

THE CONSTITUTION FOLLOWS THE DRONE: TARGETED KILLINGS, LEGAL CONSTRAINTS, AND JUDICIAL SAFEGUARDS

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INTRODUCTION

The more national security law stays the same, the more it changes. To understand why, consider relevant developments that have occurred in the few months since the original version of these remarks were delivered earlier this year.

As far as we know, targeted killing remains alive and well as a key element of U.S. policy. Reports of deaths from just drone strikes for just the first half of 2014 in just Yemen range from 45 to 105.¹ If accurate, these numbers represent a slight increase over the previous year,² and the numbers may increase far more dramatically beyond Yemen. Overnight, the same Administration that has been under fire for overuse of drones has come under criticism for not deploying them more to counter the recent and stunning advance of the al Qaeda associated Islamic State in Iraq and Syria on Baghdad.³

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1. *Yemen: Reported US Covert Actions 2014*, BUREAU OF INVESTIGATIVE JOURNALISM, (Jan. 6, 2014), <http://www.thebureauinvestigates.com/2014/01/06/yemen-reported-us-covert-actions-2014/> [<http://perma.cc/KYM3-Y8JZ>].

2. *Yemen: Reported US Covert Actions 2013*, BUREAU OF INVESTIGATIVE JOURNALISM, (Jan. 3, 2013), <http://www.thebureauinvestigates.com/2013/01/03/yemen-reported-us-covert-actions-2013/> [<http://perma.cc/YX34-AEMV>].

3. Dan Lamothe, *When will the U.S. send drones to Iraq? The question won't go away*, WASH. POST, June 12, 2014, <http://www.washingtonpost.com/news/checkpoint/wp/2014/06/12/when-will-the-u-s-send-drones-to-iraq-the-question-wont-go-away/> [<http://perma.cc/55UZ-CBZ9>].

Yet just as targeted killing persists, so too do more legally constrained alternatives. Last March, Sulaiman Abu Ghaith was convicted for conspiracy to kill Americans and for providing, and conspiring to provide, material support to terrorists by a jury in the United States District Court for the Southern District of New York.⁴ The son-in-law of Osama bin Laden, Abu Ghaith had been a high-ranking member of al Qaeda who released a series of inflammatory videos after the attacks of September 11. U.S. authorities discovered him in Turkey in 2013. But rather than assassinate him, they instead successfully requested that Jordanian officials arrest him and turn him over for criminal trial in the United States. Just over a year later he stood convicted in a courtroom located a few blocks from Ground Zero in Manhattan.

Together, the continued use of drones and the Abu Ghaith conviction demonstrated that not much had changed since the book *Kill or Capture* underlined the stark contrast of the Obama Administration's policies.⁵ More recently still, however, another federal court in the same complex did alter the legal landscape. This June, in response to an ACLU Freedom of Information Act request, the Second Circuit ordered the release of an only partially redacted version of the long sought OLC memorandum providing the legal basis for the killing of Anwar al-Awlaki, a U.S. citizen alleged to be a high ranking al Qaeda operative, by a drone in 2011.⁶ With its release, the memorandum permits a more thorough critique of the Administration's use of targeted killing, its legal justifications, and the proper role of the courts.

This essay addresses each of these topics. First, it considers the current level of targeted killing and the ongoing need for greater transparency notwithstanding the court-ordered release of the al-Awlaki memorandum. Second, it briefly considers the international law constraints applicable to targeted killing. Finally, the essay focuses on the principal limits established by

4. Benjamin Weiser, *Jurors Convict Abu Ghaith, Bin Laden Son-in-Law, in Terror Case*, N.Y. TIMES, Mar. 26, 2014, <http://www.nytimes.com/2014/03/27/nyregion/bin-ladens-son-in-law-is-convicted-in-terror-trial.html> [<http://perma.cc/PKQ2-3WKW>].

5. DANIEL KLAIDMAN, *KILL OR CAPTURE: THE WAR ON TERROR AND THE SOUL OF THE OBAMA PRESIDENCY* (2012).

6. Charlie Savage, *Court Releases Large Parts of Memo Approving Killing of American in Yemen: Targeting Anwar al-Awlaki was Legal, Justice Department Said*, N.Y. TIMES, June 23, 2014, <http://www.nytimes.com/2014/06/24/us/justice-department-found-it-lawful-to-target-anwar-al-awlaki.html> [<http://perma.cc/6Z47-XFPF>].

the Constitution, standards that in turn compel some form of judicial review with regard to at least certain uses of lethal force currently practiced.

I. TRANSPARENCY

Assessing how well the U.S. applies the relevant law to the actual practice of targeted killing requires knowledge of what the government's practices are as well as how it understands the law. On the law, the Administration has been piecemeal. On the facts it has been close to Orwellian.

Take first targeted killing itself: For nearly four years the Obama Administration did not officially acknowledge that the practice took place. Not until April 2012 did John Brennan, then White House counterterrorism advisor, concede that the United States government conducts targeted strikes against specific al Qaeda terrorists, sometimes using remotely piloted aircraft, often referred to publicly as drones.⁷ Yet to date, neither Brennan nor any other official has set forth how many drone strikes or other instances of targeted killing have occurred, how many have been killed or injured, how many of that number have been civilians rather than legitimate targets, or where these acts have taken place.

The Administration's reticence stands in stark contrast to the dramatic rise in drone strikes, particularly since President Obama took office. Faced with official silence, it has fallen to an array of media, NGOs, even law school human rights programs, to fill the void. These sources more or less agree that the government has authorized something like 300-plus drone strikes, which have killed about 3,500 people, including approximately 300 to 400 civilians, mainly in Yemen, Pakistan, and Somalia.⁸ The same

7. Greg Miller, *Brennan Speech is First Obama Acknowledgement of use of Armed Drones*, WASH. POST, Apr. 30, 2012, http://www.washingtonpost.com/world/national-security/brennan-speech-is-first-obama-acknowledgement-of-use-of-armed-drones/2012/04/30/gIQAq7B4rT_story.html [<http://perma.cc/MUU5-FFUX>].

8. See, e.g., COMM. ON INT'L LAW, N.Y.C. BAR, *THE LEGALITY UNDER INTERNATIONAL LAW OF TARGETED KILLINGS BY DRONES LAUNCHED BY THE UNITED STATES 19-20* (2014) [hereinafter N.Y.C. BAR REPORT]; *Human Rights Institute*, COLUMBIA LAW SCH., <http://web.law.columbia.edu/human-rights-institute> [<http://perma.cc/NH37-RKUB>] (last visited Nov. 11, 2014); *Monthly Updates on the Covert War*, BUREAU OF INVESTIGATIVE JOURNALISM, <http://www.thebureauinvestigates.com/category/projects/drones/monthly-updates/> [<http://perma.cc/TT8Y-YCS7>] (last visited Nov. 11, 2014).

sources further indicate that the vast majority of these strikes have taken place since President Obama took office.⁹ Of the deaths, Attorney General Eric Holder has acknowledged that four were U.S. citizens, including the alleged operational leader of al Qaeda in the Arabian Peninsula (AQAP), Anwar al-Awlaki. All of these killings also occurred since 2009.¹⁰ Nor is official reticence limited to the strikes themselves. While some information is publically available with regard to the government's procedures for targeted killing,¹¹ it nonetheless remains incomplete in several regards¹²—gaps that outside sources once again have attempted to fill in.¹³

Acknowledging drone attacks, yet failing to address the specifics, is sufficiently Orwellian in its own right. This is especially so when former administration officials indicate that the true numbers are far lower than what the press and NGOs report.¹⁴ The Administration doubtless has sound security reasons for withholding certain information. But not to provide any—especially when outside sources offer at least plausible conjectures—undermines any attempt to assess whether the policy comports with the law.

Then there is the government's legal analysis. Here significantly more material has been forthcoming. Yet its release has been needlessly grudging, incremental, disjointed, and most importantly, incomplete.

The resulting pastiche roughly falls into three categories. First, and to their credit, several leading officials outlined the government's legal position in prominent speeches, including John Brennan, Harold Koh, and Jeh Johnson.¹⁵ Second, im-

9. *Supra* note 8.

10. Letter from Eric H. Holder, Jr., Att'y Gen., to Sen. Patrick J. Leahy, Chairman, Senate Comm. on the Judiciary (May 22, 2013), available at <http://s3.documentcloud.org/documents/703181/ag-letter-5-22-13.pdf> [<http://perma.cc/4ZCP-B5R8>].

11. JOINT CHIEFS OF STAFF, JOINT PUBLICATION 3-60: JOINT TARGETING (2013), available at http://cfr.org/content/publications/attachments/Joint_Chiefs_of_Staff-Joint_Targeting_31_January_2013.pdf [<http://perma.cc/T52A-HQFV>].

12. *Id.*

13. See generally KLAIDMAN, *supra* note 5.

14. *Authorization for Use of Military Force After Iraq and Afghanistan: Hearing Before the Senate Foreign Relations Committee*, 113th Cong. 13 (2014) (statement of Harold Hongju Koh, Sterling Professor of International Law, Yale Law School), http://www.foreign.senate.gov/imo/media/doc/Koh_Testimony.pdf [<http://perma.cc/F6GT-23TF>].

15. N.Y.C. BAR REPORT, *supra* note 8, at 5.

portant material has been leaked, most notably, a Department of Justice White Paper summary of a longer Office of Legal Counsel memorandum by David Barron and Marty Lederman on the legal basis for the targeted killing of al-Awlaki.¹⁶ Finally and most recently, the Administration released a partially redacted version of the OLC memorandum itself, agreeing not to contest a Second Circuit order in an effort to advance David Barron's nomination to the First Circuit.¹⁷ On these bases, it is possible to piece together an overall government position.¹⁸ Even then, as Greg Katsas's observations indicate, the analysis in these records remains somewhat thin.¹⁹

As a matter of both due process and freedom of information, the American public and our allies are at the very least entitled to know what the legal basis is for using the extraordinary power of targeting someone for death, through whatever means. On this the left and right broadly agree, and probably more to the point, so do watchdogs and insiders. Calls for greater transparency have issued from such usual suspect as the ACLU, Human Rights Watch, and Human Rights First.²⁰ Yet they have also come from former government officials, and erstwhile Federalist Society stalwarts as Jack Goldsmith²¹ and John Bellinger.²² Not

16. U.S. DEP'T OF JUSTICE, *LAWFULNESS OF A LETHAL OPERATION DIRECTED AGAINST A U.S. CITIZEN WHO IS A SENIOR OPERATIONAL LEADER OF AL-QA'IDA OR AN ASSOCIATED FORCE* (2011) [hereinafter DOJ WHITE PAPER], available at http://msnbcmedia.msn.com/i/msnbc/sections/news/020413_DOJ_White_Paper.pdf [<http://perma.cc/5T23-8PJS>].

17. *New York Times Co. v. U.S. Dep't of Justice*, 752 F.3d 123 (2d Cir. 2014).

18. See N.Y.C. BAR REPORT, *supra* note 8, at 48–59.

19. Gregory Katsas, *Targeted Drone Killings: Legal Justifications Under the Bush and Obama Administrations*, 2 HARV. J.L. & PUB. POL'Y: FEDERALIST EDITION 251 (2015).

20. See, e.g., PREDATOR DRONES FOIA, AM. CIVIL LIBERTIES UNION, <https://www.aclu.org/national-security/predator-drones-foia> [<http://perma.cc/UT28-X7KT>] (last visited July 5, 2014); Letta Tayler, *The Truth About the United States Drone Program*, HUMAN RIGHTS WATCH, <http://www.hrw.org/news/2014/03/24/truth-about-united-states-drone-program> [<http://perma.cc/6MP3-XY2M>]; Adam Jacobsen, *Investigation Isn't Enough: More Drone Transparency Needed*, Human Rights First (Jan. 10 2014), <http://www.humanrightsfirst.org/blog/investigation-isn-t-enough-more-drone-transparency-needed> [<http://perma.cc/RDC9-DS4C>].

21. See Stephen I. Vladeck, *Targeted Killing and Judicial Review*, 82 GEO. WASH. L. REV ARGUENDO 11, 13 n.10 (2014), http://www.gwlr.org/wp-content/uploads/2014/02/Vladeck_SME2.pdf [<http://perma.cc/9BD7-ST7C>].

22. John B. Bellinger III, *Will drone strikes become Obama's Guantanamo?*, WASH. POST, Oct. 11, 2011, <http://www.washingtonpost.com/opinions/will-drone-strikes-become->

many national security law issues command a near consensus. The need for the U.S. to provide a comprehensive legal analysis concerning targeted killing, however, is one of them.²³

II. INTERNATIONAL LAW

Targeted killing implicates international law as fully as domestic norms. And contrary to certain commentators' suggestions,²⁴ the United States does well to take its international legal obligations seriously. Historically, the U.S. has been a leader in the development of the international humanitarian law of armed conflict—the laws of war—ostensibly the most relevant body of international law.²⁵ Today, moreover, adherence to international law is critical to leverage support from allies and the international community in an era of overstretched military commitments and reduced defense budgets. A recent report by the New York City Bar Association illustrates that a thorough treatment of the relevant international law issues can be encyclopedic.²⁶ It suffices here to map out some of the more important points of contention: one threshold, one concerning whether armed force can be used, one addressing how it can be employed. In each instance, international law does not necessarily foreclose targeted killing. But it does present obstacles that the Administration has yet to answer adequately.

As an initial matter, just where around the globe can the United States confront terrorism militarily, including targeted

obamas-guantanamo/2011/09/30/gIQA0ReIGL_story.html [http://perma.cc/9GBV-EV9L].

23. The Council on Foreign Relations, for example, recently issued a report making transparency in U.S. drone policy a key imperative going forward. MICAH ZENKO & SARAH KREPS, COUNCIL ON FOREIGN RELATIONS, LIMITING ARMED DRONE PROLIFERATION (2014), available at http://i.cfr.org/content/publications/attachments/Limiting_Armed_Drone_Proliferation_CSR69.pdf [http://perma.cc/2V24-FL3V].

24. See, e.g., John O. McGinnis & Ilya Somin, *Democracy and International Human Rights Law*, 84 NOTRE DAME L. REV. 1739 (2009).

25. See JOHN FABIAN WITT, LINCOLN'S CODE: THE LAWS OF WAR IN AMERICAN HISTORY (2013). The U.S. stance to human rights law has been relatively more ambivalent. Louis Henkin's classic observation perhaps still puts it best, "the United States has not been a pillar of human rights, only a "flying buttress"—supporting them from the outside." Louis Henkin, *Rights: American and Human*, 79 COLUM. L. REV. 405, 421 (1979).

26. N.Y.C. BAR REPORT, *supra* note 8.

killing, rather than as a matter of criminal law enforcement? Drones, for example, have been used on the so-called “hot” battlefields of Afghanistan, as well as neighboring Pakistan. Yet they have also been used hundreds if not thousands of miles away in Yemen and Somalia.

A threshold cut depends on whether the action is part of an “armed conflict.” If not, then international human rights law applies, under which extra-judicial killing is clearly prohibited.²⁷ If so, then targeted killing may be used subject to the laws of war. A classic international armed conflict exists when two states are engaged in hostilities.²⁸ But it may be, in the words of Common Article 3 of the Geneva Conventions, “an armed conflict not of an international character,” that is, between a state and a non-state actor, when a conflict has achieved a sufficient intensity and the non-state belligerent is sufficiently organized to be a party to the conflict.²⁹ This extension of the laws of war traditionally implicated civil wars or insurgencies within a state. Transnational terrorism, in extending the lethal force of non-state actors, has extended the application of the laws of armed conflict. President Obama early on rejected President Bush’s characterization that the nation is involved in a “global war on terror.”³⁰ The Administration nonetheless maintains that the U.S. is engaged in “a global armed conflict with al Qaeda and associated forces.”³¹ The recently released OLC memo in fact argues that as a “leader” of AQAP, an organization associated with al Qaeda, al-Awlaki could be targeted in Yemen.³²

27. See N.Y.C. BAR REPORT, *supra* note 8.

28. Geneva Convention (I) for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field art. 2, Aug. 12, 1949, 6 U.S.T. 3114, 75 U.N.T.S. 31 [hereinafter Geneva Convention I].

29. *Id.*, art. 3.

30. See Peter Baker, *Obama’s War Over Terror*, N.Y. TIMES, Jan. 17, 2010, <http://www.nytimes.com/2010/01/17/magazine/17Terror-t.html> [http://perma.cc/6WER-D2M5].

31. *US: Reassess Targeted Killings in Yemen*, HUM. RIGHTS. WATCH (Oct. 22, 2013), <http://www.hrw.org/news/2013/10/21/us-reassess-targeted-killings-yemen> [http://perma.cc/F74L-Q9Q2].

32. Memorandum from David J. Barron, Acting Assistant Att’y Gen., Office of Legal Counsel, U.S. Dep’t of Justice, to the Att’y Gen., *Applicability of Federal Criminal Laws and the Constitution to Contemplated Lethal Operations Against Shaykh Anwar al-Aulaqi* 21–24 (July 16, 2010) [hereinafter OLC Memo], available at

On this view the United States can engage in targeted killing anywhere persons deemed members of al Qaeda or associated forces appear. Assume for the sake of debate that the Administration is correct in its apparent assumption that al Qaeda and its allies today conduct violent operations at a sufficiently intense level to qualify as armed conflict. Assume further for the sake of debate that these enemies remain sufficiently organized to count as belligerents under the laws of war. It would then appear indisputable that the United States could engage in targeted killing not just in Afghanistan, Iraq, or Syria where active and organized armed insurgencies associated with al Qaeda foment violence on a level approaching a civil war. The U.S. could also engage in targeted killing in Yemen or Libya, where nothing like that level currently occurs. For that matter, it would appear that the United States could also employ targeted killing against al Qaeda members on the streets of London, Paris, and New York.

The potential reach of the government's analysis is breathtaking. As Rosa Brooks points out, it would legitimate targeted killing by any state virtually anywhere in the name of armed conflict against terrorism, including potentially such actions as the assassination of Chilean diplomat Orlando Letelier in Washington, D.C.³³ Nor, as a matter of law, does it afford comfort that as a matter of policy the limits of this analysis have yet to be tested. As Federalist Society icon James Madison observed, one of the main points of law is to constrain officials who may not be so virtuous or prudent not to exercise power rashly.³⁴

Assuming an armed conflict exists—as noted, no small assumption in most contexts—applicable international law classically divides into two parts. *Jus ad bellum* rules address the circumstances under which armed force may be used in the first place. *Jus in bello* constraints deal with how a lawful armed conflict may be conducted. Contrary to certain critics, targeted kill-

http://www.lawfareblog.com/wp-content/uploads/2014/06/6-23-14_Drone_Memo-Alone.pdf [<http://perma.cc/ES2Q-RSCT>].

33. Rosa Brooks, *Cross-Border Targeted Killings: "Lawful But Awful"?*, 2 HARV. J.L. & PUB. POL'Y: FEDERALIST EDITION 233 (2015); see also *The Constitutional and Counterterrorism Implications of Targeted Killing: Hearing Before the Subcomm. on the Constitution, Civil Rights, and Human Rights of the S. Comm. on the Judiciary*, 113th Cong. 9 (2013) (statement of Rosa Brooks, Professor, Georgetown Univ. Law Center).

34. THE FEDERALIST NO. 51, at 320 (James Madison) (Clinton Rossiter ed., 1961).

ing does not necessarily violate either body of law. That said, the current use of drones raises serious questions under both.

As to *jus ad bellum*, the key issue comes down to whether the United States can resort to armed force in the territory of another sovereign state such as Yemen. The U.N. Charter prohibits a state from using force or even the threat of force against the territorial integrity of another state. Only three exceptions exist. First, armed intervention would be permitted with Security Council authorization under Chapter VII of the Charter. Next, though essentially implicit in the Charter itself, a state may consent to the use of force on its territory by another state. Finally, under Article 51 a state may act in self-defense if an “armed attack” occurs.

The Obama Administration’s justifications have been either unclear or heroically strained. No U.S. official argues that current drone policy falls under any Security Council authorization.³⁵ Rather, publically available information suggests that states have granted their consent, though at least Pakistani officials have recently made statements to the contrary. Perhaps because consent cannot be taken for granted, the Administration has placed greater reliance on self-defense. Its apparent theory is that 9/11 clearly constituted an “armed attack” on the United States by al Qaeda, and that current drone strikes in Yemen on members of its associated forces constitute an ongoing act of self-defense responding to those attacks.

Among other problems, the Administration’s position once more has no obvious or even plausible limits. The attacks of September 11 provided a clear justification for the invasion of Afghanistan as an act of self-defense against an armed attack. Less clear is how threatened acts by members of splinter groups a dozen years later qualify as such a response. Less clear still under this analysis is how many more years it would take before the September 11 justification expires. Self-defense could be a basis for countering subsequent attacks, actual or threatened. But if threatened, such attacks under traditional *jus ad bellum* analysis would have to be imminent. Ironically or not, the classic international law formulation for imminence came from U.S. Secretary of State Daniel Webster, who stated that the need for preemptive self-defense had to be “instant, overwhelming, leav-

35. N.Y.C. BAR. REPORT, *supra* note 8, at 61 n.227.

ing no choice of means, and no moment of deliberation.” Whether antiquated or not, neither this nor any other definition of imminence appears in the OLC memo.

That leaves *jus in bello* constraints on how a state employs lethal force,³⁶ assuming the use of force is lawful to begin with—as noted, another assumption that cannot be taken for granted. These constraints are contained in the customs of war as well as the Geneva Conventions and its Protocols.³⁷ The four relevant basic principles are that you can kill someone if: (1) there is military necessity,³⁸ (2) the means you use are proportional,³⁹ (3) you

36. NOAM LUBELL, EXTRATERRITORIAL USE OF FORCE AGAINST NON-STATE ACTORS 7 (2010) (defining *jus in bello* as “the laws regulating the conduct of the parties to an armed conflict”); Robert D. Sloane, *The Cost of Conflation: Preserving the Dualism of Jus Ad Bellum and Jus in Bello in the Contemporary Law of War*, 34 YALE J. INT’L L. 47, 49 (2009) (defining *jus in bello* as “the law governing the conduct of hostilities”); Kelisianna Tynne, *Targeting the Terrorist Enemy: The Boundaries of an Armed Conflict Against Transnational Terrorists*, 16 AUSTL. INT’L L.J. 161, 164 (2009) (stating that *jus in bello* “determines how the force is to be applied when the initial use of force results in an armed conflict”).

37. See COMMENTARY ON THE ADDITIONAL PROTOCOLS OF 8 JUNE 1977 TO THE GENEVA CONVENTIONS OF 12 AUGUST 1949, at 598 (Claude Pilloud et al. eds., 1987) [hereinafter COMMENTARY ON THE ADDITIONAL PROTOCOLS] (“It is the foundation on which the codification of the laws and customs of war rests: the civilian population and civilian objects must be respected and protected in armed conflict, and for this purpose they must be distinguished from combatants and military objectives. The entire system established in The Hague in 1899 and 1907 and in Geneva from 1864 to 1977 is founded on this rule of customary law.”); see also INGRID DETTER DELUPIS, THE LAW OF WAR 156 (2d ed. 2000) (recognizing that *jus ad bellum* and *jus in bello* form the contents of the law of war in customary international law); Sloane, *supra* note 36, at 48 (favorably citing the SCSL Appeals Chamber’s distinction between *jus ad bellum* and *jus in bello* as “accurately characterize[ing] . . . ‘a bedrock principle’ of the law of war”). See generally *Treaties and States Parties to such Treaties*, INT’L COMM. OF THE RED CROSS, <http://www.icrc.org/ihl> [<http://perma.cc/JRH5-G2QL>] (last visited June 26, 2014, 2:59 PM) (providing a list of treaties codifying the laws of war including the Hague Convention on the means and methods of warfare and the Geneva Conventions and its Protocols).

38. See ICRC, *Interpretive Guidance on the Notion of Direct Participation in Hostilities Under International Humanitarian Law*, 90 INT’L L. REV. RED CROSS 991, 1041–42 (2009), available at <http://www.icrc.org/eng/assets/files/other/irrc-872-reports-documents.pdf> [<http://perma.cc/4Y8-TNN9>] (“Complementing and implicit in the principle of military necessity is the principle of humanity, which forbids the infliction of suffering, injury or destruction not actually necessary for the accomplishment of legitimate military purposes.”); JUDITH GARDAM, NECESSITY, PROPORTIONALITY AND THE USE OF FORCE BY STATES 2 (2004) (defining necessity as “a balance between the demands of military necessity and considerations of humanity”); Christopher Greenwood, *Historical Development and Legal Basis*, in THE HANDBOOK OF HUMANITARIAN LAW IN ARMED CONFLICT 30–31 (Dieter Fleck ed., 1995) (requiring that pursuit of a military objective must not cause unnecessary injury, destruction, or suffering).

make reasonable efforts to discriminate between civilians and combatants;⁴⁰ and (4) you employ means that are humane in that they do not use or create inordinate suffering.⁴¹

As with *jus ad bellum*, the Administration acknowledges that these constraints apply to the use of drones. And as a general matter, here its case is strong. Many have criticized drones as too easy, too distant, too bloodless (at least for the US) to be a legitimate way to wage war. A drone operator somewhere in Colorado using a joystick to kill someone in Yemen must raise issues that a true pilot flying a bombing sortie over Yemen does not, perhaps because the prospect of the enemy shooting down the pilot seems more “fair.” But legally such criticisms are beside the point. To the contrary, drones in one sense represent a significant step forward from previous ordnance delivery systems.

39. See *Legality of the Threat or Use of Nuclear Weapons*, Advisory Opinion, 1996 I.C.J. 226, ¶ 41 (July 8) (stating that proportionality is a rule of customary international law required for exercising the right to self-defense); see also Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts (Protocol I), June 8, 1977, art. 51, ¶ 5(b), 1125 U.N.T.S. 3 (defining proportionality as prohibiting “an attack which may be expected to cause incidental loss of civilian life, injury to civilians, damage to civilian objects, or a combination thereof, which would be excessive in relation to the concrete and direct military advantage anticipated”); Molly McNab & Megan Matthews, *Clarifying the Law Relating to the Unmanned Drones and the Use of Force: The Relationships Between Human Rights, Self-Defense, and Armed Conflicts, and International Humanitarian Law*, 39 DENV. J. INT’L L. & POL’Y 661, 690 (2011) (stating that a proportionality analysis factors in “the value of the target, the location of the attack, the timing of the attack, the number of anticipated civilian casualties, and the amount of damage anticipated to civilian objects, such as buildings, bridges, hospitals and utilities”).

40. See *Legality of the Threat or Use of Nuclear Weapons*, Advisory Opinion, 1996 I.C.J. 226, ¶ 78 (July 8) (stating that the distinction between civilians and combatants form part of the “cardinal principles contained in the texts constituting the fabric of humanitarian law”); COMMENTARY ON THE ADDITIONAL PROTOCOLS, *supra* note 37, at 598 (explaining that the distinction between civilians and combatants is “the foundation on which the codification of the laws and customs of war rests”); see also Protocol I, *supra* note 39, art. 51, ¶ 2 (recognizing that customary international law provides that the “civilian population as such, as well as individual civilians, shall not be the object of attack”). This requirement raises the additional problem of determining who is a civilian and combatant in the context of a non-international armed conflict under Common Article 3. On this point the ICRC takes the position that only those persons performing a “continuous combat function” may be targeted. By contrast, the U.S. asserts that it may legitimately target civilians who have repeatedly served a group such as AQAP, but are who have returned to their civilian activities, since they may return to active service as any point.

41. See Greenwood, *supra* note 38, at 30–31.

Compared to aerial bombing, drones are far more precise, enabling both better discrimination between military and civilian and a more proportional response. According to some estimates, the percentage of civilian deaths in major conflicts since World War II, including Afghanistan, ranges from 70 to 150. By contrast, approximations of civilian deaths in drone strikes fall between a high of 35 percent to a low of six percent.⁴²

This is not to say drones do not raise *jus in bello* issues in specific cases. The applicable constraints are notoriously fact-intensive. The killing of al-Awlaki, for example, may well have been lawful. No one who was indisputably a civilian was apparently killed in the strike. As far as we know he was killed instantly, without unnecessary suffering. Then again, we as yet have few facts to support the government's claim that he was a high level AQAP leader who had become "operational." Nor is it clear what operations he was undertaking that made his death a military objective. Significantly, even the newly released OLC memo does not apply the *jus in bello* law it references to any facts, but simply takes it on faith that the military will comport with that law.⁴³ Conversely, "signature" drone attacks would appear to presumptively violate the law of armed conflict. Under this approach, targeting is based on whether a person or group fits the "signature" of combatants, such as a group of young men in a particular tribal area known for terrorist activity. Such "signatures" however have proved to be overbroad, have resulted in the killing of civilian gatherings, and so would have difficulty comporting with the requirement of taking reasonable measures to discriminate. For this reason, President Obama apparently rejected the use of this method early in his Administration.⁴⁴

All of which again raise the need for greater transparency. No one would argue for the disclosure of military details that would compromise future missions. But surely specifics could be provided without doing so, especially given widespread press coverage. Without more information, it will remain impossible to

42. William Saletan, *In Defense of Drones*, SLATE (Feb. 19, 2013, 11:40 PM), http://www.slate.com/articles/health_and_science/human_nature/2013/02/drones_war_and_civilian_casualties_how_unmanned_aircraft_reduce_collateral.html [<http://perma.cc/TW54-NLCS>].

43. OLC Memo, *supra* note 32, at 28–30.

44. KLAIDMAN, *supra* note 5, at 41–42.

know whether the United States lives up to international law obligations that it played so great a role in fashioning.

III. THE CONSTITUTION AND THE COURTS

However important the international law considerations, domestic law for now promises the more effective constraints, and the Constitution does so in particular. The Constitution's comparative advantage does not result solely from American ambivalence to "foreign legal materials." Instead, there is growing agreement, if not consensus, that current drone policy raises critical Due Process concerns, at least for targeted U.S. citizens. That would-be counterweight to the Federalist Society, the American Constitution Society, not surprisingly adopts this view.⁴⁵ Yet so too does former Attorney General Alberto Gonzales, and he does so in a comprehensive law journal article.⁴⁶ Most importantly, in public and private the Obama Administration also concedes the applicability of the Constitution to drone strikes outside U.S. borders.

Disagreement prevails, however, over what process is due. Some critics argue for some judicial oversight from outside the Executive's security infrastructure. Steve Vladeck, in an insightful response to Gonzalez, argues for a version of FISA courts that can review who is targeted *ex post*.⁴⁷ Neither Gonzales nor the ACS go that far, opting instead for enhanced procedures within the security establishment.⁴⁸ A somewhat less demanding version of this approach appears to be the government's current position. Official and unofficial sources indicate significant, though not necessarily sufficient, procedures within the Executive for designating particular individuals as targets.⁴⁹ By contrast, the Administration's legal position does not appear to require any more than

45. See Deborah Pearlstein, *Enhancing Due Process in Targeted Killing*, AM. CONST. SOC'Y FOR L. & POL'Y (2013), available at https://www.acslaw.org/sites/default/files/Pearlstein_-_Due_Process_in_Targeted_Killing.pdf [<http://perma.cc/QJ7Q-739U>].

46. Alberto R. Gonzales, *Drones: The Power to Kill*, 82 GEO. WASH. L. REV. 1 (2013).

47. See Vladeck, *supra* note 21, at 12.

48. See Pearlstein, *supra* note 45; Gonzales, *supra* note 46.

49. See *infra* text accompanying notes 69–70.

the determination of a “high level official” within the Executive to render lawful marking someone for death.⁵⁰

The Federalist Society has earned a reputation for hosting contrary views. Here then are two arguments that current constitutional discourse on targeted killings does not go nearly far enough. First, Due Process protections properly apply to citizens and non-citizens alike. Second, these protections should ordinarily entail not just judicial review, but judicial review prior to a drone strike or targeted killing more generally.

A. *The Constitution Follows Non-Citizen Targets*

Nearly all of the discussion of Due Process limits on drones focuses too narrowly on U.S. citizens. This emphasis is fine so far as it goes. But the reality is that only three American citizens are known to have been killed in drone strikes. By contrast, estimates of non-citizen fatalities commonly number around three or four hundred. The related three to four thousand non-fatal casualties almost certainly have been non-citizens as well. If Due Process extends only to citizens, the current debate centers on a problem that is far more apparent than real.

Yet such a narrow application should not be assumed. To the contrary, conventional methods of constitutional interpretation support a powerful case that Due Process extends to non-citizens abroad outside a conventional battlefield setting. Start with the text. The Due Process Clause provides that “no *Person* shall be deprived of Life, Liberty or Property without due Process of Law.”⁵¹ Both the original document and later amendments typically draw an evident distinction between citizens and persons. Citizens generally enjoy greater rights of political participation. Persons at least possess certain fundamental rights of person and property.⁵² Nothing in any constitutional text, moreover, indicates that Due Process rights—to the extent they apply abroad—apply any differently to non-citizens as opposed to citizens. It follows that if al-Awlaki merits Due Process consideration, so too should any associate similarly targeted who

50. OLC Memo, *supra* note 32, at 41.

51. U.S. CONST. amend. V (emphasis added).

52. *See Sugarman v. Dougall*, 413 U.S. 634 (1973) (applying the Fourteenth Amendment Equal Protection Clause, which expressly applies to persons, to aliens within the United States).

happened not to be born in the United States. The source for any such distinction must lie elsewhere.

One candidate might be original understanding. Serious historical scholarship on Founding views and early practice concerning the extraterritorial reach of the Constitution to potential non-citizen belligerents has only just gotten underway. One pioneer, my colleague Andrew Kent, has nonetheless assembled early examples demonstrating that, among other things, the Constitution did not protect noncitizens outside the United States or military enemies wherever located.⁵³

Yet initial applications do not necessarily translate into a proper originalist conception of a constitutional principle. For one thing, in this instance the evidence appears especially sparse. The new United States was not in a position to often project military power abroad to noncitizens who were not clearly combatants. For this reason, early examples are few and far between, and discussions at the Federal Convention or ratification debates are all but non-existent.⁵⁴ More generally, discrete contemporary examples may undercut rather than define the norm that those who framed and ratified a constitutional provision sought to entrench. Consider the Fourteenth Amendment and miscegenation. Both in 1868 and through much of the 20th century, anti-miscegenation laws proliferated. More sophisticated versions of originalism reject limiting either Equal Protection or Due Process to such inadequate contemporary applications of the more general goal that the texts permit and discussions at the time suggest.⁵⁵

So, too, with targeted killing. The text of the Due Process Clause makes no distinction as to either citizenship or geography. Moreover, it clearly reflects the revolutionary Federalist

53. See, e.g., Andrew Kent, *The New Originalism and the Foreign Affairs Constitution*, 82 *FORDHAM L. REV.* 757, 763 (2013); Andrew Kent, *The Constitution and the Laws of War During the Civil War*, 85 *NOTRE DAME L. REV.* 1839, 1875 (2010); J. Andrew Kent, *A Textual and Historical Case Against a Global Constitution*, 95 *GEO. L.J.* 463, 524 (2007).

54. See generally *RECORDS OF THE FEDERAL CONVENTION OF 1787* (Max Farrand, ed., 1911) (4 vols.); *THE DOCUMENTARY HISTORY OF THE RATIFICATION OF THE CONSTITUTION* (John P. Kaminski et al. eds., 1976) (21 vols.).

55. See *Loving v. Virginia*, 388 U.S. 1 (1967); see generally JACK M. BALKIN, *LIVING ORIGINALISM* (2011) (arguing that the original understanding of the Constitution is not confined to contemporaneous understandings).

conception that the Constitution is a grant of liberty to power,⁵⁶ with the corollary that the government established may exercise authority only within the limitations attached.⁵⁷ Among these would necessarily including according some form of Due Process before denying someone the right to life, at least outside a traditional battlefield context in which the individual's status as a combatant could not be assumed.

One final source of constitutional authority is tradition, including that formalized version known as precedent. As Kent has also observed, the distinctions between domestic and foreign, enemy and friend, and noncitizen are breaking down, both in the real world and in the law determining the domain of rights and the right to access the courts. Reflecting these changes is the current confused state of the Supreme Court's jurisprudence on application of the Constitution beyond the nation's borders. At least four approaches compete. Constitutional rights stop at the border. Or they apply only to citizens regardless of location. Or they apply universally. Or they are subject to a balancing test, weighing the right at stake, the degree of U.S. control over the location at issue, and the practical difficulties in judicial oversight.⁵⁸

What about application of the Due Process abroad to noncitizens? The answer might appear to have been resolved under *Johnson v. Eisentrager*.⁵⁹ There the Court ostensibly rejected the contention that a constitutional right to habeas review applied to German prisoners of war captured in China, both because they were undisputedly enemy aliens and because they were captured and held outside sovereign U.S. territory. The Court, however, rejected this reading of *Eisentrager* in *Boumediene v. Bush*.⁶⁰ Relying on, among other things, separation of powers considerations as well as the *Insular Cases*, the majority in effect moved the issue from the territorial to the balancing category. Applying this

56. THE FEDERALIST NO. 84, at 513 (Hamilton) (Clinton Rossiter ed., 1961) ("Here, in strictness, the people surrender nothing; and as they retain every thing they have no need of particular reservations.").

57. *Id.*

58. See Martin S. Flaherty, *Extraterritoriality*, in THE ENCYCLOPEDIA OF AMERICAN GOVERNANCE (Mark Graber ed., forthcoming 2014).

59. 339 U.S. 763 (1950).

60. 553 U.S. 723 (2008).

approach, *Boumediene* viewed the right to habeas review as fundamental, the degree of US control over detainees in Guantanamo significant, and the judicial review of their claims practical.⁶¹ To be sure, *Boumediene* formally rested on the Suspension Clause.⁶² Moreover, Justice O'Connor's plurality opinion in *Hamdi v. Rumsfeld*, which specifically dealt with the due process right to a habeas hearing, noted in repeated dicta that the petitioner was a U.S. citizen.⁶³ But *Boumediene* makes clear that due process and habeas are difficult to separate; that if anything the Suspension Clause has more stringent requirements than *Hamdi's* articulation of Due Process; and that both the Suspension Clause and its associated Due Process rights extended to noncitizens at Guantanamo.⁶⁴

What remains, then, is applying the balancing approach to a targeted drone strike. Certainly the right at stake could not be more important. Conversely, the U.S. does not exercise anything like the type of control over a desert in Yemen as it does over a U.S. Naval Base in Cuba. Or does it? In the instant a drone hits its target, U.S. control over a given location is devastating and total. Finally, and most prominent in *Boumediene*, is the practicality of judicial enforcement. Vetting a kill list, either ex post or ex ante, would not appear to entail substantially more obstacles than vetting detention.

Text, history, precedent. None of these preclude extending Due Process consideration to the U.S. government deciding to mark someone who is not undisputedly a combatant for death outside a battlefield. To the contrary, these conventional sources of constitutional law point the other direction, one more consistent with the rule of law ideas that the Constitution of the United States forged.

B. *The Process That Targets Are Due*

It remains to determine what process is due. Indeed, the task cannot be avoided even if one rejects the proposition that the Constitution does not follow drones abroad that target nonciti-

61. *Id.* at 739–72.

62. *Id.* at 771.

63. 542 U.S. 507, 509, 511, 515–16, 519, 522–24, 527–33, 535–37 (2004) (O'Connor, J., concurring) (discussing the application of Due Process protection to citizens).

64. *Boumediene*, 553 U.S. at 773–92.

zens. As noted, *Hamdi* and *Boumediene* support the extraterritorial application of Due Process to detention. Also as noted, commentators across the political spectrum believe that Due Process applies abroad to the targeted killing of citizens. Most important, both the earlier OLC white paper, and now that partially released underlying OLC memorandum, confirm that the Obama Administration endorses this view. All of these authorities agree, moreover, on the general framework that should apply. None of them, however, conclude that the result compels judicial review of targeting decisions before they take place. They should.

The consensus Due Process framework for government-sanctioned killing comes from unlikely sources. As Greg Katsas notes, the standard is set out in *Mathews v. Eldridge*.⁶⁵ A standard developed for entitlement benefits, the Supreme Court has extended *Mathews* to all manner of mundane matters such as prejudgment attachments in *Connecticut v. Doehr*.⁶⁶ Notwithstanding this pedigree, Justice O'Connor took *Mathews* off the shelf and applied it to the determination of whether an individual was an "unlawful enemy combatant" in *Hamdi*.⁶⁷ Whatever else might be said about this backstory, the *Mathews* test does provide some guidance, is adaptable, and has generated a significant body of case law in the various contexts in which it has been used.

The classic three-part *Mathews* formulation states that 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.⁶⁸

How does this Social Security test apply to drone strikes? The first and (most of) the last prongs largely cancel out. No private interest can be more important than the right to life as affected

65. 424 U.S. 319 (1976).

66. 501 U.S. 1, 2 (1991).

67. *Hamdi*, 542 U.S. at 529.

68. *Mathews*, 424 U.S. at 323.

by a hellfire missile. Conversely, no government interest outweighs preventing a potentially catastrophic terrorist attack. The real devil is in assessing the risk of erroneous deprivation of life and the probable value of additional or substitute safeguards (as offset by any additional administrative or substitute burdens). Generally speaking, the *Mathews* test permits unfettered government action in exigent circumstances. It would not prevent the killing of an individual who presents an immediate threat to U.S. forces or civilians. The dominant practice of placing persons on a “kill list” to be dealt with if the opportunity presents itself months or even years later is, however, another matter.

From what we think we know, the procedures in place for designating someone as a target are not modest. Public information on targeting is set out in the Defense Department’s Joint Publication 3-60: Joint Targeting (JP 3-60), a manual prepared under the auspices of the Joint Chiefs of Staff. The process includes: (1) vetting a proposed target by an interagency group; (2) validating whether the target meets military and legal requirements by another, primarily but not exclusively, military group; (3) positive identification of the target by the military; (4) collateral damage estimates; (5) placement on a further targeting list; (6) forwarding to a military component commander; (7) approval by the Joint Forces commanders; and (8) if a sensitive target, approval by the President or Secretary of Defense.⁶⁹ Investigative journalists confirm that dozens of officials from various agencies are involved in advanced targeting decisions.⁷⁰ On one hand, the process appears to be a textbook example of the intra-executive checks extolled by Jack Goldsmith.⁷¹ But on the other, any system without outside checks is open to Madisonian concerns about the abuse of power. Telling in this regard is the investigative account that relates Harold Koh, then Legal Advisor to the State Department, relating how the pressure not to object to approval of a targeted killing could be akin to trying to stop a runaway freight train.⁷²

A growing list of proposed alternatives seek to address these concerns. One type of alternative would add further intra-

69. See Pearlstein, *supra* note 45, at 11–14.

70. KLADMAN, *supra* note 5, at 52.

71. See generally JACK GOLDSMITH, *POWER AND CONSTRAINT: THE ACCOUNTABLE PRESIDENCY AFTER 9/11* (2012).

72. KLADMAN, *supra* note 5, at 202.

executive checks. Former Attorney General Gonzales adopts this approach in recommending a model based on Combat Status Review Tribunals, or CSRTs. Instituted in the wake of *Hamdi* to determine who qualified for detention as an “unlawful enemy combatant,” CSRTs are three-officer panels in which the detainee receives notice of the basis for his or her detention, and at which an advocate represents the interests of the detainee, has access to relevant information and exculpatory evidence, and has the opportunity to present arguments to the panel at a hearing. For Gonzales, the point is to have a formal and neutral arbiter approve a non-exigent targeting decision at some point in the process.⁷³ Yet there are genuine reasons to doubt the proposal’s ultimate neutrality, however well intentioned. It might be safely predicted that the combination of a three-officer panel with a military “devil’s advocate” would hardly be equal to stopping Koh’s military freight train. Nor need one rely on mere predictions. As it happens, not once have existing CSRT’s overturned any of the hundreds of prior determinations that a detainee was an unlawful enemy combatant. These affirmances, moreover, have often rested on the flimsiest of evidence.⁷⁴

Steve Vladeck, a leading expert in this area, in his thoughtful response to Gonzales goes a considerable step further.⁷⁵ For him, the Due Process solution lies in the Foreign Intelligence Surveillance Court (FISC), either by expanding its jurisdiction to cover targeted killing, or by using it as a model for a court specifically tailored for that issue. Established in 1978 under the Foreign Intelligence Surveillance Act (FISA), FISCs consider warrants dealing with national security investigations.⁷⁶ Vladeck rightly praises Gonzales for rejecting the tired idea that courts cannot attain the expertise to adjudicate in such sensitive areas of national security. But he parts company with Gonzales, also rightly, in treating the FISC as a superior model. First and most important, FISCs are

73. See Gonzales, *supra* note 46, at 52–54.

74. See MARK DENBEAUX & JOSHUA DENBEAUX, NO-HEARING HEARINGS: AN ANALYSIS OF THE PROCEEDINGS OF THE GOVERNMENT’S COMBATANT STATUS REVIEW TRIBUNALS AT GUANTÁNAMO (2006), available at http://law.shu.edu/publications/guantanamoReports/final_no_hearing_hearings_report.pdf [http://perma.cc/YP2M-LY39].

75. Vladeck, *supra* note 21.

76. *Id.* at 15.

true Article III courts, comprised of sitting federal judges chosen by the Chief Justice of the United States. Second, they have over time increasingly been authorized to conduct adversarial proceedings on a range of procedural and substantive issues.⁷⁷ Third, the process also includes the possibility of appeal of adverse decisions to the FISA Court of Review.⁷⁸

These features, among others, insure that FISCs address *Mathews'* Due Process concerns far more effectively than even formally distinct checks within the Executive Branch such as CSRTs. As Vladeck points out, in the slightly different yet complementary context of the Suspension Clause, the *Boumediene* Court subjected CSRT's to a pointed critique.⁷⁹ Nonetheless, Vladeck's analysis does not reflect the full courage of its convictions. In the end, he proposes a FISC-type court, but to review targeted killings only *ex post*, for damages.⁸⁰ There would be no mechanism for challenging placement on a "kill-list" in non-exigent circumstances *before* a killing took place.

For this reason, Vladeck's step forward still does not go far enough. Laudable as it is in other respects, his FISC-style court proposal falls short of *Mathews* concerns precisely because of its *ex post* limitation. Consider again the private interest. The right to life remains not only an "interest" of the highest order, it's deprivation is irreparable and cannot be adequately offset by any damage remedy to next-of-kin. Likewise, *ex post* review does nothing to minimize the risk of erroneous deprivation of this fundamental interest. A FISC-style court would be better equipped to determine whether a particular targeting decision was in error, but only after an erroneous deprivation had taken place. That said, even *ex post* decisions by such a court might have the effect of discouraging future instances of erroneous targeting. But nothing in *Mathews* does or should be taken to speak to addressing purely prospective and systemic concerns. Rather, the *Mathews* test presupposes the interest of an individual in having a system that safeguards his or her right before it can be terminated, especially when the termination is irrevocable.

77. *Id.* at 15–16.

78. See 50 U.S.C. §§ 1861(f), 1881a(h)(4) (2012).

79. *Boumediene*, 553 U.S. at 781–92; Vladeck, *supra* note 21, at 17.

80. Vladeck, *supra* note 21, at 18, 23–27.

Against these overwhelming factors are the governmental interests. Clearly the interest in preventing terrorist attacks also remains unchanged, and of the highest order. The key question therefore comes down to whether giving a FISC-style court *ex ante* review in non-exigent circumstances would entail sufficient financial or administrative burdens that it would justify leaving in place the current risk of the erroneous deprivation of life. That would appear to be a difficult burden to sustain. Many, perhaps most, instances of targeting may well require that secrecy trump any procedural right to notice. Yet even in those cases, a court appointed representative arguing on behalf of the targeted individual before an Article III court would be the least that Due Process would demand before that person's life could be ended. In other instances in which the targeting would effectively become public knowledge—as in al-Awlaki's case itself—mechanisms could be tailored to allow the person or his family to actively participate in making the case for error. That would serve them, and the Constitution, far more effectively than compensation after the fact.

IV. CONCLUSION

Of course, legal analysis does not necessarily make for sound policy. This truism is fine as far as it goes, but in truth it holds in only one direction. Targeted killing, drones in particular, may be perfectly legal depending on the complex circumstance. Yet a perfectly legal practice may be bad policy. Lawful killings may nonetheless generate recruits for terrorist groups, alienate allies, and weaken domestic support. Conversely, an illegal practice bears certain policy implications almost by definition. The violation of international law in itself tends to alienate allies, undermine the nation's credibility, and invite reciprocal violations against the United States, if not by lawless terrorists themselves then by other state or non-state actors who otherwise would have followed the rules lest others violate the rules when dealing with them. The violation of domestic law, among other things, invites precisely the type of impunity and abuse of power that the Founder whose silhouette serves as emblem of the Federalist Society helped establish the Constitution to prevent. The current administration clearly shows more concern for these matters than its predecessor. Whether that concern is sufficient, however, is another matter.