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# GUY FAWKES'S DANGEROUS REMEDY: THE UNCONSTITUTIONALITY OF GOVERNMENT-ORDERED ASSASSINATION AGAINST U.S. CITIZENS AND ITS IMPLICATIONS FOR DUE PROCESS IN AMERICA

EMILY C. KENDALL\*

## I. INTRODUCTION

History remembers Guy Fawkes as the Englishman responsible for the formation and thwarted implementation of the Gunpowder Plot in 1605. As a devout Catholic who viewed England's King James I as an evil tyrant and persecutor of Catholicism and its followers, Guy Fawkes conspired with other like-minded Englishmen to blow up Parliament in hopes that the ensuing governmental upheaval would restore Catholicism to England.<sup>1</sup> However, the Gunpowder Plot was unsuccessful, and the conspirators were arrested and imprisoned in the Tower of London.<sup>2</sup> In January of 1606, Guy Fawkes, along with seven of his co-conspirators, was tried by a jury of his peers, convicted of the charges levied against him, and executed for his treasonous crimes.<sup>3</sup>

Guy Fawkes was certainly guilty of treason, a term of art that will be defined subsequently in this Article. As the highest crime against the very nation that bore the criminal, nations have always regarded treason as one of the most contemptible acts, punishable by the harshest sentences.<sup>4</sup> Yet, Guy Fawkes' crimes

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1. WILLIAM HARRISON AINSWORTH, *GUY FAWKES: OR, THE GUNPOWDER TREASON* 5 (G. Routledge & Co. 1857).

2. *Id.* at 261.

3. *Id.* at 341–348.

4. See Linton Weeks, *These Days, Everyone Dares Call It Treason*, NPR

were not so monstrous, not so inhumane, and not so horrifying as to warrant a complete disavowal of the English legal system—a system that was established to address, amongst others, this very class of crimes. And that occurred in 1606. If Guy Fawkes attempted to vindicate his Catholic brethren in the United States in 2012, he would encounter a very different “legal” system.

In early January 2010, the media exploded with news stories revealing that President Obama’s administration sanctioned the killing of U.S. citizens without due process of law when evidence indicated that the citizen was involved in terrorist plots against the country.<sup>5</sup> In an extremely hawkish move seemingly uncharacteristic of the new Democratic administration, the Executive Office avowed that it will target Americans who the Central Intelligence Agency deems pose a terroristic threat to the United States and its citizens.<sup>6</sup> In fact, the Obama administration explicitly sanctioned the killing of American citizen, Muslim cleric Anwar Al-Aulaqi.<sup>7</sup> The United States will target such a citizen regardless of where the citizen is found, and without the niceties of well-established legal procedures protected by the U.S. Constitution, such as warrants and jury trials. Such a targeted killing would amount to an assassination of a U.S. citizen by his or her own government.<sup>8</sup>

This unprecedented overreaching of governmental power threatens the due process that the Constitution guarantees to every American citizen. Notably, in addition to Mr. Al-Aulaqi, there are at least three other American citizens who have been targeted for assassination, and the Obama administration has reserved the right to add more Americans to its High-Value Target

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(Oct. 4, 2011), <http://www.npr.org/2011/10/04/140987790/these-days-everyone-dares-call-it-treason> (quoting Justice William O. Douglass’s proclamation that “treason is the worst crime of all”).

5. Scott Shane, *U.S. Approves Targeted Killing of American Cleric*, N.Y. TIMES, Apr. 7, 2010, <http://www.nytimes.com/2010/04/07/world/middleeast/07yemen.html>; see also Dana Priest, *U.S. Military Teams, Intelligence Deeply Involved in Aiding Yemen on Strikes*, WASH. POST, Jan. 27, 2010, <http://www.washingtonpost.com/wp-dyn/content/article/2010/01/26/AR2010012604239.html?sid=ST2010012700394> (analyzing the collaboration between the United States and Yemen to kill terrorists located in Yemen); Jason Ryan, *License to Kill? Intelligence Chief Says U.S. Can Take Out American Terrorists*, ABC NEWS (Feb. 3, 2010), <http://abcnews.go.com/Politics/license-kill-intelligence-chief-us-american-terrorist/story?id=9740491> (discussing the United States’ decision to target Americans abroad who pose “a direct terrorist threat to the United States”).

6. Shane, *supra* note 5.

7. *Id.*

8. See BLACK’S LAW DICTIONARY (9th ed. 2009) (defining “assassination” as “the act of deliberately killing someone, [especially] a public figure, [usually] for hire or for political reasons”).

Kill List.<sup>9</sup> The presidential sanctioning of the assassination of American citizens, regardless of their alleged crimes, poses tremendous implications for our legal system and is poised to radically change the very fabric and character of this country.

The following discussion will provide an overview of these implications as well as outline the dangers inherent in adopting this policy. This Article will further discuss which legal remedies may be afforded to the American people so that they may assert their right to due process of law. Part II details the U.S. government's policy and approach to the assassination of Americans and its justifications for sanctioning this act. Part III puts forward the history and explanation of the constitutional provisions that already provide remedies for Americans seeking to participate in terrorist activities against our nation. Part IV applies the Constitution to domestic terrorist situations to demonstrate the efficacy of these constitutional safeguards. Part V examines how the abandonment of the constitutional protections will affect American liberties. Finally, Part VI presents the legal remedies available to prevent the U.S. Government's usurpation of the people's critical due process rights.

In defense of his treason, Guy Fawkes purportedly stated that, "[a] desperate disease requires a dangerous remedy."<sup>10</sup> While Fawkes compared his king to a disease, the American government apparently takes the view that its own people could be a disease, one so deadly that its treatment should escape the boundaries of the very Constitution that created it. However, the remedy of lawless assassination threatens the rights of every American and must be renounced as a crime itself. By returning to the principles established in the Constitution and exercising the lawful means of prosecuting domestic terrorists, the United States will continue its long and celebrated history of opposing tyranny both outside and inside its borders.

## II. THE PRESIDENTIAL POLICY OF ASSASSINATION

Amid the public outrage that accompanied President Obama sanctioning the assassination of U.S. citizens, there was abashed murmuring that the President was simply continuing the policies of former President Bush—policies that President Obama previously excoriated and juxtaposed against his own proposed plans to improve the country.<sup>11</sup> And to be true, President Bush did

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9. John C. Dehn & Kevin Jon Heller, *Targeted Killing: The Case of Anwar Al-Aulaqi*, 159 U. PA. L. REV. PENNUMBRA 175, 185 (2011).

10. THE DICTIONARY OF NATIONAL BIOGRAPHY Vol. 6 (1917).

11. See Lawrence Friedman & Victor Hansen, *Obama's Terrorism Policy: Change if Necessary, but Not Necessarily Change*, JURIST LEGAL NEWS & RESEARCH (Sept. 25, 2009), <http://jurist.law.pitt.edu/forumy/2009/09/obamas-terrorism-policy-change-if.php> (comparing President Obama's policies to those

issue an executive order on June 9, 2002, declaring that American citizen Jose Padilla was an “enemy combatant” who represented “a continuing, present and grave danger to the national security of the United States.”<sup>12</sup> Therefore, the policies enacted under President Bush’s administration most likely did lay the foundation upon which the current administration has built its assassination policies—and this foundation was Ground Zero.

A. *The Progenitor: George W. Bush*

On September 11, 2001, the United States experienced its most deadly domestic attack since Pearl Harbor.<sup>13</sup> Due to the national panic, shock, and unrest that followed the destruction of the World Trade Center and the deaths of nearly three thousand Americans, President Bush acted swiftly to put into place unprecedented investigative policies in the name of heightened national security.<sup>14</sup> These policies aimed to give the American government practically unfettered authorization in its investigations concerning the terrorists who conceived, propagated, and executed the September 11th attacks, as well as other terrorists who pose similar threats to the nation.<sup>15</sup> Although the USA PATRIOT Act is perhaps the most well-known of these measures, the Bush administration adopted numerous policies and issued several executive orders for the purpose of finding, arresting, and prosecuting terrorists.

One of these policies, a Congressional act passed exactly a week after the September 11th attacks, is the Authorization to Use Military Force (AUMF).<sup>16</sup> The AUMF authorizes the President to demand the use of all necessary force against those nations, organizations, or persons he determines were involved in the planning, commission, or aided those who were involved in the

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of his predecessor, President Bush).

12. See *Padilla v. Hanft*, 423 F.3d 386, 389 (4th Cir. 2005) (providing a copy of President Bush’s June 9, 2002, Memorandum to the Secretary of Defense declaring Jose Padilla an enemy combatant), *cert. denied*, 547 U.S. 1062 (2006).

13. Michael B. Mukasey, *National Security and the Rule of Law*, 32 HARV. J.L. & PUB. POL’Y 831, 833 (2009).

14. Jennifer C. Evans, *Hijacking Civil Liberties: The USA PATRIOT Act of 2001*, 33 LOY. U. CHI. L.J. 933, 934 (2002).

15. See *Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism (USA PATRIOT ACT) Act of 2001*, Pub. L. No. 107-56, 115 Stat. 272 (2001) (enhancing investigatory tools available to law enforcement in order to protect national security); see also Frederic Block, *Civil Liberties During National Emergencies: The Interactions Between the Three Branches of Government in Coping with Past and Current Threats to the Nation’s Security*, 29 N.Y.U. REV. L. & SOC. CHANGE 459, 473 (2005) (providing an overview of the U.S.A. PATRIOT ACT).

16. *Authorization for Use of Military Force*, Pub. L. No. 107-40, 115 Stat. 224 (2001) [hereinafter AUMF].

planning or commission, of the September 11th attacks.<sup>17</sup> The AUMF has been implicated in most of the United States' military operations and engagements since 9/11. For instance, it was under this authority that former President Bush engaged in the military occupation of Afghanistan and sent forces after Al Qaeda.<sup>18</sup> Notably, it was also under this statute that former President Bush ordered the execution of American citizen, Mr. Kamal Derwish, by predator drone attack, as Derwish travelled in a vehicle with six alleged Al Qaeda operatives in Yemen.<sup>19</sup>

In addition to the arrests and detention of suspected terrorists, former President Bush also used the authority granted to him under the AUMF to mobilize the Joint Special Operations Command (JSOC).<sup>20</sup> The JSOC had been created in 1980 in the aftermath of the U.S. military's failure to rescue fifty-three American hostages in Tehran, Iran.<sup>21</sup> The wide berth of authority given to the JSOC is not relevant to the instant discussion, but it is relevant to note that the JSOC is involved in multiple aspects of the United States' military and security operations. Specific to the subject of domestic terrorist threats, on January 11, 2007, former President Bush affirmed in a major speech that he was committed "to seek[ing] out and destroy[ing] the networks providing advanced weaponry and training to our enemies in Iraq."<sup>22</sup> Later that year, the JSOC began implementing cross-border operations into Iran from Iraq.<sup>23</sup> These operations included seizing, interrogating, pursuing, capturing, and executing "High-Value Targets" who were suspected of terrorist activities against the U.S.<sup>24</sup>

As it has been invoked to stretch the U.S. Constitution to, and arguably beyond, its limits, the AUMF has come under criticism in

17. *Id.*; see also Sarah Christian, "Yes, We Can" Grant Guantanamo Detainees Habeas Corpus Rights, in Boumediene v. Bush, 29 J. NAT'L ASS'N ADMIN. L. JUDICIARY 599, 613 (2009) (summarizing AUMF).

18. Christian, *supra* note 17, at 613.

19. Gregory E. Maggs, *Assessing the Legality of Counterterrorism Measures Without Characterizing Them as Law Enforcement or Military Action*, 80 TEMP. L. REV. 661, 676 (2007).

20. *Report: Bush Order Allowing Murder of U.S. Citizens Abroad Still in Effect*, CURRENT (Jan. 27, 2010), [http://current.com/news/92005604\\_report-bush-order-allowing-murder-of-us-citizens-abroad-still-in-effect.htm](http://current.com/news/92005604_report-bush-order-allowing-murder-of-us-citizens-abroad-still-in-effect.htm).

21. Steven Emerson, *Stymied Warriors*, N.Y. TIMES MAGAZINE (Nov. 13, 1988), <http://www.nytimes.com/1988/11/13/magazine/stymied-warriors.html?pagewanted=all&src=pm>.

22. See Alfonso Serrano, *Full Transcript of Bush's Iraq Speech*, CBS NEWS (June 19, 2009, 5:04 PM), <http://www.cbsnews.com/stories/2007/01/10/iraq/main2349882.shtml> (providing a transcript of President Bush's June 19, 2009, speech addressing the war in Iraq).

23. Marsha Reid, *Forecast*, GEOPOLITICAL MONITOR (July 7, 2008), <http://www.geopoliticalmonitor.com/index.php/us-escalating-covert-ops-in-iran>.

24. *Id.*

recent years and was famously implicated in the landmark Supreme Court decision *Hamdan v. Rumsfeld*.<sup>25</sup> In *Hamdan*, the Court ruled that the AUMF did not give the President the right to convene a military commission to try a prisoner because the military commission violated the Uniform Code of Military Justice and the Geneva Convention.<sup>26</sup> Specifically, the Court found that the AUMF violated these two other legal provisions because it deprived the prisoner of the barest due process rights, such as the right to know the crime for which he or she is charged, and the right to have the charge presented to a judge for an evaluation of the sufficiency of the evidence to hold him or her.<sup>27</sup>

*Hamdan* is a landmark case in American constitutional law jurisprudence and its many facets and implications have been discussed in great depth since the 2006 decision. Americans may have thought that *Hamdan* would be the last that they would hear of the AUMF, for what else could the Commander-in-Chief attempt to justify through this Act? As it turns out, the AUMF is once again being invoked to exercise the ultimate abuse of governmental power—assassination.

### B. The Promulgator: Barack Obama

#### 1. The Revelations of The Washington Post

On January 27, 2010, *Washington Post* reporter Dana Priest published the groundbreaking story revealing that President Obama is continuing President Bush's policy of sanctioning the assassination of U.S. citizens.<sup>28</sup> In the story, the *Post* revealed that as part of the U.S. military operations to ferret out terrorist cells, President Obama approved a December 24, 2009, air strike against a Yemeni compound where U.S. citizen Anwar Al-Aulaqi was thought to be meeting with other Al Qaeda leaders.<sup>29</sup> The article made a point of emphasizing that the Obama administration was merely adopting the same stance as the Bush administration with regard to U.S. citizens suspected of terrorism.<sup>30</sup> The article quoted a senior administration official saying that, if a U.S. citizen joins Al Qaeda, "it doesn't really change anything from the standpoint of whether [the U.S.

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25. *Hamdan v. Rumsfeld*, 548 U.S. 557 (2006).

26. *Id.* at 624-625, 632.

27. *Id.* at 613, 633-35.

28. Dana Priest, *U.S. Military Teams, Intelligence Deeply Involved in Aiding Yemen on Strikes*, WASH. POST (Jan. 27, 2010), <http://www.washingtonpost.com/wp-dyn/content/article/2010/01/26/AR2010012604239.html>.

29. *Id.*

30. *Id.*

military] can target them, . . . they are then part of the enemy.”<sup>31</sup> In the following weeks and months, nearly every major and fringe news publication picked up the story and the ensuing controversy spread like wildfire.

In addition to the spotlight on Mr. Al-Aulaqi, these news stories also revealed the reason behind the United States' targeting of Mr. Al-Aulaqi for assassination—he had been placed on the aforementioned High-Value Target lists as a suspected terrorist.<sup>32</sup>

These High-Value Target lists were also originally compiled under the Bush administration, but rather than destroying them, President Obama continues to add to them.<sup>33</sup> The High-Value Target lists are supposed to be compilations of the most dangerous terrorists who pose the most serious threats to the United States and its interests.<sup>34</sup> The precise conditions for inclusion on the lists are classified and thus unknown, but administration officials assert that the evidence presented against a suspect must be clear and convincing before the person will be added to the lists.<sup>35</sup> Shockingly, the President is not legally required to approve the addition of each name to the lists, nor is his approval required before specific attacks are launched against the citizens named on the lists.<sup>36</sup>

## 2. *The Response of the Obama Administration*

Many Americans probably know the name Anwar Al-Aulaqi or, if they do not, they at least know that the President asserted the right to assassinate American citizens without an indictment or a jury trial—and that he did so on September 30, 2011, when U.S. forces killed Anwar Al-Aulaqi.<sup>37</sup> Interestingly, it appears that very few people remember that President Bush ordered and successfully executed the assassination of Kamal Derwish, the above-referenced American citizen. Although difficult to explain

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31. *Id.*

32. Shane, *supra* note 5.

33. See James Risen & David Johnston, *Threats and Responses: Hunt for Al Qaeda; Bush Has Widened Authority of C.I.A. to Kill Terrorists*, N.Y. TIMES (Dec. 15, 2002), <http://www.nytimes.com/2002/12/15/world/threats-responses-hunt-for-al-qaeda-bush-has-widened-authority-cia-kill.html?pagewanted=all&src=pm> (discussing President Bush's list of wanted terrorist suspects whom the CIA is authorized to kill if needed).

34. See *id.* (stating that those who are on the “High-Value Target list” are “the worst of the worst”).

35. *Id.*

36. *Id.*

37. Laura Kasinov, *Fatal Strikes Hit Yemen as Violence Escalates*, N.Y. TIMES, Oct. 16, 2011, <http://www.nytimes.com/2011/10/16/world/middleeast/yemeni-security-forces-fire-on-protesters-in-sana.html>.



with exact certainty, the most likely explanation for this disparity in fame is the fact that Mr. Derwish was assassinated barely a year after September 11th.<sup>38</sup> With the American people still riding the waves of patriotic pride that is often accompanied by a freer rein to their government and a united sense of revenge against the enemy, the American people did not widely demand an explanation for the assassination of their fellow countryman in November 2002. By January 2010, however, the tides had changed and Americans began to clamor for a constitutional justification for the President's newly claimed power to kill American citizens without charge or trial.

After the *Washington Post* broke the Anwar Al-Aulaqi story, the public demanded that the President account for his actions.<sup>39</sup> On March 25, 2010, Harold Koh, the Legal Advisor to the Department of State, spoke to the American Society of International Law on the topic of citizen assassination.<sup>40</sup> In this speech, Mr. Koh specifically cited the aforementioned AUMF as the statute authorizing the President to target U.S. citizens for assassination. However, that statute is the lone authority he cites. Mr. Koh failed to point to any specific constitutional provision that grants the President this authority. Rather, Mr. Koh repeatedly affirms that there can be no unlawful killing of aggressive belligerents because by attacking or conspiring to attack the United States, these belligerents are themselves acting outside the law and are no longer accorded its protection.<sup>41</sup> Thus, Mr. Koh inherently categorizes the unlawful killing of these people as legal impossibility—since there is no law to protect them, no law is broken when they are killed.

Mr. Koh's speech to the American Society of International Law remains the most comprehensive justification of the Obama administration's policy. Other members of the administration have given shorter interviews which contain similar rationalizations. For example, in a House of Representatives hearing, then Director of National Intelligence, Dennis C. Blair, asserted that the national intelligence agencies "take direct actions against terrorists in the intelligence community. If we think that direct action will involve killing an American, we get specific permission [from the administration] to do that."<sup>42</sup> Additionally, Deputy White

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38. *Id.*

39. See generally Editorial, *The Power to Kill*, N.Y. TIMES (Mar. 10, 2012), <http://www.nytimes.com/2012/03/11/opinion/sunday/the-power-to-kill.html> (raising the writer's concern about the lack of accountability and oversight).

40. Harold Koh, Legal Advisor, U.S. Dep't of State, *The Obama Administration and International Law*, Address at the Annual Meeting of the American Society of International Law (Mar. 25, 2010), available at <http://www.state.gov/s/l/releases/remarks/139119.htm>.

41. *Id.*

42. Shane, *supra* note 5. Also, please note that as of May 2010, Mr. Blair

House National Security Adviser for Homeland Security and Counterterrorism, John O. Brennan, stated in an interview with the *Washington Times* that if an American citizen is abroad and trying to attack the United States or its interests, those people “will face the full brunt of a U.S. response.”<sup>43</sup> Notably, CIA Director Leon Panetta also attempted to justify the administration’s policy by essentially affirming that those Americans who allegedly engage in, support, or otherwise facilitate terrorist attacks are no longer Americans—only terrorists.<sup>44</sup> The observant reader will notice that none of these explanations reference constitutional provisions that grant the President this arbitrary power to strip a U.S. citizen of his or her citizenship, or to end his or her life.

Conspicuous by its absence is the President’s own direct and explicit explanation of the legal grounds for his actions. As seen above, the White House has allowed a number of its advisors and military personnel associated with the Obama Administration to comment and respond to questions from the press regarding the assassination of American citizens. However, the President himself has yet to issue an official statement on this subject.

### III. ASSASSINATING U.S. FOREIGN POLICY AND OUR CONSTITUTION: THE MANY LAWS THAT OUTLAW ASSASSINATION

The notion of a country’s leader allowing, or perhaps more disturbing, ordering that country’s military to assassinate its citizens should be especially abhorrent to Americans, a people who maintain such a strong national sense of pride in their rejection of all forms of tyranny and injustice. Historically, we Americans have been exceptionally proud of our country’s roots and how our founders threw off the shackles of a king who had the audacity to tax them without representation—let alone execute them without arrest or trial. Certainly, the American opposition to injustice would extend with the most fervent resistance to the assassination of American citizens.

However, this ideal is not simply an intangible principle lauded on the Fourth of July and then forgotten for the rest of the year. As explained below, the presidential policy of targeting

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announced his retirement as Director of National Intelligence.

43. Eli Lake, *Dozens of Americans Believed to Have Joined Terrorists*, WASH. TIMES (June 24, 2010), <http://www.washingtontimes.com/news/2010/jun/24/dozens-from-us-on-list-of-targets-as-terrorists/?page=all>.

44. See *60 Minutes: The Defense Secretary: Leon Panetta* (CBS television broadcast June 10, 2012), available at <http://www.cbsnews.com/video/watch/?id=7396830n> (conducting an interview with Dr. Panetta in which he specifically states that “[d]espite the fact that these people are citizens, they are first and foremost terrorists.”).

American citizens for assassination directly conflicts with multiple U.S. and international policies, laws, and court decisions, thereby establishing that this policy is in fact counter to well-established precedents that span decades of U.S. law and policy. It comes as little surprise that such a flagrant disregard for everything Americans hold dear roused a tremendous and disgusted response. The section that follows offers merely a brief sampling of the many laws that represent the U.S. tradition of diametric opposition to assassination and culminates in a constitutional analysis of assassination.

#### A. *U.S. Foreign Policy Regarding Assassination*

##### 1. *International Treaties*

The United States is a party to many treaties that prohibit their signatories from committing acts of assassination. As a threshold matter, it is important to understand the legal status of treaties between the United States and the rest of the world. First, treaties are made pursuant to Article VI, Clause 2 of the Constitution, which states that “This Constitution, and the Laws of the United States . . . and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land.”<sup>45</sup> The U.S. Supreme Court has consistently held that treaties made between the United States and a foreign nation are as legally binding as laws made by Congress,<sup>46</sup> as long as the treaty does not directly violate the Constitution.<sup>47</sup> Therefore, when looking to the treaties that the United States has voluntarily entered into, it should be remembered that these treaties bind the United States and the President just as validly as those domestic laws that are promulgated in the U.S. Code.

The Fourth Geneva Convention, the common moniker that describes the Geneva Convention related to the Protection of Civilian Persons in Time of War, was adopted in August 1949.<sup>48</sup> The Fourth Convention defines humanitarian protections for civilians in a war zone and outlaws the practice of total war, defined as a war that is limitless in scope, involving a belligerent who engages in the levying of all of its resources in order to render beyond use their rival’s capacity for resistance.<sup>49</sup> The United

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45. U.S. CONST. art. VI, cl. 2.

46. *Missouri v. Holland*, 252 U.S. 416, 433 (1920).

47. *Reid v. Covert*, 354 U.S. 1, 16–17 (1957).

48. Geneva Convention Relative to the Protection of Civilian Persons in Time of War, Aug. 12, 1949, 6 U.S.T. 3316, 75 U.N.T.S. 135, available at <http://www.icrc.org/ihl.nsf/full/380> [hereinafter Geneva Convention].

49. See generally *id.* (providing civilians protection by forbidding the murder and torture of civilians, along with barring the taking of hostages).

States ratified this treaty in 1955.<sup>50</sup>

Interestingly, however, even if the United States had not ratified the treaty, the United Nations Security Council, of which the United States is a party, concluded in 1993 that the treaty had passed into the body of customary international law.<sup>51</sup> This conclusion made the treaty binding on nonsignatories to the treaty whenever these nonsignatories engage in armed conflicts.<sup>52</sup> Thus, even if the United States had not ratified the treaty, it would still be bound by its provisions. It is therefore clear that the United States is bound by the Fourth Geneva Convention.

It is equally clear that the Convention applies to and protects United States citizens. The Fourth Geneva Convention is binding in war and in armed conflicts where war has not yet been declared.<sup>53</sup> As is widely known, there has been no formal declaration of war against any country in regards to the United States' war on terror.<sup>54</sup> The United States is certainly engaging in armed conflict in furtherance of this "war" so the treaty is undeniably in effect.

Furthermore, the protections of the treaty apply to both combatants and noncombatants.<sup>55</sup> Assuming, *arguendo*, that a domestic terrorist is an enemy combatant, this treaty still effectively limits the targeting of that individual by restraining the United States from utilizing its full military force against one belligerent.<sup>56</sup> The use of drone attacks, secret agents, and all other forms of the highest military command should certainly constitute a full levying of resources as contemplated by the Geneva Convention and, as such, its provisions would prevent the implementation of the current assassination policy.

Additionally, the Geneva Convention applies to noncombatants, defined as members of armed forces who have laid down their arms, and combatants who are *hors de combat* (out of the fight) on account of wounds, detention, or any other cause.<sup>57</sup> As detailed further below, Anwar Al-Aulaqi, is accused of being a

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50. Geneva Conventions of Aug. 12, 1949, Reservation/Declaration Text of the United States of America (Feb. 8, 1955), *available at* <http://www.icrc.org/ihl.nsf/NORM/D6B53F5B5D14F35AC1256402003F9920?OpenDocument>.

51. U.N. Secretary-General, *Report of the Secretary-General Pursuant to Paragraph 2 of Security Council Resolution 808*, ¶¶ 41-44, U.N. Doc. S/25704 (May 3, 1993).

52. *Id.*

53. Geneva Convention, *supra* note 48.

54. Patricia Smith, *Going to War Who Decides?*, N.Y. TIMES UPFRONT [http://teacher.scholastic.com/scholasticnews/indepth/upfront/features/index.asp?article=f040207\\_War\\_Powers](http://teacher.scholastic.com/scholasticnews/indepth/upfront/features/index.asp?article=f040207_War_Powers) (last visited Aug. 25, 2012).

55. *Id.*

56. *Id.*

57. *Id.*

senior recruiter, motivator, and planner for Al Qaeda missions.<sup>58</sup> As heinous and treasonous as these crimes undoubtedly are, they do not amount to armed combat within the working definition imposed by the Geneva Convention.<sup>59</sup> Therefore, Anwar Al-Aulaqi would be considered a noncombatant for purposes of this treaty, and its provisions against total war would have prevented the United States from ordering his assassination.

## 2. U.S. Domestic Laws Regarding Assassination

In addition to its international treaty obligations, the United States has also committed itself to a policy of nonassassination in its own domestic laws. Before examining how the highest law of the land prohibits this practice, it is important to examine the many other U.S. laws that similarly outlaw assassination. The totality of these laws further establishes the unconstitutionality of the current trend of assassinating American citizens.

### a. Executive Orders Banning Assassination

First, the current President's policy of condoning the assassination of American citizens is in direct opposition to three executive orders issued by his predecessors. On February 18, 1976, former President Gerald Ford signed Executive Order 11,905 ("EO 11,905"), the United States' first official ban on assassination.<sup>60</sup> This order confined the ban to political assassination only and prohibited employees of the U.S. Government from engaging or conspiring to engage in political assassination.<sup>61</sup> One could make the argument that in its current form, the President's assassination policy would still comply with EO 11,905 because those on the High-Value Target Lists are allegedly hunted for their proposed violence against the United States, and not for their political beliefs.<sup>62</sup> However, the febleness of this argument is readily apparent in light of the subsequent executive orders that have amended and augmented EO 11,905.

A mere two years after the issuance of EO 11,905, then President Jimmy Carter signed Executive Order 12,036 ("EO 12,036") on January 24, 1978.<sup>63</sup> The significance of EO 12,036 is twofold. First, this is the first presidential order that mandates a complete prohibition on all assassination.<sup>64</sup> In section 2-306, President Carter removed the qualifier "political" with the result that the order prohibited persons employed by or acting on behalf

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58. *Infra*, Part V.

59. Geneva Convention, *supra* note 48.

60. Exec. Order No. 11,950, 41 Fed. Reg. 7703 (Feb. 18, 1976).

61. *Id.*

62. *Id.*

63. Exec. Order No. 12,036, 43 Fed. Reg. 3674 (Jan. 24, 1978).

64. *Id.*

of the United States from engaging in or conspiring to engage in assassination.<sup>65</sup> By removing the “political” qualifier, the Carter administration considerably broadened the definition of assassination that concomitantly worked to shrink military operations.

Second, EO 12,036 established new oversight committees and enacted new restrictions on the intelligence community.<sup>66</sup> Notably, EO 12,036 prohibited intelligence agents from targeting and pursuing American citizens unless the President authorized the operation and the Attorney General both approved the operation *and* found probable cause to believe that the American citizen was a threat to the United States.<sup>67</sup> This section of EO 12,036 is particularly noteworthy in light of the absence of a similar safeguard in the current assassination protocol. As noted above, presidential approval is *not* required for an American to be placed on the High-Value Target Lists, inclusion on which subjects the American to assassination attempts by the U.S. government.<sup>68</sup>

Executive Order 12,333, entitled United States Intelligence Activities, was signed by former President Ronald Reagan on December 4, 1981.<sup>69</sup> Of relevance is Part 2.11 that confirmed the United States’ proscription on its intelligence agencies sponsoring or carrying out assassination missions.<sup>70</sup> Specifically, this part of the order states that “[n]o person employed by or acting on behalf of the United States Government shall engage in, or conspire to engage in, assassination.”<sup>71</sup> It is important to note that all three of these executive orders were directed at restraining both the U.S. military *and* its intelligence community. As explained above, the intelligence community works closely with the military in compiling the High-Value Target Lists. Thus, in stark contrast to the current administration, past presidents took momentous steps to curb the liberties taken by state actors when these actors violated the liberties of others.

#### b. The Constitutional Ban on Assassination

The Constitution is largely a prohibitory document in that it mostly outlines what the federal government and states cannot do. For instance, Article X restricts the states from entering into treaties, coining money, emitting bills of credit and other functions that the founders thought best reserved to the federal

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65. *Id.*

66. *Id.*

67. *Id.*

68. Shane, *supra* note 5.

69. Exec. Order No. 12,333, 46 Fed. Reg. 59,941 (Dec. 4, 1981).

70. *Id.*

71. *Id.*

government.<sup>72</sup> However, just as the states are prohibited from engaging in specific functions, certain acts are foreclosed to all branches of the government. One such taboo is especially pertinent to the instant discussion—that of passing bills of attainder.<sup>73</sup>

As described by one of the recognized authorities on the Constitution, Justice Joseph Story,<sup>74</sup> bills of attainder were special legislative acts that bestowed capital punishments upon persons adjudged guilty of high offenses (such as treason) without any conviction or semblance of due process.<sup>75</sup> Specifically, according to Justice Story the process of issuing bills of attainder involved the English legislature’s “irresponsible despotic discretion.”<sup>76</sup> The English legislature made these life and death decisions “under the influence of unreasonable fears or unfounded suspicions.”<sup>77</sup> Bills of attainder “hearings” (for lack of a more descriptive term) were typically conducted without calling the accused party to defend himself, and there were no offerings of proof to corroborate the grave charges levied against the defendant.<sup>78</sup>

It is exactly this lack of due process and jury trials that shocked the consciences of our founding fathers and spurred them to prohibit this practice, a practice that was antithetical to the burgeoning American ideals of justice and the cornerstone belief that innocence is assumed until guilt is proven.<sup>79</sup> Justice Story averred that to the founders, the injustice of bills of attainder would pose significant dangers for abuse and would result in the death and ruination of citizens.<sup>80</sup> Notably, Justice Story asserts that bills of attainder were mostly used in England in times of rebellion or war, times “in which all nations are most liable . . . to forget their duties and to trample upon the rights and liberties of

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72. U.S. CONST. art. X.

73. U.S. CONST. art. I, § 9.

74. Ronald D. Rotunda & John E. Nowak *Introduction* to JOSEPH STORY, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES xix (Carolina Academic Press 1987) (1833).

75. 2 JOSEPH STORY, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES § 1344 (3d ed. 2001); *see also* Edwin Viera, Jr., *Death Squads Part II*, NEWS WITH VIEWS (Dec. 14, 2010), <http://newswithviews.com/Vieira/edwin232.htm> (referring to Justice Joseph Story for the proposition that bills of attainder are unconstitutional).

76. 2 STORY, *supra* note 75; Viera, *supra* note 75.

77. 2 STORY, *supra* note 75; Viera, *supra* note 75.

78. 2 STORY, *supra* note 75; Viera, *supra* note 75.

79. *See* Sol M. Linowitz, *Speeches from the Cornell Law School Centennial Celebration, April 15-16, 1988: Keynote Address*, 73 CORNELL L. REV. 1255, 1258 (1988) (discussing that the founding fathers remembered the English Bills of Attainder “under which, Parliament had, as judge, prosecutor, and jury, sent men to their death without giving them a chance to defend themselves”).

80. 2 STORY, *supra* note 75; Viera, *supra* note 75.

others.”<sup>81</sup> Additionally, these prohibitions on issuing bills of attainder have also been upheld in U.S. courts.<sup>82</sup>

It seems that the foresight possessed by the drafters of the Constitution was both long and premonitory as they ratified a constitution that explicitly prohibited all “Bills of Attainder”, both for Congress—“[n]o Bill of Attainder . . . shall be passed;” and for the States—“[n]o State shall . . . pass any Bill of Attainder.”<sup>83</sup> Thus, imposing a death sentence on the head of a citizen, regardless of the crime the citizen allegedly committed, would without question qualify as issuing a bill of attainder and, as such, it is specifically prohibited by the U.S. Constitution.

To be certain, both international law and U.S. law allow for the killing of individuals without trial if the person poses an immediate, specific imminent threat to physical safety and life—the most common examples are self-defense laws.<sup>84</sup> However, it need hardly be stated that claiming a person poses an immediate threat and placing him on the High-Value Target Lists for months at a time is a logical contradiction. Thus, it is clear that the placement of Anwar Al-Aulaqi on the High-Value Target Lists, where he remained from January 2010, to his death on September 30, 2011, is violative of both U.S. legal tradition and international law.

#### IV. THE ANSWER IS IN THE CONSTITUTION

Clearly, the U.S. Constitution, U.S. public policy, international law, and executive orders issued by past presidents all demonstrate that Americans recognize and wish to prevent the use of assassination as a solution to political or war problems. In the face of this widely held belief, what solution can be advocated in the face of a world in which terrorists inhabit? Defenders or supporters of the presidential “power” to assassinate U.S. citizens justify their position by highlighting that these are American citizens who commit crimes against the nation, and that these people need to be punished for their crimes. The truth of this premise is so plain that it does not need addressing or confirmation. It is not the goal that must be attacked but rather

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81. 2 STORY, *supra* note 75; Viera, *supra* note 75.

82. United States v. Lovett, 328 U.S. 303, 315 (1946); *see also* United States v. Brown, 381 U.S. 437, 461–62 (1965) (holding that a statute making it a crime for a member of the communist party to hold a position in a labor organization was a bill of attainder and thus proscribed by the U.S. Constitution).

83. U.S. CONST. art. I, § 9, cl. 3; U.S. CONST. art. I, § 10, cl. 1; *see also* Viera, *supra* note 75 (quoting the U.S. Constitution).

84. *See* Garner v. Tennessee, 471 U.S. 1, 11 (1985) (permitting the use of deadly force in situations where a person poses an immediate threat); *see also* Shane, *supra* note 5 (explaining that international law permits the use of “lethal force” when an individual poses an immediate threat).



the methods employed to accomplish it. The question remains: What are we to do with domestic terrorists? The answer is of course found in the Constitution, specifically in Article 3, Section 3: the Treason Clause.<sup>85</sup>

#### A. Treason Provision

The U.S. Constitution's Treason Clause provides:

Treason against the United States shall consist only in levying War against them, or in adhering to their Enemies, giving them Aid and Comfort. No Person shall be convicted of Treason unless on the Testimony of two Witnesses to the same overt Act, or on Confession in open Court. The Congress shall have power to declare the Punishment of Treason, but no Attainder of Treason shall work Corruption of Blood, or Forfeiture except during the Life of the Person attainted.<sup>86</sup>

To fully understand why the Treason Clause is the constitutionally appropriate remedy for bringing domestic terrorists to justice, the history of the Treason Clause's creation, implementation, and application is examined below.

For the purposes of this Article, treason is defined as the levying of war against the United States or as giving its enemies aid and comfort.<sup>87</sup> As is widely agreed upon by previous and modern constitutional scholars, the U.S. Constitution was written by authors who were strongly influenced by Blackstone, Montesquieu, and Locke.<sup>88</sup> These eminent thinkers recognized the truly detestable nature of treason and the necessity of its severe punishments. However, equally necessary and equally plain was the requirement of confining treason to very specific and enumerated crimes. As Blackstone and Montesquieu averred, because treason is the highest crime any man can possibly commit, it ought to accordingly be the crime that is the most precisely described, “[f]or if the crime of high treason be indeterminate, this alone . . . is sufficient to make any government degenerate into arbitrary power.”<sup>89</sup>

If Blackstone and Montesquieu were the authorities our founding fathers looked to for guidance in writing the Constitution, Justice Joseph Story has carried on the torch and

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85. U.S. CONST. art. III, § 3.

86. *Id.*

87. *Id.*

88. See generally Donald S. Lutz, *The Relative Influence of European Writers on Late Eighteenth-Century American Political Thought*, 78 AM. POL. SCI. REV. 189 (1984) (analyzing various European influences on early American political beliefs).

89. WILLIAM BLACKSTONE, COMMENTARIES 4:74-91, 350-351 (1796), available at [http://press-pubs.uchicago.edu/founders/documents/a3\\_3\\_1-2s8.html](http://press-pubs.uchicago.edu/founders/documents/a3_3_1-2s8.html).

attained the reputation for equal expertise on the Constitution as it was written.<sup>90</sup> In his authoritative tome *Commentaries on the Constitution*, Justice Story provides an illustrative explanation of the Treason Clause, its origins, and its purposes.

Story begins his analysis of the Treason Clause with the premise that, because treason's aim is to overthrow the government by force, this crime has historically and continues to be deemed the highest crime that can be committed in a civilized society.<sup>91</sup> On account of its tendency to create universal danger and alarm, suspicions of treason often cloud the otherwise rational minds of the public. The prejudice associated with this crime was so extreme that Story asserted that even the mere accusation of treason against an individual, whether just or unjust, subjects the individual to suspicion and hatred; and, in times of high political excitement, acts of a very subordinate nature are often, by popular prejudices as well as by royal resentment, magnified into this ruinous importance.<sup>92</sup> Because of these potentially corrupt and morally disastrous consequences, Story added his voice to the reverberation of the past in emphasizing the importance of clearly defining the exact nature and limits of the crime.<sup>93</sup>

Story then offers a brief account of the history of treason in England, where the founding fathers adopted many of their legal traditions and principles.<sup>94</sup> English history was replete with injustices regarding treason. In its ancient common law, the judgments of treason were mostly left to the judge's discretion to determine whether acts were treasonous.<sup>95</sup> Since at this time the judges were holding their offices at the pleasure of the crown, their judicial propriety was often compromised and their positions were used as political instruments to imprison and execute enemies of the King.<sup>96</sup>

Notably, a particularly unjust practice of the tyrannical officeholders was to create constructive treasons; that is, by their own whim and decision the judges elevated offenses into the guilt and punishment of treason, even though these offenses were never contemplated to be classified as such.<sup>97</sup> Unsurprisingly, the practice of creating these constructive treasons proved to be so unjust and resulted in grievously punishing the innocent that Parliament found it absolutely necessary to pass a statute barring the imposition of constructive treason during the reign of Edward

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90. Rotunda & Nowak, *supra* note 74, at xxiv.

91. 2 STORY, *supra* note 75, § 1797.

92. *Id.*

93. *Id.*

94. *Id.*

95. *Id.*

96. *Id.*

97. *Id.*

III in 1695.<sup>98</sup>

This statute bears striking resemblance to the U.S. Constitution's Treason Clause. For instance, it provides that those accused of treason have the right to be represented by up to two counsels, a conviction for the crime could not stand unless evidence of two witnesses to the same offense was provided, and the indictment for the crime had to be signed by the grand jury within three years of the alleged offense.<sup>99</sup>

Inspired by this English Act, and wary of governmental oppression, those at the Constitutional Convention strove to lay down an impassible barrier against arbitrary and unjust constructions of treason.<sup>100</sup> To do so, the framers confined the crime of treason to two specific classes of acts: levying war against the United States and giving its enemies aid and comfort.<sup>101</sup> Notably, treason is the only crime that is specifically defined in the Constitution, which is likely a clear demonstration of the gravity of this offense.

It is plain that the framers viewed the crime of treason as one of the most heinous acts that can be committed against one's country. Further evidence of their reservation to prosecute only the most heinous acts with this charge presents itself in the fact that very few treason trials have ever been heard in the United States.<sup>102</sup> The Supreme Court has noted that "[t]he basic law of treason in this country was framed by men who . . . were taught by experience and by history to fear an abuse of the treason charge almost as much as they feared treason itself."<sup>103</sup>

Clearly, the charge of treason should be levied only against those individuals who commit the vilest, most violent, and most horrendous acts—acts that are nearly always attributed to alleged terrorists, including American citizen Anwar Al-Aulaqi. It seems that the treason charge would have been perfectly applicable to

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98. *Id.*

99. *Treason (Ireland) Act of 1695*, WIKIPEDIA, [http://en.wikipedia.org/wiki/Treason\\_\(Ireland\)\\_Act\\_1821](http://en.wikipedia.org/wiki/Treason_(Ireland)_Act_1821) (last modified May 12, 2012).

100. See Sam Finegold & Gina Kim, *Treason in the War on Terror*, HARV. POL. REV. (Dec. 7, 2011, 10:02 p.m.), <http://hpronline.org/covers/constitution/treason-in-the-war-on-terror/> (stating that in order to prevent arbitrary and fraudulent treason allegations, the founding fathers made treason difficult to establish).

101. 2 STORY, *supra* note 75, § 1799; see also David Maxey, *The Unfinished Revolution*, U.S. DEPT OF THE INTERIOR, [http://www.nps.gov/revwar/unfinished\\_revolution/treason.htm](http://www.nps.gov/revwar/unfinished_revolution/treason.htm) (last updated May 13, 2003, 15:32) (setting forth some of the reasoning behind the limited nature of the Treason Clause).

102. See *Treason*, CIVICS LIBRARY OF THE MO. BAR (2006), <http://members.mobar.org/civics/treason.htm> (explaining that there have been "very few" treason convictions over the past two hundred years).

103. *Cramer v. United States*, 325 U.S. 1, 21 (1945).

Mr. Al-Aulaqi's crimes. Since that is the case, then why was he not charged and prosecuted with our nation's highest crime?

*B. Letters of Marque and Reprisal*

Some supporters of the assassination policy may concede that treason would be the appropriate crime to levy against domestic terrorists, but these supporters typically counter with the argument that it is too difficult to apprehend single individuals to bring to the United States for trial.<sup>104</sup> Since bringing formal criminal charges and apprehending individuals is deemed too time-consuming or difficult, measures that have previously "worked," such as bombing entire compounds and President Obama's sanction of attacking entire facilities if the domestic terrorist is inside, have been utilized in order to kill terrorists. However, as often happens in war, usually rational minds overlook solutions that are clearly found in the Constitution. In the case of U.S. citizens who are suspected of terrorist activities, letters of marque and reprisal can easily be issued in order to bring these individuals back to their home country to answer for their alleged crimes and acts against their homeland.

Article 1, Section 8, Clause 11 of the Constitution authorizes Congress to "grant letters of marque and reprisal."<sup>105</sup> A reprisal is an action taken on the part of the injured in return for the injury.<sup>106</sup> A reprisal includes any measures that are taken as retaliation for an attack, including capturing a U.S. citizen who is accused of terrorist actions and is living abroad. The term "marque" relates to the French word for "marching," and in this context means crossing or marching across a border in order to effectuate a reprisal.<sup>107</sup> Thus, a letter of marque and reprisal would authorize a private person, not the U.S. armed forces or other government agents, to engage and complete reprisal operations outside the country's borders.<sup>108</sup> The founders included the Marque and Reprisal Clause so that the U.S. government would not have to engage the military and force a costly war on Americans in order to apprehend single individuals.

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104. *Fox News Sunday Panel Debates Legality of Anwar al-Awlaki Assassination*, MEDIAITE.COM (Oct. 2, 2011), <http://videos.mediaite.com/video/Fox-News-Sunday-Killing-Al-Awla>.

105. U.S. CONST. art. I.

106. See J. Andrew Kent, *Congress's Under-Appreciated Power to Define Offenses Against the Law of Nations*, 85 TEX. L. REV. 843, 920 (2007) (defining reprisal to include "compensatory retaliations . . . during war or peacetime").

107. See William Young, Note, *A Check on Faint-Hearted Presidents: Letters of Marque and Reprisal*, 66 WASH & LEE L. REV. 895, 900 (2009) (explaining that a letter of marque "authorize[s] seizures outside [government's] . . . jurisdiction").

108. See *id.* at 913 (indicating that letters of marque and reprisal could not be given to government officials or members of the armed forces).

Making use of the letters of marque and reprisal in order to bring the September 11th terrorists to justice was not a hindsight solution. A mere three weeks after the attacks in October 2001, Texas Congressman Ron Paul introduced H.R. 3076, the September 11 Marque and Reprisal Act of 2001.<sup>109</sup> The purpose of the bill was to authorize the U.S. Department of State to issue these letters and enable private citizens to hunt down and bring terrorists to justice in the United States.<sup>110</sup> The passage of this bill, which died in committee, would have empowered U.S. citizens to assume the responsibility of pursuing terrorists and permitted them to track and capture these individuals.<sup>111</sup>

Interestingly, letters of marque and reprisal are not only specifically provided for in the U.S. Constitution, but they are also completely within the bounds of international law.<sup>112</sup> Thus, if the United States issued these letters instead of deploying troops to kill U.S. citizens, not only would we cease to violate our own laws, but we would also respect international law as well.

Why implement the immoral, illegal, and extra-constitutional measure of assassination when the Constitution provides for the arrest, detention, and punishment of those who commit crimes against their country? One of the oft-proffered answers is that the evidence against these treasonous individuals is so overwhelming that the safeguards of due process required by the Treason Clause, including confession in open court and evidence by two witnesses, would merely serve as an unjustifiable delay in bringing these individuals to justice. However, as demonstrated in the subsequent section, constitutional safeguards, which are the birthright of all U.S. citizens, do not cause undue delay or burden to the judicial system or Americans. Rather, they work to ensure that our nation does not devolve into one that wrecks havoc upon its own citizens.

## V. APPLYING THE ANSWER

Throughout the history of the United States, there have been fewer than forty federal prosecutions for treason and even fewer convictions.<sup>113</sup> Perhaps the United States' most infamous traitor,

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109. September 11 Marque and Reprisal Act of 2001, H.R. 3076, 107th Cong. (2001).

110. *Id.*

111. *Id.*

112. See generally Theodore M. Cooperstein, *Letters of Marque and Reprisal: The Constitutional Law and Practice of Privateering*, 40 J. MAR. L. & COMM. 221 (2009) (discussing the development of letters of marque and reprisal under both national and international law).

113. Greg Krikorian & Richard B. Schmitt, *Videos Lead to Treason Charge*, L.A. TIMES (Oct. 12, 2006), <http://articles.latimes.com/2006/oct/12/local/me-gadah12>.

Benedict Arnold, was accused of committing treason by conspiring with the British in 1779.<sup>114</sup> At his court-martial trial in 1779, Arnold was cleared of all but two minor charges.<sup>115</sup> Additionally, several men were convicted of treason in connection with the 1794 Whiskey Rebellion but were subsequently pardoned by President George Washington.<sup>116</sup> The trial of Aaron Burr in 1807, perhaps the most infamous treason trial, resulted in an acquittal.<sup>117</sup> Interestingly, after the American Civil War, the U.S. government did not try nor accuse any person involved with the Confederate States of America of treason, though a number of leading Confederates (including Jefferson Davis<sup>118</sup> and Robert E. Lee)<sup>119</sup> were indicted. Those who were indicted received blanket amnesty issued by President Andrew Johnson as he left office in 1869.<sup>120</sup>

The United States has not always jumped to the solution of assassination as a means to deal with American citizens suspected of terrorism. On the contrary, on October 11, 2006, a federal grand jury issued the first indictment for treason against the United States since 1952 when it charged Adam Yahye Gadahn with treason based on videos in which he appeared as a spokesman for Al Qaeda and threatened attacks on American soil.<sup>121</sup> Mr. Gadahn is still at large, and thus his trial has not yet commenced.<sup>122</sup> Therefore, it is useful to examine a number of cases that were successfully tried pursuant to the Treason Clause in order to have an understanding of what would happen if the Constitution was honored and Anwar Al-Aulaqi, and similarly situated Americans, were brought to real justice.

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114. WILLARD STERNE RANDALL, *BENEDICT ARNOLD: PATRIOT AND TRAITOR* 486-92 (1990).

115. *Id.*

116. Institute of Governmental Studies, *Pardown Power*, UC BERKELEY (2010), <http://igs.berkeley.edu/library/research/quickhelp/federal/pardon.html>.

117. PETER CHARLES HOFFER, *THE TREASON TRIALS OF AARON BURR* 64-67 (2008).

118. Roy F. Nichols, *United States vs. Jefferson Davis, 1865-1869*, 31 *AM. HIST. REV.* 266-84 (1926).

119. THOMAS FLEMING, *THE SECRET TRIAL OF ROBERT E. LEE* 45-55 (2006).

120. Andrew Jackson, President of the United States of America, Proclamation No. 134 – Granting Amnesty to Participants in the Rebellion, with Certain Exceptions (May 29, 1865).

121. Dan Eggen & Karen DeYoung, *U.S. Supporter of Al-Qaeda Is Indicted on Treason Charge*, *WASH. POST* (Oct. 12, 2006), <http://www.washingtonpost.com/wp-dyn/content/article/2006/10/11/AR2006101101101121.html>.

122. Jonathan Lemire, *Bin Ladin Liked CBS*, *NYDAILYNEWS.COM* (May 3, 2012), [http://articles.nydailynews.com/2012-05-03/news/31560696\\_1\\_adam-gadahn-osama-bin-laden-propaganda-video](http://articles.nydailynews.com/2012-05-03/news/31560696_1_adam-gadahn-osama-bin-laden-propaganda-video).

### A. *Treason in the Whiskey Rebellion*

After the ratification of the U.S. Constitution in 1789, the new federal government was given the power to levy taxes—a power previously withheld from it under the Articles of Confederation.<sup>123</sup> By 1789, the federal government had accumulated \$54 million in debt and the states had amassed an additional \$25 million of debt.<sup>124</sup> While serving as the first Secretary of the Treasury, Alexander Hamilton convinced Congress to consolidate the debts into one debt that would be funded by the federal government.<sup>125</sup> By December 1790, Hamilton passed an excise tax on domestically distilled spirits, the first tax levied by the new federal government on a domestic product.<sup>126</sup> The whiskey excise became law in March 1791, and in response, the Whiskey Rebellion commenced on September 11, 1791.<sup>127</sup> The Whiskey Rebellion consisted of attacks against tax collectors that quickly escalated to open fire.<sup>128</sup> Rebels tarred and feathered officials, the tax went uncollected in several states, and President Washington called up the state militias to deal with the insurrection.<sup>129</sup> The rebels collapsed as the militia marched into Pennsylvania in October 1794, and the president officially declared the rebellion over soon thereafter.<sup>130</sup>

Some of the most prominent leaders of the insurrection fled westward to safety and to escape arrest and prosecution.<sup>131</sup> After investigation, approximately twenty people were arrested on charges of treason and brought to Philadelphia for trial.<sup>132</sup> All but two of these defendants were released or acquitted.<sup>133</sup> The two that were not were Philip Vigol and John Mitchell. The two defendants were tried in separate trials and both were sentenced to be hanged for conspiring and acting against the United States.<sup>134</sup> Notably,

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123. Charles W. Calomiris, *Institutional Failure, Monetary Scarcity, and the Depreciation of the Continental*, 48 J. ECON. HIST. 65 (1988).

124. Josiah Pertz, *Hamilton to States: Drop Debt—The Federal Government's Assumption of States' Debts*, in 2004 GILDER LEHRMAN HISTORY SCHOLARS PROJECTS ON ALEXANDER HAMILTON 1 (2004).

125. *Id.*

126. WILLIAM HOGELAND, *THE WHISKEY REBELLION: GEORGE WASHINGTON, ALEXANDER HAMILTON, AND THE FRONTIER REBELS WHO CHALLENGED AMERICA'S NEWFOUND SOVEREIGNTY* 27 (2010).

127. THOMAS P. SLAUGHTER, *THE WHISKEY REBELLION: FRONTIER EPILOGUE TO THE AMERICAN REVOLUTION* 113 (1988).

128. *Id.*

129. *Id.* at 114-15.

130. *Id.* at 219.

131. Michael Hoover, *The Whiskey Rebellion*, TTB.GOV, [http://www.ttb.gov/public\\_info/whisky\\_rebellion.shtml](http://www.ttb.gov/public_info/whisky_rebellion.shtml) (last visited Aug. 25, 2012).

132. *Id.*

133. *Id.*

134. *Whiskey Tax*, TAX NEWS (June 2010), <http://www.taxrates.cc/html/06b-whiskey-tax.html>.

Vigol was later pardoned by President Washington, and Mitchell by President Adams, on the grounds that conspiring and acting to prevent a law from going into effect did not constitute treason as contemplated by the Constitution.<sup>135</sup>

### B. *Treason in the Civil War*

After the Whiskey Rebellion ended in the late 1790s, the Treason Clause was not contemplated in American courts until the Lincoln administration was forced to contend with roughly half of the population of the country during the Civil War. Recall that the Constitution gives Congress the power to declare the punishment for treason. The Treason Act of July 17, 1862, declared that treason against the United States was punishable by death or fines and imprisonment.<sup>136</sup> During the Civil War and its aftermath, no regular court condemned any person to death, and only two military tribunals did so. These two military tribunal decisions had wide repercussions. For instance, in the military tribunal for Lambdin P. Milligan, he and several others were convicted of treason by a military commission and were sentenced to be hanged for conspiracy to free prisoners of war.<sup>137</sup> However, during a subsequent appeal to the Supreme Court, the Court declared that the military trial was illegal because it was not conducted in a war zone or in an area placed under martial law.<sup>138</sup>

The only person convicted of treason during the Civil War whose sentence was not subsequently pardoned or overturned was William Bruce Mumford, a resident of New Orleans, Louisiana.<sup>139</sup> The treasonous act for which he was hanged on June 7, 1862, was tearing down the American flag at the U.S. Mint in New Orleans while the Union troops invaded the city.<sup>140</sup> (Recall that ex-President of the Confederacy Jefferson Davis was also indicted for treason but his case never came to trial and he was eventually released.)<sup>141</sup>

### C. *The Prospective Case of U.S. v. Anwar Al-Aulaqi*

Clearly, in the darkest times of our nation, Americans have conspired to and actually acted against their countrymen and their

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135. HARRY M. WARD, *GOING DOWN HILL: LEGACIES OF THE AMERICAN REVOLUTIONARY WAR* 67 (2008).

136. *Id.*

137. *Id.*

138. William Rehnquist, *Civil Liberty and the Civil War: The Indianapolis Treason Trials*, 72 *IND. L.J.* 927, 934 (1997).

139. Robert P. Broadwater, *William B. Mumford Became a Southern Hero for Defying Union Sailors in New Orleans*, *AMERICA'S CIVIL WAR*, Nov. 2005, at 20.

140. *Id.*

141. Nichols, *supra* note 118, at 266.



nation. However, until the founders and the colonists triumphed in the Revolutionary War, they were also perpetuating treasonous acts against their nation. Properly aware that “treason is a charge invented by winners as an excuse for hanging the losers,” the founders provided a steadfast and strict guideline for determining if an American actually committed treasonous acts, or if he simply had the misfortune to be on the losing side.<sup>142</sup> So how did we know what side Anwar Al-Aulaqi was on?

Some readers may think that the idea of bringing a terrorist to trial is simply preposterous. However, as noted above, on October 11, 2006, the United States attempted to do just that when a federal grand jury indicted Adam Gadahn, also known as Azzam al-Amriki or “Azzam the American,” on charges of treason.<sup>143</sup> Since the constitutional mechanisms of indictment and trial are in place, they must be utilized to protect the due process rights of not only these suspected terrorists, but the rights of the entire U.S. population. In sacrificing the Constitution to national security, the United States is in terrible danger of creating a domino effect that will culminate in a drastically different country.

Many people say that September 11th changed everything, and White House officials have gone so far as to speak of the new “Law of 9/11” and assert that, in the context of individuals and acts related to that day, American laws and jurisprudence for the past two hundred years are nonentities.<sup>144</sup> And it cannot be doubted or disagreed upon by rational minds that the tragedies committed on that day were acts of total disregard for the sanctity of human life and embodied the cowardice of those who committed them. But the country already suffered an attack of this magnitude in its past, for instance on December 7, 1941. Rather than stooping to our enemies’ level and transforming the land of the free into a violent tribal society, the Americans working in our government who swore an oath to uphold the Constitution must do just that. The long vision of our founding fathers did not cripple or handicap their descendants. As demonstrated above, the procedural instructions and judicial requirements for conviction in the Treason Clause have already been applied to past traitors and have already been successful at bringing those treasonous villains

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142. Benjamin Franklin Quotes, QUOTEID.COM, [http://www.quoteid.com/Benjamin\\_Franklin.html](http://www.quoteid.com/Benjamin_Franklin.html) (last visited Aug. 25, 2012).

143. Press Release, Dep’t of Justice, U.S. Citizen Indicted on Treason, Material Support Charges for Providing Aid and Comfort to al Qaeda (Oct. 11, 2006), [available at](http://www.justice.gov/opa/pr/2006/October/06_nsd_695.html) [http://www.justice.gov/opa/pr/2006/October/06\\_nsd\\_695.html](http://www.justice.gov/opa/pr/2006/October/06_nsd_695.html). Gadahn was also charged with providing material support to a foreign terrorist organization (Al Qaeda) in violation of 18 U.S.C. § 2339B. Paul T. Crane, *Did the Court Kill the Treason Charge?: Reassessing Cramer v. United States and Its Significance*, 36 FLA. ST. U. L. REV. 635, 636 n.1 (2009).

144. Koh, *supra* note 40.

to real justice.

#### VI. GUY FAWKES'S DANGEROUS REMEDY AND THE SICKNESS IT WILL SPREAD: THE FUTURE OF TREASON IN THE "AGE OF TERRORISM"

Treason is the only crime specifically defined in the Constitution. After the Revolutionary War, the framers narrowed the scope of the Treason Clause and gave it extraordinarily strict boundaries in order to prevent governmental oppression of citizens. In the face of such noble history and intentions, the current administration's frustration of this goal, and its sidestepping of the Constitution in the name of protecting the nation for which it stands, is remarkably unfortunate.<sup>145</sup>

In his dissent in *Hamdi v. Rumsfeld*,<sup>146</sup> Justice Scalia stated that when the U.S. government accuses its citizens of waging war against it, "our constitutional tradition has been to prosecute him in federal court for treason or some other crime."<sup>147</sup> He added that "citizens aiding the enemy have been treated as traitors subject to the criminal process."<sup>148</sup> The key word in this sentence is *process*. As an American citizen, Anwar Al-Aulaqi was entitled to due process and specifically the process rights afforded in the Treason Clause. However, because he was undoubtedly well aware that the government had placed him on the United States' High-Value Target Lists, there was little to no chance that Anwar Al-Aulaqi was going to return to the country in order to file a complaint against the price on his head. But his father did just that.<sup>149</sup>

On August 31, 2010, Anwar Al-Aulaqi's father, Mr. Nasser Al-Aulaqi, brought a complaint against the U.S. government in the U.S. District Court for the District of Columbia with the help of

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145. Benjamin A. Lewis, *An Old Means to a Different End: The War on Terror, American Citizens . . . and the Treason Clause*, 34 HOFSTRA L. REV. 1215, 1221 (2006).

146. *Hamdi v. Rumsfeld*, 542 U.S. 507, 554 (2004) (Scalia, J., dissenting).

147. *Id.* (Scalia, J., dissenting).

148. *Id.* at 559 (Scalia, J., dissenting).

149. Although not especially relevant for the purposes of this Article, it is interesting to note that Mr. Nasser Al-Aulaqi had to first file suit in order to even be *allowed* to file suit. In the case of Al-Aulaqi, the government went so far as to attempt to preclude any legal challenge to its policy. In July, the Secretary of the Treasury, Timothy Geithner, labeled Al-Aulaqi a "specially designated global terrorist," under a federal regulation that makes it a crime for lawyers to provide representation for his benefit without first seeking a license from the government. Complaint for Injunctive and Declaratory Relief, *American Civil Liberties Union v. Geithner*, No. 10-cv-01303 (D.D.C. Aug. 3, 2010). The ACLU and CCR had to file a separate lawsuit challenging the legality and constitutionality of the licensing scheme before the U.S. government relented and granted them the right to represent Al-Aulaqi without risking criminal prosecution. See *generally id.* (setting forth the ACLU's constitutional challenges).

the American Civil Liberties Union (ACLU).<sup>150</sup> The complaint named President Obama, Director of the CIA Leon C. Panetta, and Secretary of Defense Robert M. Gates as defendants in their official capacities.<sup>151</sup> The complaint demanded declaratory and injunctive relief against the targeted killing of Anwar Al-Aulaqi until the case against his son could be heard by a court.<sup>152</sup> The complaint contained four claims for relief.<sup>153</sup> First, it contended that the Fourth Amendment guarantees Anwar Al-Aulaqi the right to be free from unreasonable seizures.<sup>154</sup> Specifically, the complaint asserts that the targeted killing of Anwar Al-Aulaqi in circumstances in which the United States does not present concrete, detailed, and imminent threats, and where there are means other than lethal force that could reasonably be employed to neutralize any alleged threat posed by him, is a violation of the prohibition against *unreasonable* seizures.<sup>155</sup>

Second, the complaint asserted that the United States' policy of targeted killings also violates the Fifth Amendment by authorizing, outside of armed conflict, the killing of U.S. citizens without due process of law.<sup>156</sup> Third, Mr. Nassar Al-Aulaqi brought a claim under the Alien Tort Statute for the harm that he will suffer if his son were to be killed by the U.S. government.<sup>157</sup> Finally, the complaint alleged that the U.S. policy of killing U.S. citizens on the basis of secret criteria violates the Fifth Amendment due process notice requirements.<sup>158</sup>

On December 7, 2010, U.S. District Court Judge John Bates dismissed the complaint, finding that Mr. Nassar Al-Aulaqi lacked standing to sue on behalf of his son.<sup>159</sup> Judge Bates based his findings on three grounds, each of which is considered separately below.

First, Judge Bates ruled that Mr. Nassar Al-Aulaqi did not have "next friend standing" because the judge found that there was no reason to believe that Anwar Al-Aulaqi would be unable to utilize the U.S. court system absent his father's intervention.<sup>160</sup> Specifically, Judge Bates wrote that "[t]here is nothing preventing [Anwar Al-Aulaqi] from peacefully presenting himself at the U.S. Embassy in Yemen and expressing a desire to vindicate his

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150. Complaint for Declaratory and Injunctive Relief at ¶¶ 1, 12, Al-Aulaqi v. Obama, 727 F. Supp. 2d 1 (D.D.C. 2010) (No. 10-1469).

151. *Id.* ¶¶ 10-12.

152. *See generally id.* (requesting injunctive and declaratory relief).

153. *Id.* ¶¶ 27-30.

154. *Id.* ¶ 27.

155. *Id.* (emphasis added).

156. *Id.* ¶ 28.

157. *Id.* ¶ 29.

158. *Id.* ¶ 30.

159. *Al-Aulaqi*, 727 F. Supp. 2d at 54.

160. *Id.* at 17-20.

constitutional rights in U.S. courts.”<sup>161</sup>

Judge Bates is certainly correct in stating that, if he so chose, Anwar Al-Aulaqi could elect to present himself at the nearest U.S. Embassy and go peacefully into its custody. However, as Professor Kevin Jon Heller of Melbourne Law School argues in his debate with West Point Professor John C. Dehn, if Anwar Al-Aulaqi decided to present himself to the U.S. authorities, in doing so Anwar Al-Aulaqi himself would be robbing the courts of jurisdiction to hear his claim for an injunction, for in turning himself in, the present action—which sought to prevent the U.S. government from unlawfully killing him—would likely be deemed moot.<sup>162</sup> As Professor Heller succinctly concludes: “Managing to avoid assassination is not the same as challenging the government’s right to assassinate in the first place.”<sup>163</sup>

Professor Heller also points out the other reason why Judge Bates’s proposed “solution” for Anwar Al-Aulaqi was in fact no real solution at all. Professor Heller explains that the proffered resolution of presenting one’s self to the U.S. authorities would not be feasible for those American citizens who do not know that they are being targeted as terrorists by their government.<sup>164</sup> Anwar Al-Aulaqi was in the unique position of being aware of the proverbial price on his head, but for at least three other American citizens who are on the High-Value Target Lists, there is no indication that these citizens have any knowledge of their inclusion on this list.<sup>165</sup>

Moreover, Professor Heller points out that even more shockingly, Judge Bates’s opinion does not require that the U.S. government inform its citizens when the citizens have been targeted for death before actually killing or attempting to kill them.<sup>166</sup> Professor Heller explains that these American citizens, who could be (and are likely) woefully ignorant of their inclusion on the High-Value Target Lists, by nature of their ignorance, cannot avoid being killed by turning themselves in or otherwise availing themselves of the U.S. authorities.<sup>167</sup> On the contrary, Professor Heller avows that Judge Bates’s opinion actually incentivizes the U.S. government to *not* inform American citizens that these citizens have been placed on the Kill List, because (currently) these citizens can apparently be killed with impunity.<sup>168</sup>

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161. *Id.* at 17.

162. John C. Dehn & Kevin Jon Heller, *Targeted Killing: The Case of Anwar Al-Aulaqi*, 159 U. PA. L. REV. 175, 185 (2011).

163. *Id.*

164. *Id.*

165. *Id.*

166. *Id.*

167. *Id.*

168. *Id.*

In addition to his finding that Mr. Nassar Al-Aulaqi lacked standing because other avenues were open to his son to vindicate his rights, Judge Bates also asserted in his opinion that even if Mr. Nassar Al-Aulaqi had standing, the court would still be unable to hear the case due to the political question doctrine.<sup>169</sup> Judge Bates averred:

Because decision-making in the realm of military and foreign affairs is textually committed to the political branches, and because courts are functionally ill-equipped to make the types of complex policy judgments that would be required to adjudicate the merits of plaintiff's claims, the Court finds that the political question doctrine bars judicial resolution of this case.<sup>170</sup>

This avowal by a district court judge, which remains unchallenged and is now arguably moot due to Anwar Al-Aulaqi's death, should have shocked the conscience of every American and put them all on notice that their current administration has reserved the right to assassinate its own citizens, and that their court system agreed that the executive branch properly holds this power. As the country's seat of justice, the court system is the only branch that is committed to evaluating the legality of actions, both of citizens and of the government. By ruling that presidential assassination is a political question and therefore not fit for review by the courts, Judge Bates effectively robbed every American citizen of the only avenue available in which to challenge his or her own attempted assassination by the U.S. government.

Mr. Nasser Al-Aulaqi's failed case is frightfully premonitory in looking to the future of due process rights in the United States as the country continues to wage its war on terrorism. As the very definition of "terrorism" continues to expand, so too does the reach of the executive branch that is now asserting the right to take the lives of American citizens, without trial, if the government believes the citizen poses a threat to the country. As explained above, such prospective threats are specifically provided for in the Constitution, by nature of the Treason Clause and letters of marque and reprisal, and assassination is specifically prohibited by the proscription against Bills of Attainder.

In order to prevent further assaults on the Constitution, and indeed on the lives and rights of American citizens, the solutions are twofold. First, the Obama administration must reconsider its actions and repudiate its policy on the assassination of American citizens. Like most political moves, this policy will only be reversed if it becomes a high-priority voting issue. Therefore, like-minded members of Congress should work to galvanize their constituents

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169. *Al-Aulaqi*, 727 F. Supp. 2d at 44-52.

170. *Id.* at 52.

and urge them to communicate their concerns to the White House in the hopes that the Obama administration will heed their complaints and repudiate this horrifying policy.

Second, the courts could also help protect constitutional rights against assassination by hearing additional lawsuits brought by other American citizens on the Kill List, and ruling that these lists are unconstitutional. The goal of these suits should be to convince the court to disagree with (or overturn in the case of an appeals court) Judge Bates's ruling that the question of whether the U.S. government can assassinate its citizens is a political question upon which the courts cannot decide. The court system is in the best position to counsel against the assassination policy and to rule that the President cannot claim this power on behalf of the administration and in supposed support of national security.

## VII. CONCLUSION

Anwar Al-Aulaqi presented a serious problem to the U.S. government. As a citizen, he was supposed to be entitled to the due process safeguards of the Constitution. But as a suspected terrorist, he needed to be detained and possibly eliminated at all costs. However, as his death and his father's failed case suggest, it is possible that the U.S. government is a potentially bigger problem for American citizens, any of whom could be at risk for placement on the High-Value Target Lists without notice or warning.

By conducting this constitutional analysis regarding assassination of American citizens, it is clear that real, feasible, and legal solutions exist to address valid dangers posed by terrorists. Rather than placing American citizens on a secretive "kill list," the government should have followed the law and charged Anwar Al-Aulaqi with treason and issued letters of marque and reprisal against him to bring him to justice. Guy Fawkes's dangerous remedy, that of assassinating those who threaten the American way of life, should not become the status quo in the land of the free and the home of the brave. Rather, the United States would be better advised to look to its Constitution for answers to these complex and life-and-death questions that will only continue to occur in the future.

Thomas Jefferson once wrote, "[t]he unsuccessful strugglers against tyranny have been the chief martyrs of treason laws in all countries."<sup>171</sup> Undoubtedly he was referring to himself and the rest of the founders who struggled against the tyranny of the British crown. When confronted with King George's parade of horrors,

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171. *Thomas Jefferson on Treason*, WORLD POL'Y INST., <http://www.worldpolicy.newschool.edu/wpi/globalrights/dp/treason.html> (last visited Aug. 25, 2012).

the founders did not hatch an assassination plot but rather issued the Declaration of Independence. Similarly, the current leaders of our country, rather than resorting to assassination, should abide by the laws of the land. In doing so, they will ensure that, even in the midst of war and terror, the country maintains its legacy of integrity and justice.