supported by force of arms. Such is the case now before me, and I can only say that if the authority which the constitution has confided to the judiciary department and judicial officers, may thus, upon any pretext or under any circumstances, be usurped by the military power, at its discretion, the people of the United States are no longer living under a government of laws, but every citizen holds life, liberty and property at the will and pleasure of the army officer in whose military district he may happen to be found.

Despite the clear ruling that his actions had been deemed unconstitutional, the president disregarded the order and opined: "Are all the laws, but one, to go unexecuted, and the government itself go to pieces, lest that one be violated?" President Lincoln would go on to suspend the writ a number of times during the Civil War, with the battle between the Judiciary and the Executive becoming moot with the passage of the Habeas Corpus Suspension Act in March 1863.

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49 Id.
50 17 F. Cas 144 (C.C.D. Md. 1861).
51 Id. at 152.
2. World War II, Korematsu, and Youngstown Steel

The era of the Second World War represented a dramatic shift in the willingness of the Court to approve of Executive action during wartime. Supreme Court decisions in *Ex parte Quirin*\(^5^4\) and *Johnson v. Eisentrager*\(^5^5\) offered a significantly more expansive view of Executive powers during wartime than its Civil War predecessors. However, whereas the decisions in *Quirin* and *Eisentrager* dealt with non-citizens who had taken up arms against the United States, the Court's decision in *Korematsu* came to represent the approval of the Executive exercise of power over American citizens during times of war.

The *Korematsu* case dealt with the Executive's authority to issue an order providing for the internment of Japanese Americans on the west coast of the United States during the war.\(^5^6\) Korematsu challenged his detention as a violation of the equal protection clause of the Fourteenth Amendment. Despite the equal protection challenge the Court's decision rested not on the constitutional validity of the racial classification but on the authority of the President during war:

Korematsu was not excluded from the Military Area because of hostility to him or his race. He was excluded because we are at war with the Japanese Empire, because the properly constituted military authorities feared an invasion of our West Coast and felt constrained to take proper security measures, because they decided that the military urgency of the situation demanded that all citizens of Japanese ancestry be segregated from the West Coast temporarily, and, finally, because Congress, reposing its confidence in this time of war in our military leaders — as inevitably it must — determined that they should have the power to do just this.\(^5^7\)

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\(^5^4\) 317 U.S. 1, 48 (1942) (holding that the President has the authority to try "unlawful combatants" by military tribunal and declining habeas review).

\(^5^5\) 339 U.S. 763, 790-91 (holding that U.S. courts had no jurisdiction over German prisoners being held in a U.S. administered prison in Germany).

\(^5^6\) *Korematsu v. United States*, 323 U.S. 214 (1944).

\(^5^7\) Id. at 223; *See* Exec. Order No. 9066, 7 Fed. Reg. 1407 (Feb. 19, 1942).
While *Korematsu* has historically been excoriated due to its racist underpinnings, it was the embrace of the idea that the Executive has significantly greater powers to limit certain fundamental rights of citizenship during times of war which had a lasting effect.

Because Congress had acquiesced in the President’s decision to detain Japanese Americans in internment camps in *Korematsu*, the Supreme Court had no occasion to question the President’s authority to act contrary to Congressional wishes. This determination would come before the Court during the Korean War in *Youngstown Sheet & Tube Co. v. Sawyer*. In an attempt to prevent a nationwide strike, which he believed would jeopardize national security, President Truman ordered the Secretary of Commerce to seize and operate the country’s steel mills. The Court eventually held that the President did not have the inherent authority to seize the mills and in doing so had acted contrary to Congressional intent. The decision in Youngstown represented only a mild departure from the Supreme Court’s deference to Executive decisions during wartime. However, this departure from unlimited Executive powers during times of war would have significant implications nearly half a century later.

3. The Global War on Terror

Following the terrorist attacks on September 11, 2001, the Bush administration implemented a program of indefinite detention of both American citizens and non-citizens suspected of terrorism. The majority of these “detainees” were held at the American military prison in Guantanamo Bay, Cuba. This was a concerted attempt by the administration to

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58 343 U.S. 579 (1952).
59 Id. at 588-89.
60 *Detainees*, N.Y. TIMES (Nov. 30, 2012) (In 2002, the Bush Administration made a sweeping declaration that the majority of the detainees were “unlawful combatants” and thus were not protected by the Geneva Convention. A special detention facility was set up at the American Naval Base in Guantanamo, the reasoning being that the Supreme Court decision in *Johnson v. Eisentrager* would withdraw them from the reach of the judiciary. In addition to those detained at Guantanamo, a smaller group of “high value” detainees were held in secret prisons scattered around the globe by the Central Intelligence Agency).
withdraw federal habeas jurisdiction to review Executive detention from the courts. However, from 2004-2008, in a series of narrow, technical decisions, concerning both Executive and legislative attempts to withdraw habeas jurisdiction, the Supreme Court rejected the administration’s “unitary Executive” theory and the broad presidential powers commensurate with it.

Beginning with *Rasul v. Bush*, the Supreme Court took a number of steps to significantly limit the Executive’s authority to detain suspected terrorists indefinitely and beyond the reach of judicial review. In *Rasul*, the Government, basing their contentions on *Eisentrager*, argued that the courts lacked jurisdiction to hear habeas petitions of aliens being detained abroad. In fact, the choice of Guantanamo was an explicit attempt to place the detainees beyond the reach of the judiciary. However, the Supreme Court held that although the United States lacked ultimate sovereignty that they did exercise “exclusive jurisdiction and control”. Based on this determination the Court rejected the Administration’s reasoning and found that the judiciary had jurisdiction to hear habeas reviews of those detained at Guantanamo.

In response to the Court’s ruling in *Rasul*, Congress passed the Detainee Treatment Act of 2005 (DTA). The bulk of the Act sought to remedy many of the abuses which had taken place at Guantanamo since its inception as a prison for detainees. However, in response to the Court’s decision regarding the process due those individuals held at Guantanamo, the DTA also

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63 Brief For the Respondents, supra note 51, at 14-50.
64 See Cullen Murphy, Todd S. Purdum, David Rose, Philippe Sands, *Guantanamo: An Oral History*, VANITY FAIR (January 11, 2012), available at http://www.vanityfair.com/politics/2012/01/guantanamo-bay-oral-history-201201 (“The whole point of Guantanamo was to create a regime of incarceration and interrogation — including torture — that the law could not reach: a “legal black hole,” as the English court of appeal put it. Although the 45-square-mile naval base on the southern shore of Cuba is fully subject to the U.S. writ...the Bush Administration argued from the outset that Guantanamo was outside American legal jurisdiction, and that, in essence, its personnel could treat detainees as they wished.”).
65 Rasul, 542 U.S. at 467.
66 Id. at 485.
established Combatant Status Review Tribunals (CSRT) to determine the status of those being detained. While the Act did provide for appeal to the Circuit Court of Appeals for the District of Columbia, it nonetheless stripped the judiciary of original jurisdiction to hear habeas petitions.

Not surprisingly, in *Hamdan v. Rumsfeld*, the Court rejected this attempt, through the DTA, to withdraw detainees from the reach of the courts and found that the president lacked the authority to establish the tribunals. Furthermore, it found that the military commissions established by the Bush administration shortly after the September 11th attacks violated both the Uniform Code of Military Justice (UCMJ) and the Third Geneva Convention. Following the Court's decision in *Hamdan*, Congress passed the Military Commissions Act of 2006 (MCA).

The main purpose of the MCA was to establish the procedures for trying detainees by military commissions valid under the UCMJ and Geneva Conventions. However, it also attempted to strip the courts of jurisdiction to hear the habeas petitions of those being detained not only at Guantanamo but also eliminated habeas jurisdiction for any alien, wherever seized or held, so long as they have been, “determined by the United States to have been properly detained as an enemy combatant or is awaiting such determination.”

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68 *Id.* at § 1405 (The section of the Act establishing the CSRTs explicitly attempted to remove habeas jurisdiction from the judiciary: “Except as provided in section 1005 of the Detainee Treatment Act of 2005, no court, justice, or judge shall have jurisdiction to hear or consider... an application for a writ of habeas corpus filed by or on behalf of an alien detained by the Department of Defense at Guantanamo Bay, Cuba).

69 548 U.S. 557, 575-76 (2006) (The Court took the preliminary step of finding that the DTA and CSRTs did not strip the judiciary of the power to hear habeas petitions and that abstention was not necessary in the present case).

70 *Id.* at 590-635 (In a lengthy opinion, the Court first found that the military commissions set up by the Bush Administration were not authorized by either the DTA, AUMF, or the UCMJ. It then proceeded to find that the military commissions themselves violated the UCMJ and the Geneva Convention).


72 *Id.* § 948b ("PURPOSE. - This chapter establishes procedures governing the use of military commissions to try alien unlawful enemy combatants engaged in hostilities against the United States for violations of the law of war and other offenses triable by military commission.").

73 *Id.* § 950j ("Except as otherwise provided in this chapter and notwithstanding any other provision of law... no court, justice, or judge shall have jurisdiction to hear or consider any claim or cause of action whatsoever, including any action pending on or filed after the date of the enactment of the Military Commissions Act of 2006, relating to the prosecution, trial, or judgment of a military commission under this chapter, including challenges to the lawfulness of procedures of military commissions under this chapter.").
In 2008, Boumediene challenged the constitutionality of the statute.\textsuperscript{74} In a five-member majority ruling the Court, for the third time, struck down an attempt to withdraw habeas review from the judiciary. Specifically, the Court found that the CSRTs did not provide a sufficient alternative to habeas proceedings, that Congress's jurisdiction-stripping effort violated the Suspension Clause and that absent a wholesale suspension of the writ neither the President nor Congress could carve out an exception as it pertained to individuals detained at Guantanamo Bay.\textsuperscript{75}

Whereas Rasul, Hamdan and Boumediene dealt with the access to habeas review concerning non-citizens, the Supreme Court has also had occasion to consider the procedural rights due an American citizen designated an "enemy combatant" by the Executive. In Hamdi v. Rumsfeld,\textsuperscript{76} a plurality of the Court agreed with the Executive on the substantive issue of whether it could lawfully detain enemy combatants without preferring criminal charges. However, the Court went on to find that, procedurally, the decision to detain Hamdi indefinitely was deficient.\textsuperscript{77} Applying the procedural due process test promulgated in Mathews v. Eldridge,\textsuperscript{78} the Court determined that Hamdi was entitled to, "notice of the factual basis for his classification,\

\textsuperscript{75} Id. at 792 ("Although we do not hold that an adequate substitute must duplicate §2241 in all respects, it suffices that the Government has not established that the detainees access to the statutory review provisions at issue is an adequate substitute for the writ of habeas corpus. MCA § 7 thus effects an unconstitutional suspension of the writ.").
\textsuperscript{76} Hamdi v. Rumsfeld, 542 U.S. 507 (2004) ("There is no bar to this Nation's holding one of its own as an enemy combatant....[I]f the record establishes that United States troops are still involved in active combat in Afghanistan, those detentions are part of the exercise of ‘necessary and appropriate force,’ and therefore are authorized by the AUMF.").
\textsuperscript{77} Id. at 532.
\textsuperscript{78} Matthews v. Eldridge, 424 U.S. 319, 334-335 (1976) ("More precisely, our prior decisions indicate that identification of the specific dictates of due process generally requires consideration of three distinct factors: First, the private interest that will be affected by the official action; second, the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards; and finally, the Government's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail.").
and a fair opportunity to rebut the Government’s factual assertions before a neutral decisionmaker.  

Taken as a whole, this series of Supreme Court decisions represent a substantial weakening of the unlimited emergency powers that the Executive has enjoyed throughout American history. It is clear that suspected terrorists, citizen and non-citizen alike, are entitled to both the substantive and procedural safeguards of the Constitution. Because of the amorphous and seemingly indeterminate nature of the war on terror, this ongoing conflict between the Judicial Branch and the Executive and Legislative Branches represents a significant impediment to the efficient and effective waging of the war.

The American approach has traditionally sought to deal with emergencies within the general framework of the Constitution, despite its ambiguous language and unclear allocation of emergency powers. The result has been that throughout separate eras power has been exercised and rights have been affected in an inconsistent manner. A second approach for dealing with emergencies relating to terrorism, particularly within the United Kingdom and Israel, has been ad hoc legislative mechanisms that address what are determined to be ongoing threats of terrorism. The following section addresses whether such a system would be better suited to confront the terrorist threat.

B. Emergency Powers in the United Kingdom

Many of the emergency laws enacted in the United Kingdom prior to 2001 dealt with the conflict in Northern Ireland, as opposed to any threat from international terrorism. The most significant of these was the 1973 Northern Ireland (Emergency Provisions) Act (EPA).  

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79 Hamdi, 542 U.S. at 533.
Northern Ireland, the Act removed the right to trial by jury for a number of serious offenses, including murder, bombings and armed robbery. The EPA also granted the police broad powers to arrest those suspected of being part of a terrorist organization and to perform warrantless searches. Furthermore, membership in a proscribed terrorist organization, defined as “the use of violence for political ends”, became a criminal offense.

As Irish Republican Army (IRA) activity spread to England, Scotland and Wales, Parliament passed the Prevention of Terrorism Act (PTA) in 1974. Whereas the EPA covered only Northern Ireland, the PTA was in effect throughout the United Kingdom. The PTA allowed the police to detain persons for up to seven days without judicial approval and the Secretary of State to remove individuals from the United Kingdom. Although the PTA was also used against international terrorists, the overwhelming majority of those it was used against were Irish. For a quarter century the majority of terrorism laws passed in the United Kingdom concerned the ongoing conflict in Northern Ireland. However, in 2000, Parliament passed the Terrorism Act, which provided an extended list of proscribed terrorist organizations, including those beyond association with Northern Ireland.

The Terrorism Act was short lived, and in response to the September 11th attacks the United Kingdom passed the Anti-terrorism, Crime and Security Act. The matters covered by the act include the seizure of terrorist property, new police powers, and the detention of

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81 Id. §2 (“A trial on indictment of a scheduled offense shall be conducted by the court without a jury.”); See id. sch. 27 for list of schedule offenses.
82 Id. §§10-18.
83 Id. §19, 28.
85 Id. §5, 7
87 Terrorism Act, 2000, c. 11, (U.K.).
suspected international terrorists. Specifically, the act reintroduced internment without trial into United Kingdom law, allowing the Home Secretary to detain a non-national suspected of being an international terrorist so long as he reasonably believes the individual to be a threat to national security and to order a person’s removal from the country.

Under the Act an individual who wished to challenge his detention was unable to do so in ordinary courts. The Act provided that the Special Immigration Appeals Commission (SIAC) was to hear any challenge to an individual’s detention and could reverse the Home Secretary’s decision if it were found there were no reasonable grounds for detention. The SIAC does not operate under ordinary court rules and the Commission may hear secret evidence against the detainee in the absence of the detainee or his legal representative. Although, the Act did allow an individual to appeal SIAC decisions to the Court of Appeals.

In response to certain provisions of the 2001 Act being invalidated by the House of Lords, Parliament passed the Prevention of Terrorism Act 2005. The invalidated provisions concerned the detention of non-nationals and were ruled by the House of Lords to be a violation of both the European Convention on Human Rights and the Human Rights Act of 1998. The 2005 Act established the “control order”, a form of house arrest, as a lesser restrictive means of monitoring individuals suspected of terrorist ties than those provided for by the 2001 Act. Despite being a lesser restrictive means of protecting the public from a terrorist act, the “control orders” are significantly constrictive of the individual’s liberty rights, including limits on the

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89 Id. §§ 1, 23, 89-101
90 Id. §§ 21-36
91 Id.
92 Id.
93 Prevention of Terrorism Act, 2005, c. 2, (U.K.) [hereinafter PTA].
94 See A (FC) and others (FC) v. Secretary of State for the Home Department, [2004] UKHL 56, [2002] EWCA Civ 1502 (appeal taken from Eng. and Wales), available at http://www.publications.parliament.uk/pa/ld200405/ldjudgmt/jd041216/a&oth-1.htm (For more on this case see Part III).
person’s employment, associations or communications with certain individuals, freedom of movement and electronic tagging.96

The powers granted under the 2005 Act were quickly supplemented following the July 2005 bombings of the London Subway when Parliament passed the Terrorism Act 2006.97 In addition to modifying existing offences, the Act introduces new offenses such as encouragement of terrorism or dissemination of terrorist publications.98 The Act also extended the period of detention for those suspected of terrorism.99 During debate in the House of Commons, a ninety-day detention period before being charged was proposed, representing a significant extension of the fourteen days that were currently allowed under existing legislation. However, the amendment was defeated and the period of detention was only extended to twenty-eight days, double what was previously allowed.100

As shown above, the United Kingdom has a robust statutory framework for preventative detention in addition to a broad definition of what constitutes terrorism and the criminal sanctions attached to their violation. Because the European Convention on Human Rights binds the United Kingdom there has been a more concerted effort by the United Kingdom to deal with the threat of terrorism within a criminal justice framework.101 Despite efforts to bring individuals to trial where possible, there is still a large margin of discretion granted to Parliament regarding legislative acts that implicate fundamental rights. The post-2000 Acts significantly increased police powers when combating terrorism, and, moreover, the procedures applied to detention hearings lack the protections commensurate with a traditional criminal proceeding. While

96 Id.
97 Terrorism Act, 2006, c. 11, (U.K.).
98 Id. § 1.
99 Id. § 23.
judicial bodies have provided a legitimate check on legislative overreaching, there are still important fundamental rights that are restricted by the struggle between liberty and security in the United Kingdom.

C. Emergency Powers in Israel

Focus on the state of Israel is especially relevant concerning the war on terrorism. Israel has been in a constant state of emergency since it’s founding and, as such, has a large body of law concerning explicit emergency powers. Because the nature of the war on terrorism appears increasingly indefinite the lessons learned from the Israeli experience can provide a case study for whether or not explicit emergency provisions are wise and the considerable chance that they may be used to violate human rights both in the international and domestic spheres.

The authority to determine when an emergency exists in Israel is provided by the Basic Law: The Government. That authority is explicitly granted to the Knesset, the Israeli legislative body. Despite the Basic Law stating that a declared emergency may not exceed one year, it provides that the Knesset as necessary may renew the emergency. Therefore, the Knesset has consistently renewed the state of emergency since 1948. The Basic law also provides that should the Prime Minister determine it is impossible to convene the Knesset, he may make emergency regulations or empower a minister to make them.

Israel’s emergency laws are divided into three main categories: Defence (Emergency) Regulations, administrative orders, and formal emergency Laws. The first of these, Defence

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103 Id. §38(a) (“Should the Knesset ascertain that the State is in a state of emergency, it may, of its own initiative or, pursuant to a Government proposal, declare that a state of emergency exists.”).
104 Id. §38(b) (“the Knesset may make a renewed declaration of a state of emergency as stated.”).
105 Id. §39(b).
(Emergency) Regulations, are a holdover from the British Mandate of Palestine. The original aim of these laws was to suppress Palestinian and Jewish insurgency during the period from 1937-1945. Despite being the law of a colonial power, the Modern State of Israel incorporated the Defence (Emergency) Regulations into their own law due to the state’s establishment during a time of war. As a result, the power to enforce the Defence (Emergency) Regulations belongs to military authorities. These include the power to arrest, inspections, and the ability to open and close roads and businesses. The regulations also allow for the military to suppress movement and speech.

Despite being termed emergency laws, the Defence (Emergency) Regulations are not dependent on a declared state of emergency, nor are they restricted to any time limit. Furthermore, the Defence (Emergency) Regulations grant vast power to the military authorities. In addition to the powers that can have a significant affect on the daily lives of Israelis and Palestinians, the Defence (Emergency) Regulations have also been used to expropriate Arab lands and to try civilians by military tribunal. Despite multiple attempts to repeal the Defence (Emergency) Regulations legislation has repeatedly stalled in the Knesset. However, the Emergency Powers (Detentions) Law, passed by the Knesset in 1979, did manage to repeal the provisions of the Defence (Emergency) Regulations concerning administrative detention.

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107 Id. at 143.
108 Id. at 144; The day following the Declaration of the Independence of Israel, forces from Egypt, Transjordan, Syria, and Iraq invaded the former Mandate of Palestine culminating in the 1948 Arab-Israeli War.
109 Id. at 143; See also B’Tselem, Defense (Emergency) Regulations (April 29, 2010), http://www.btselem.org/printpdf/22543.
110 Mehozay, supra note 42, at 143.
111 Id.
112 B’Tselem, supra note 98.
113 Id. (Efforts to repeal the regulations in 1951 and 1967 failed. The effort in 1967 stalled after the outbreak of the 1967 War. Since that time no serious effort has been undertaken to repeal the regulations).
Administrative emergency orders are the second form of Israeli emergency laws and are considered original Israeli law, in that they were not inherited from the colonial power.\textsuperscript{115} Generally, administrative emergency orders delegate legislative authority to government ministers. These orders differentiate from the Defence (Emergency) Regulations in only a few, but significant, respects. First, administrative emergency orders are dependent on a declared state of emergency. Second, emergency orders must be in accordance with "the defense of the State, public security and the maintenance of supplies and essential services."\textsuperscript{116} However, such language poses no significant constraint on the authority of the Knesset to pass such orders, given that the objectives are so broad. These types of orders have commonly been used as part of a broad administrative detention regime in both the West Bank and the Occupied Palestinian Territories.\textsuperscript{117}

Administrative detention in the West Bank is currently carried out under an administrative order.\textsuperscript{118} The Order grants military commanders in the West Bank the power to detain a person for up to six months, so long as they have reasonable grounds to believe that "a certain person must be held in detention for reasons to do with regional security or public security".\textsuperscript{119} The military commanders, at their own discretion, may extend the detention order for an additional period of up to six months.\textsuperscript{120} However, the order fails to specify a maximum period in which an individual can be administratively detained.

\textsuperscript{115} Mehozay, \textit{supra} note 42, at 146.
\textsuperscript{118} B’Tselem, \textit{supra} note 103; \textit{See also} Order regarding Security Provisions [Consolidated Version] (Judea and Samaria), 5770-2009, SH No. 1651 p. 271 (Isr.).
\textsuperscript{119} Order regarding Security Provisions [Consolidated Version] (Judea and Samaria), 5770-2009, SH No. 1651 § 273(a) (Isr.).
\textsuperscript{120} \textit{Id.} § 273(b).
Whereas the Defence (Emergency) Regulations were silent on the issue of judicial review, the administrative detention order provides that individuals who are detained are entitled to challenge their detention. The administrative detention order provides that individuals who are detained are entitled to challenge their detention. According to the order, within eight days from the day the person is detained, the individual must be brought before a military judge to determine if the detention is justified. The military judge may approve the order, cancel it, or shorten the duration. Deviation from the criminal rules of evidence are allowed during hearings and either the detainee or the military commander may also appeal the military court’s decision to the Military Court of Appeals.

Despite the comprehensive and broad authority encompassed by the Defence (Emergency) Regulations and administrative emergency orders, there is still a third category of Israeli emergency laws. The Knesset formally enacts this class of laws in their capacity as the legislative authority in Israel. Many formal emergency laws begin as administrative emergency orders, limited to three-month periods and intended to be temporary. However, when renewed by the Knesset they become formal laws, part of the Israeli statutory framework.

Formal emergency laws provide the Israeli government with an additional tool for detention of suspected terrorists. The Emergency Powers (Detention) Law was enacted, in 1979, to replace the provisions regarding administrative detention in the Defence (Emergency) Regulations. In contrast to the administrative detention order, the Emergency Powers (Detention) Law applies to residents of Israel, resident of the occupied territories, and foreign

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121 Id. § 275(a)-(b).
122 Id.
123 Id.
124 Id. § 277(a)-(c), 278(a)-(b).
125 Mehozay, supra note 95, at 152.
126 Id. at 153.
127 Id.
128 Emergency Powers (Detention) Law, 5739-1979, SH No. 76 (Isr.) [hereinafter EPDL].
nationals.\textsuperscript{129} Despite the broader application of these laws, the detainee is entitled to review of their confinement before the President of the District Court where they are detained.\textsuperscript{130} The review must take place within three months of the detainment and the President may set aside the detention order if he believes it was not made for reasons of state security or public security or if it was made in bad faith or for irrelevant considerations.\textsuperscript{131}

In response to the first and second intifadas, the Knesset passed another set of formal laws, further convoluting the legal framework governing detention. Entitled the Internment of Unlawful Combatants Law, the purpose of this law is to regulate the detainment of civilians who carry out hostilities against Israel and are not entitled to prisoner-of-war status under international humanitarian law.\textsuperscript{132} The Law enables the detention of individuals for an unlimited period of time if the chief of staff, or an officer holding the rank of major-general or above, believes that their release will harm state security.\textsuperscript{133}

Similar to the Emergency Powers (Detention) Law, the Unlawful Combatants Law stipulates that judicial review is to be held before a District Court judge once every six months.\textsuperscript{134} However, it differs in a significant respect. The Law provides that during the judicial proceedings the state can rely on two legal presumptions: 1) release of the detainee will harm state security, and 2) the determination of the Minister of Defense that the organization the detainee is a part of is perpetrating hostile acts against the State of Israel.\textsuperscript{135}

\textsuperscript{129} B'Tselem, \textit{supra} note 103.
\textsuperscript{130} EPDL, \textit{supra} note 117, § 4(a)-(d).
\textsuperscript{131} Id. § 4(c).
\textsuperscript{132} Internment of Unlawful Combatants, 2002, 5762-2002, SH No. 192, § 1 (Isr.) ("This Law is intended to regulate the incarceration of unlawful combatants not entitled to prisoner-of-war status, in a manner conforming with the obligations of the State of Israel under the provisions of international humanitarian law.").
\textsuperscript{133} Id. § 3(a).
\textsuperscript{134} Id. § 5(a)-(f).
\textsuperscript{135} Id. § 7.
As shown above, the Israeli system for handling emergencies is extremely convoluted. There is a large amount of overlap between the Regulations, Administrative Orders, and Laws. Furthermore, there is both an official and unofficial hierarchy between the laws. While some require a declared state of emergency, others are in operation at all times. It is also unclear which law may have supremacy given a conflict between relevant provisions. However, the more disconcerting development has been the asymmetrical manner in which the law has been applied. The Defence (Emergency) Regulations have frequently been used to expropriate Palestinian lands in the Occupied Palestinian Territories. Moreover, administrative detention has been used extensively and disproportionately against Palestinians. The result has been that, rather than a set of laws applicable only to emergency situations, the emergency regime has become a governing tool.

In 2008, the Israeli Supreme Court had the occasion to address the constitutionality of the Internment of Unlawful Combatants Law. The case dealt with two residents of the Gaza Strip who were being held by Israel as alleged members of Hezbollah and, as the individuals claimed, in violation of their right under the Basic Law: Human Dignity and Liberty. In ruling that the Law was constitutional the Court applied section eight of the statute: “There shall be no violation of rights under this Basic Law except by a law befitting the values of the State of Israel, enacted

136 B’Tselem, supra note 98.
137 B’Tselem, supra note 106.
138 See Mehozay, supra note 95, at 137 (“Israel's long-standing state of emergency has had considerable bearing on the state's governance. Less known, but equally important, is the fact that Israel's legal system features several overlapping and incoherent emergency legal mechanisms that exist side by side. This article demonstrates that Israel's ever-shifting body of emergency law has been used to suit its governing authorities' political ends. A chief goal has been to create flexibility in the application of law in order to systematically discriminate against Palestinians while maintaining a degree of legitimacy as a government by law.”).
139 CrimA 6659/06 A and B v. State of Israel [2008] (Isr.) (For further discussion of this case refer to Part III).
140 Basic Law: Human Dignity and Liberty, 1992, SH No. 1391 (Isr.).
for a proper purpose, and to an extent no greater than is required.” This test is known as the principle of proportionality.

III. Due Process Balancing v. the Principle of Proportionality

A. The Need for a Legal Framework Regarding Targeted Killings

During the war on terror, each attempt by the Executive to withdraw habeas review from the courts has resulted in a strong rebuke from the Supreme Court. Given that the war on terror appears to be indefinite in duration, the United States must clearly address what powers the President has to limit constitutional rights while combatting terrorism rather than continuing to address the matter with multiple legislative acts followed by judicial determinations that the President has exceeded his authority. Because the Supreme Court is unlikely to be able to uphold the targeted killing program under due process analysis it may be better suited by applying the principle of proportionality to American terrorism cases moving forward.

As part of his opinion dismiss the al-Aulaqi case, the district court judge cited the political question doctrine, implying that the decision to place Mr. al-Aulaqi on a targeted kill list constituted a nonjusticiable political question. In doing so, the judge expressed an unwillingness to question the Executive’s decision to take military action in addition to a reluctance to involve the courts in foreign policy-making. However, the issue before the court was not whether it would be prudent to question the military and foreign policy decision of the Executive branch but whether the Executive branch has the authority to unilaterally deprive a
U.S. citizen of his life absent due process. As stated by the President of the Israeli Supreme Court, Aharon Barak: "Judicial review does not examine the wisdom of the decision to engage in military activity. In exercising judicial review, we examine the legality of the military activity."

The decisions regarding the Guantanamo detainees were fraught with political implications. Despite this fact, the Supreme Court found judicially manageable standards by which to adjudicate the plaintiff’s claims. This reflects the Court’s determination that:

The very purpose of a Bill of Rights was to withdraw certain subjects from the vicissitudes of political controversy, to place them beyond the reach of majorities and officials and to establish them as legal principles to be applied by the courts. One's right to life, liberty, and property, to free speech, a free press, freedom of worship and assembly, and other fundamental rights may not be submitted to vote; they depend on the outcome of no elections.

In dismissing the complaint, albeit on standing grounds, the district court left al-Aulaqi’s constitutional rights wholly un-vindicated. Assuming the question eventually comes before the Supreme Court, the issue of whether or not the Executive can unilaterally deprive a citizen of their procedural and substantive rights absent process will have to be addressed. This would involve both the Matthews v. Eldridge test for procedural due process and strict scrutiny review regarding the fundamental right to life. Given the courts previous decision in terrorism cases, it is difficult to foresee the Executive program surviving this type of review.

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144 Complaint For Declaratory and Injunctive Relief at 1-2 Al-Aulaqi v. Obama, 727 F. Supp.2d 1 (D.C. Cir. 2010) (No. 1:10-cv-01469) (“This case concerns the Executive’s asserted authority to carry out “targeted killings” of U.S. citizens suspected of terrorism far from any field of armed conflict. According to numerous published reports, the government maintains lists of suspects – “kill lists” – against whom lethal force can be used without charge, trial, or conviction. Individuals, including U.S. citizens, are added to the lists based on Executive determinations that secret criteria have been satisfied. Executive officials are thus invested with sweeping authority to impose extrajudicial death sentences in violation of the Constitution and international law.”).  
147 Al-Aulaqi, 727 F.Supp.2d at 14-35.  
B. The Principle of Proportionality

Whereas the Supreme Court has consistently rejected acts of Executive unilateralism that deprive individuals of their fundamental rights throughout the war on terror, courts in the United Kingdom and Israel have, through the principle or proportionality, developed a more flexible approach to matters concerning the constitutional implications of the conflict. The principle of proportionality is a three-step process of judicial review. The first subtest examines whether there is a rational connection between the objective and means used to achieve it. The second subtest examines whether the objective could be achieved through less intrusive means. The third subtest examines whether the injury caused is in proportion to the benefit achieved.

1. United Kingdom

It is important to first distinguish the United Kingdom from the United States and Israel with regards to the legal regime under which they are operating. The United Kingdom is a signatory to the European Convention on Human Rights (ECHR), which has domestic legal effect pursuant to the Human Rights Act of 1998.149 As a matter of judicial review this has little to no effect. Both the European Court of Human Rights and courts in the United Kingdom apply the principal of proportionality concerning fundamental rights. However, the rights guaranteed in the ECHR are significantly more specific than those guaranteed by the American Constitution in addition to being broader in scope.150

In McCann and Others v. United Kingdom,151 the European Court of Human Rights applied the both the second and third subtests of the principle of proportionality, less intrusive

149 See Human Rights Act, 1998, c. 42 (U.K.); See also note 91.
150 Compare Council of Europe, European Convention for the Protection of Human Rights and Fundamental Freedoms, as amended by Protocols Nos. 11 and 14 (Nov. 4 1950) available at http://www.unhchr.org/refworld/docid/3ae6b3b04.html, with U.S. Const. amend. I–X (For instance, the ECHR explicitly provides for freedom from government intrusion in an individual's private and family life and right to marry whereas in the United States those rights have been granted only through judicial decisions).
means and proportionality in the narrow sense, regarding the targeted killing of three Provisional Irish Republican Army (PIRA) agents in Gibraltar. The claim in McCann had been that the soldiers, in killing the PIRA agents, had acted in contravention of Article 2 of the ECHR. In addressing whether Article 2 had been violated the court looked to whether the actions of the soldiers where in fact proportionate and to whether the planning and organization of the operation made lethal action necessary.

The court applied the customary international law rule of self-defense in determining whether the actions of the soldiers met the test of proportionality in the narrow sense. In doing so, they found that the decision of the soldiers to take lethal action was proportional to the objective achieved: “The Court accepts that the soldiers honestly believed, in the light of the information that they had been given, as set out above, that it was necessary to shoot the suspects in order to prevent them from detonating a bomb and causing serious loss of life.”

However, the court went on to find that the control and organization of the operation as a whole violated Article 2. Because the United Kingdom had previous knowledge of the plan to attack and had failed to detain the PIRA agents upon their entry to Gibraltar, the court found that lethal action had been rendered inevitable. Despite the Government assertion that if they had detained the agents at the border there would not have been sufficient evidence to detain and try the individuals, the court was “not persuaded that the killing of the three terrorists constituted the

152 Id. ¶ 145.
153 Id. ¶¶ 195-214.
154 Id. ¶ 192 (“On the one hand, they were required to have regard to their duty to protect the lives of the people in Gibraltar including their own military personnel and, on the other, to have minimum resort to the use of lethal force against those suspected of posing this threat in the light of the obligations flowing from both domestic and international law.”).
155 Id. ¶ 200.
156 Id. ¶¶ 213-214.
157 Id.
use of force which was no more than absolutely necessary." Therefore, the killings violated the second subtest of proportionality.

The principle of proportionality has also been used to determine the constitutionality of the Government's program of detaining suspected terrorists. In A(FC) and Others v. Secretary of State for the Home Department, foreign nationals had been detained under the 2001 Anti-terrorism, Crime, and Security Act. The foreign nationals had challenged their detention in relation to the first and second subtests for proportionality. While conceding that the prevention of a terrorist attack was a sufficiently important objective when limiting fundamental rights, they challenged whether the legislation was rationally related to the objective and whether there were substantially less restrictive measure that could achieve the objective.

The House of Lords agreed with the appellants on both these points, thus invalidating section 21 and 23 of the Act. These sections allowed for the certification and detention of a foreign national, but did not provide similar mechanisms for U.K. nationals. Reasoning that U.K. nationals were just as capable of committing terrorist acts as foreign nationals, the House of Lords found that the objective of the sections was not rationally related to the prevention of terrorism. Moreover, the court pointed to examples of less restrictive measures already

158 Id. ¶ 204, ¶ 213.
160 Id. ¶ 31(4)-(5) ("(4) Sections 21 and 23 did not rationally address the threat to the security of the United Kingdom presented by Al-Qaeda terrorists and their supporters because (a) it did not address the threat presented by UK nationals, (b) it permitted foreign nationals suspected of being Al-Qaeda terrorists or their supporters to pursue their activities abroad if there was any country to which they were able to go, and (c) the sections permitted the certification and detention of persons who were not suspected of presenting any threat to the security of the United Kingdom as Al-Qaeda terrorists or supporters.; (5) If the threat presented to the security of the United Kingdom by UK nationals suspected of being Al-Qaeda terrorists or their supporters could be addressed without infringing their right to personal liberty, it is not shown why similar measures could not adequately address the threat presented by foreign nationals.").
161 Id. ¶ 33.
162 Id.
employed against one of the appellants. Consequently, the sections also failed to impair the individual's freedom no more than necessary to accomplish the objective.

2. Israel

The Israeli Supreme Court has applied the principle of proportionality test to a wide array of cases, including those dealing with the fence separating Israel proper from the occupied territories, the internment of individuals suspected of being a member of a terrorist organization and targeted killings. Because of the circumstances Israel finds itself in, the judiciary allows for a “margin of constitutional appreciation” concerning legislative acts that implicate fundamental rights. Although this margin of appreciation gives the Knesset significant discretion when the choice is between fundamental rights and security, it is not a presumption that the legislative act in question is constitutional. The Court’s decisions reflect this understanding that the test of proportionality is a flexible test, involving assessment and evaluation and dependent on the circumstances of each case.

In *Beit Sourik Village Council v. Government of Israel,* the High Court of Justice determined whether the military’s assessment of the ideal route for a separation fence in the occupied territories violated the right of property and freedom of movement of those affected. The military had claimed that the location of the proposed separation fence was necessary for them to effectively prevent attacks originating in the Palestinian territory. Meanwhile, the

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163 *Id.* ¶ 35.
164 *Id.*
165 CrimA 6659/06 A and B v. State of Israel [2008] ("The subtests sometimes overlap and each of them allow the legislature a margin of discretion. There may be circumstances in which the choice of an alternative measure that violates the constitutional right slightly less results in a significant reduction in the realization of the purpose or the benefit derived from it, and therefore it would not be right to oblige the legislature to adopt the aforesaid measure. Consequently this court has recognized a 'margin of constitutional appreciation.'").
167 *Id.* ¶ 55 ("He claims that IDF forces' control of Jebel Muktam is a matter of decisive military importance.").
parties were in disagreement regarding the impact the fence would have on the livelihood of the Palestinians affected, although it was admittedly significant.\textsuperscript{168}

The Court quickly dispensed with the first two elements of the proportionality test, finding that there was a rational connection between the objective of the fence and the proposed route and that there was no alternate route that would fulfill security needs while causing lesser injury.\textsuperscript{169} The decisive factor for the Court was whether the injury to the local inhabitants was proportionate to the benefit of the security fence.\textsuperscript{170} In holding that it was not, the Court found that the difference between the proposed route and an alternate route that was less harmful to the inhabitants was minimal.\textsuperscript{171} Measured against the significant injury perpetrated against the inhabitants affected, the result was disproportionate.\textsuperscript{172}

Whereas the individuals whose fundamental rights were affected in \textit{Beit Sourik} were farmers and other victims of the ongoing conflict in Israel, the appellants in \textit{A and B v. State of Israel}\textsuperscript{173} did not necessarily have clean hands. Appellants had been detained under the Internment of Unlawful Combatants Law as alleged members of the Hezbollah group.\textsuperscript{174} They challenged their detention under both international humanitarian law and the Israeli Basic Law: Human Dignity and Liberty.\textsuperscript{175} After focusing on the issue of the detainee’s designation as unlawful combatants, the Court then addressed their constitutional rights.

\begin{itemize}
\item \textsuperscript{168} \textit{Id.} ¶ 52-53.
\item \textsuperscript{169} \textit{Id.} ¶ 57-58 ("By our very ruling that the route of the fence passes the test of military rationality, we have also held that it realizes the military objective of the separation fence...In this state of affairs, our conclusion is that the second subtest of proportionality, regarding the issue before us, is satisfied.").
\item \textsuperscript{170} \textit{Id.} ¶ 59.
\item \textsuperscript{171} \textit{Id.} ¶ 61 ("The gap between the security provided by the military commander’s approach and the security provided by the alternate route is minute.").
\item \textsuperscript{172} \textit{Id.} ("These injuries are not proportionate.").
\item \textsuperscript{173} CrimA 6659/06 A and B v. State of Israel [2008] (Isr.).
\item \textsuperscript{174} \textit{Id.} ¶ 2.
\item \textsuperscript{175} Basic Law: Human Dignity and Liberty, 1992, SH No. 1391 (Isr.).
\end{itemize}
As in Beit Sourik, the Court quickly found that the first subtest of proportionality, a rational connection to the objective, had been satisfied.\textsuperscript{176} However, the Court engaged in a more detailed analysis of the second subtest. Appellants argued that for the realization of the legislative purpose of the Law, detention as an unlawful combatant was not necessary or that alternatively, they should be given a criminal trial.\textsuperscript{177} The Court rejected this argument, stating that the purpose of the law was not to punish for past acts but rather to prevent future acts that threaten the security of the State.\textsuperscript{178} Moreover, the Court found that detention under the Internment Law, rather than the Emergency Powers (Detentions) Law, was proper given the different purposes served by each law.\textsuperscript{179} In addition, the Court also rejected appellants argument that the circumstances of their detention were an excessive violation of their liberty rights, and thus out of proportion to the benefit achieved by their detainment.\textsuperscript{180} Therefore, all three subtests of proportionality had been satisfied and the Court declared their detainment constitutional.

The Israeli High Court of Justice has also applied the principle of proportionality while addressing the issue of targeted killings. In Public Committee Against Torture v. Government,\textsuperscript{181} the Court engaged in an in-depth analysis of whether targeted killings, specifically those where

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\textsuperscript{176} Id. \textsuperscript{\textdagger} 32 ("Administrative detention constitutes a suitable means of averting the security threat presented by the detainee, in that it prevents the 'unlawful combatant' from returning to the cycle of hostilities against the State of Israel and thereby serves the purpose of the law. For this reason the first test of proportionality – the rational connection test – is satisfied.").
\textsuperscript{177} Id. \textsuperscript{\textdagger} 33.
\textsuperscript{178} See id. ("Bringing someone to a criminal trial is intended to punish him for acts that were committed in the past, and depends upon the existence of evidence that can be brought before a court in order to prove guilt beyond a reasonable doubt. By contrast, administrative detention was not intended to punish but to prevent activity that is prohibited by law and that endangers the security of the state.").
\textsuperscript{179} Id. \textsuperscript{\textdagger} 35 ("Thus we see that even though the Emergency Powers (Detentions) Law and the Internment of Unlawful Combatants Law prescribe a power of administrative detention whose purpose is to prevent a threat to state security, the specific purposes of the aforesaid laws are different and therefore the one cannot constitute an alternative measure for achieving the purpose of the other.").
\textsuperscript{180} Id. \textsuperscript{\textdagger} 49 (However, a look at the combined totality of the of the arrangements...the violation of the constitutional right is reasonably commensurate with the social benefit that arises from the realization of the legislative purpose.").
\textsuperscript{181} HCJ 769/02 Public Committee against Torture in Israel v. Government [2006].
\end{flushleft}
collateral damage may be a consequence of the attack, satisfy proportionality in the narrow sense, the third subtest. In addressing the third subtest the court held that there must be due proportion between the advantage and the damage caused by the targeted killing:

The test of proportionality stipulates that an attack on innocent civilians is not permitted if the collateral damage to them is not commensurate with the military advantage (in protecting combatants and civilians). In other words, the attack is proportionate if the advantage arising from achieving the proper military objective is commensurate with the damage caused by it to innocent civilians. This is an ethical test. It is based on a balance between conflicting values and interests. 182

Based on this reasoning, the court held that every targeting killing is not prohibited "ab initio", that every targeted killing must satisfy proportionality in the narrow sense and that any harm done to civilians must be not only be outweighed by the benefit achieved but also limited to the greatest extent possible. 183

As is evident from the Israeli Supreme Court's decisions, the test of proportionality allows for a significant amount of discretion with regards to legislative and military decisions. However, it is not simply a rubber stamp. Given the ongoing threat of terrorism that Israel faces the principle of proportionality provides a flexible approach that varies depending on fact-specific circumstances and the magnitude of the security interests at stake. This allows the Court to balance liberty and security interests appropriately, free from the rigorous application of a tiered system of review that can all but predetermine the outcome of a given conflict between interests.

182 Id. ¶ 45.
183 Id. ¶ 64.
CONCLUSION

There can be little doubt that Anwar al-Aulaqi was a threat to American security. He was an admitted jihadist and, although the evidence linking him directly to terrorist attacks has not been made public, the influence Mr. al-Aulaqi wielded within the English-speaking jihadist community is clear. Three of the post-9/11 attacks have cited al-Aulaqi as inspiration. However, the contention that citizens such as al-Aulaqi, Mr. Kahn, and Abdulrahman al-Aulaqi are entitled to “due process, not judicial process” is troubling. Because of the Obama Administration’s unwillingness to disclose the procedures for determining how an individual is placed on a “kill list”, let alone admit such a program exists, there is a legal vacuum concerning targeted killing.

At the onset of the war on terror the Bush administration attempted to create a legal black hole at Guantanamo. At every step their attempts were rebuffed by a Supreme Court intent on upholding the Constitution, even during the struggle against terrorism. Still, the Supreme Court has not been unreasonable, finding that the process due suspected terrorists need not be on scale with the protections provided in the criminal setting. Due to the logistical difficulties in physically detaining individuals such as al-Aulaqi it is unlikely that they will find it necessary that the Obama Administration entitle these individuals to Article III trials or even military commissions.\(^{184}\) Nevertheless, the current regime is increasingly untenable.

Most of the legal questions concerning the war on terror weigh liberty interests, generally protected as constitutional rights, against security interests that constitute a collective social good. The use of a proportionality test is not completely foreign to the Supreme Court as it has

\(^{184}\) Perhaps there is the possibility that courts similar to those established under the Foreign Intelligence Surveillance Act (FISA) could be created. FISA courts were established to oversee requests for surveillance warrants against suspected foreign intelligence agents. Applications for the warrant take place in front of an individual judge and do not involve an adversarial proceeding. Furthermore, where the Attorney General reasonable determines that an emergency situation exists he may authorize the emergency employment of electronic surveillance; See 50 U.S.C. §§ 1803, 1805(e).
applied such a test when competing constitutional interests are weighed.\textsuperscript{185} The reality may be that the conflict between a citizen's constitutional rights and the collective social benefit of being free from terrorism is, "not a context in which a court should effectively presume either constitutionality (as in rational-basis review) or unconstitutionality (as in strict scrutiny)." \textsuperscript{186}

At issue with the targeted killing of American citizens is the Executive's authority to deprive individuals of their substantive and procedural due process rights. These rights represent a significant and fundamental constitutional question and it is difficult to foresee the Supreme Court being able to uphold the most serious deprivation of rights, life, absent any process whatsoever. Because it is unlikely that the Executive program can survive the procedural due process test or strict scrutiny review there is a vacuum in the legal framework regarding the targeted killings of Americans. Since the issue is so complex, implicating both constitutional and international law concerns, a more flexible approach may be necessary. The principle of proportionality can provide such an approach.

\textsuperscript{185} Dist. of Columbia v. Heller, 554 U.S. 570, 689-90 (2008) (Breyer, J., concurring) (citing examples where the Court has taken such an approach).
\textsuperscript{186} Id. at 689.