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Greenlighting American Citizens: Proceed with Caution

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Greenlighting American Citizens: Proceed with Caution

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INTRODUCTION

Name-calling is hurtful. But when the Obama Administration labeled Anwar al-Awlaki as a "global terrorist,"[1] it was a death sentence. According to various media reports, the Obama Administration has authorized the C.I.A. to use lethal force against al-Awlaki, a dual U.S.-Yemeni citizen.[2] A U.S. drone attack targeted but missed al-Awlaki in May 2011.[3] Approximately four months later, armed drones operated by the C.I.A. fired a barrage of Hellfire missiles at a car carrying him and at least one other person.[4] Al-Awlaki and another American citizen, Samir Khan, were killed.[5]

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1. *See* Al-Aulaqi v. Obama, 727 F. Supp. 2d 1, 13 (D.D.C. 2010) ("[T]he United States has neither confirmed nor denied whether . . . it has . . . authorized the use of lethal force against [al-Aulaqi] . . . ."); *id.* at 8 ("On July 16, 2010, the U.S. Treasury Department's Office of Foreign Assets Control . . . designated Anwar Al-Aulaqi as a Specially Designated Global Terrorist . . . .").

2. *See, e.g.*, Peter Finn, *Secret U.S. Memo Sanctioned Killing of* Aulaqi, WASH. POST, Sept. 30, 2011, *available at* http://www.washingtonpost.com/world/national-security/aulaqi-killing-reignites-debate-on-limits-of-executive-power/2011/09/30/gIQAx1bUAL_story.html; Vicki Divoll, Editorial, *Will We Kill One of Our Own?*, L. A. TIMES, Apr. 23, 2010, at A25; Aamer Madhani, *What Makes Cleric al-Awlaki so Dangerous; Terrorist Wears Mask of Scholar, Knows His Foe*, USA TODAY, Aug. 25, 2010, at A1, *available at* http://www.usatoday.com/printedition/news/20100825/1a_awlaki25_cv.art.htm; Charlie Savage, *Secrets Cited in White House Effort to Block Suit*, N.Y. TIMES, Sept. 25, 2010, at A7, *available at* http://www.nytimes.com/2010/09/25/world/25awlaki.html.

3. Erika Solomon & Mohammed Ghobari, *CIA Drone Kills U.S.-Born al Qaeda Cleric in Yemen*, REUTERS, Sept. 30, 2011, *available at* http://www.reuters.com/article/2011/09/30/us-yemen-awlaki idUSTRE78T0W320110930; Mark Mazzetti, Eric Schmitt, & Robert F. Worth, *Two-Year Manhunt Led to Killing of Awlaki in Yemen,* N.Y. TIMES, Sept. 30, 2011, *available at* http://www.nytimes.com/2011/10/01/world/middleeast/anwar-al-awlaki-is-killed-in-yemen.html.

4. *See* Solomon & Ghobari, *supra* note 3; Mazzetti, Schmitt, & Worth, *supra* note 3; Paul Harris & Jamie Doward, *How U.S. Tracked Anwar al-Awlaki to his Death in Yemen*, THE GUARDIAN, Oct. 1, 2001, *available at* http://www.guardian.co.uk/world/2011/oct/01/yemen-drone-killing-ibrahim-al-asiriri.

5. Mazzetti, Schmitt, & Worth, *supra* note 3; Mark Schone & Matthew Cole, *American Jihadi Samir Khan Killed With Awlaki*, ABC NEWS, Sept. 30, 2011, *available at* http://abcnews.go.com/Blotter/american-jihadi-samir-khan-killed-awlaki/story?id=14640013. Samir Khan, an America citizen of Pakistani origin, was an editor of al-Qaeda's English-language online magazine. Mazzetti, Schmitt, & Worth, *supra* note 3. U.S. officials said that the drone strike may also have killed Ibrahim Hassan al-Asiri, a Saudi bomb maker responsible for the weapon carried by Umar Farouk Abdulmutallab who attempted to detonate explosives on an American jetliner en route to Detroit. *See* Mazzetti, Schmitt, & Worth, *supra* note 3; *infra* note 22.

This Comment argues that the C.I.A.'s targeted killing of al-Awlaki is prohibited under 18 U.S.C. § 1119,[6] commonly known as the foreign-murder statute. Although the Obama Administration might seek to avoid this prohibition by relying on the laws of war, this Comment concludes that any such reliance is misplaced for two reasons: (1) the particular laws of war on which the Administration must rely are non-self-executing,[7] and (2) those laws have not been incorporated in domestic legislation.[8] Consequently, the Administration must rely on the Authorization for Use of Military Force (AUMF) to justify violating the foreign-murder statute.[9] The AUMF does not, however, provide the needed justification.[10]

Part I of this Comment explores the background of the President's authorization to target al-Awlaki and the federal and international law relevant to that decision.[11] It concludes with a discussion of *Al-Bihani v. Obama*, the judiciary's latest ruling regarding the relationship between international and domestic law.[12] Part II begins with a discussion of the status of treaties in the United States before and after *Medellin v. Texas*, a pivotal Supreme Court decision.[13] The domestic status of relevant provisions of the laws of war is then considered in light of *Medellin*.[14] Part II next discusses whether those laws of war have been incorporated through a federal statute, specifically, the Uniform Code of Military Justice (UCMJ), or the AUMF.[15] This section is followed by a discussion of whether the AUMF supersedes the foreign-murder statute.[16] The Comment concludes that the foreign-murder statute prohibits the targeted killing of al-Awlaki.

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6. 18 U.S.C. § 1119 (2006).
7. *See* discussion *infra* Part II.A.
8. *See* discussion *infra* Part II.B.
9. One argument that could be made is that the foreign-murder statute is unconstitutional, because it infringes upon the Commander-in-Chief's wartime powers. Whether the President can ignore certain domestic law during wartime is not addressed in this Comment. This issue has been discussed extensively elsewhere. *See generally* Trevor W. Morrison, *Constitutional Avoidance in the Executive Branch*, 106 COLUM. L. REV. 1189 (2006); Harold Hongju Koh, *Can the President be Torturer in Chief?*, 81 IND. L.J. 1145 (2005); Neil Kinkopf, *The Statutory Commander in Chief*, 81 IND. L.J. 1169 (2005).
10. *See* discussion *infra* Part II.C.
11. *See* discussion *infra* Part I.A–B.
12. *See* discussion *infra* Part I.C.
13. *See* discussion *infra* Part II.A.1–2.
14. *See* discussion *infra* Part II.A.3.
15. *See* discussion *infra* Part II.B.
16. *See* discussion *infra* Part II.C.

I. GREEN LIGHT: THE OBAMA ADMINISTRATION'S DECISION TO KILL AL-AWLAKI

A. Framing the Issue

This section begins with an account of al-Awlaki's alleged terrorist activities.[17] It then briefly discusses legal arguments that will likely be made with respect to the Obama Administration's decision to kill al-Awlaki.[18] The foreign-murder statute is critical to this debate because it likely prohibits the targeted killing at issue.[19] The Obama Administration, however, may be able to avoid this prohibition by demonstrating that the laws of war prevail over the statute.

1. Al-Awlaki—The Facts

The FBI has monitored al-Awlaki's activities for years.[20] However, the New Mexico native did not become a priority until authorities discovered a series of emails between him and Nidal Hassan, the Muslim U.S. Army officer accused of killing 13 people at Fort Hood in November 2009.[21] The Government has since alleged that al-Awlaki is connected with several terrorist plots, including the 2009 failed Christmas Day bombing in which Umar Farouk Abdulmutallab attempted to detonate explosives on an American jetliner en route to Detroit.[22] Al-Awlaki is also believed to play an active role in recruiting for al-Qaeda by uploading hundreds of inflammatory sermons to the Internet,[23] including a recently posted video encouraging the killing of

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17. *See* discussion *infra* Part I.A.1.
18. *See* discussion *infra* Part I.A.2.
19. *See* discussion *infra* Part I.A.2.
20. Madhani, *supra* note 2.
21. *Id.*
22. Al-Aulaqi v. Obama, 727 F. Supp. 2d 1, 8–9 (D.D.C. 2010); Gordon Lubold, *Anwar al-Awlaki: Is it Legal to Kill an American in War on Terror?*, THE CHRISTIAN SCIENCE MONITOR, Apr. 7, 2010, *available at* http://www.csmonitor.com/USA/Military/2010/0407/Anwar-al-Awlaki-Is-it-legal-to-kill-an-American-in-war-on-terror. American intelligence officials also believe that al-Awlaki may be connected to the recent attempt to conceal powerful bombs inside parcels destined for Chicago. However, officials caution that that it is too soon to draw any firm conclusions about al-Awlaki's involvement. Mark Mazzetti & Robert F. Worth, *Parcels Bound for the U.S. Carried Complex Bombs*, N.Y. TIMES, Oct. 31, 2010, at A1, *available at* http://www.nytimes.com/2010/10/31/world/31terror.html?n=Top%2fReference%2fTimes%20Topics%2fSubjects%2fT%2fTerrorism.
23. Madhani, *supra* note 2.

Americans.[24] The Obama Administration further alleges that al-Awlaki is "the leader of external operations" for "al-Qaeda in the Arabian Peninsula,"[25] a Yemeni terrorist group that is purportedly part of al-Qaeda "or . . . an associated force, or cobelligerent, of al-Qaeda."[26]

Al-Awlaki's father enlisted the help of two prominent civil rights organizations to stop the Obama Administration from targeting his son.[27] The American Civil Liberties Union (ACLU) and the Center for Constitutional Rights (CCR) recently appeared in federal court seeking to enjoin the Administration from targeting al-Awlaki until the lawsuit is heard.[28]

There was considerable debate within the Obama Administration as to how aggressively it should respond to the lawsuit.[29] Expounding legal justifications for killing a U.S. citizen carried significant political and legal risks.[30] Moreover, directly responding to the ACLU's and the CCR's claims would implicitly confirm that al-Awlaki had, in fact, been targeted.[31] Under these circumstances, the Obama Administration chose to file a motion to dismiss on grounds that did not address the merits of the case.[32] A

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24. *Yemin Muslim Cleric al-Awlaki in US Death Threat Video*, BBC NEWS (Nov. 8, 2010), http://www.bbc.co.uk/news/world-middle-east-11709999.

25. Mazzetti, Schmitt, & Worth, *supra* note 3.

26. Opposition to Plaintiff's Motion for Preliminary Injunction and Memorandum in Support of Defendant's Motion to Dismiss at 1, Al-Aulaqi v. Obama, 727 F. Supp. 2d 1 (D.D.C. 2010) (No.10-1469). *See also Al-Aulaqi*, 727 F. Supp. 2d at 8.

27. Charlie Savage, *U.S. Debates Response to Targeted Killing Lawsuit*, N.Y. TIMES, Sept. 16, 2010, at A10, *available at* http://www.nytimes.com/2010/09/16/world/16awlaki.html.

28. Scott Shane, *Right Groups Sue U.S. on Effort to Kill Cleric*, N.Y. TIMES, Aug. 30, 2010, at A6, *available at* http://www.nytimes.com/2010/08/31/us/31suit.html.

29. *See* Savage, *supra* note 27.

30. *Id.*

31. In its brief opposing the plaintiff's petition for a preliminary injunction, the Administration was loathe to admit that al-Awlaki is being targeted:

> Plaintiff also lacks Article III standing in this action because the relief he seeks is based *on unfounded speculation* that the Executive Branch is acting or planning to act in a manner inconsistent with the terms of the requested injunction. . . . [S]uch allegations are *entirely speculative and hypothetical* . . . .

Opposition to Plaintiff's Motion for Preliminary Injunction and Memorandum in Support of Defendant's Motion to Dismiss at 2–3, Al-Aulaqi v. Obama, 727 F. Supp. 2d 1 (D.D.C. 2010) (No. 10-1469) (emphasis added).

32. The Obama Administration made the following procedural arguments:

> Plaintiff's complaint, pursuant to Federal Rule of Civil Procedure 12(b)(1), [must be dismissed] on the grounds that Plaintiff lacks standing and that his claims require the Court to decide non-justiciable

federal judge recently agreed with the Government's justiciability arguments and granted the motion to dismiss, conceding that the "serious issues regarding the merits of the alleged authorization of the targeted killing of a U.S. citizen overseas must await another day or another (non-judicial) forum."[33]

2. The Doctrinal Dilemma Posed by Targeting al-Awlaki

Reports of the Obama Administration's targeted killing of al-Awlaki have sparked a firestorm of debate among human rights advocates, constitutional scholars, and politicians.[34] The most popular objection focuses on the Fifth Amendment's prohibition against the deprivation of life without due process: As a U.S. citizen, al-Awlaki is entitled to a judicial hearing and an opportunity to defend himself.[35] This constitutional guarantee prohibits the Administration's pursuit of an extrajudicial killing.[36] Conversely, it may be argued that the targeted killing is justified under the President's Commander-in-Chief powers, which may allow the President to contravene constitutional principles during wartime.[37] Still, others may justify the targeted killing of a U.S. citizen based on the twin doctrines of necessity and self-defense.[38]

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political questions. Alternatively, the Court should exercise its equitable discretion not to grant the relief sought. In addition, Plaintiff has no cause of action under the Alien Tort Statute.

Id. at first page (unnumbered).

33. *Al-Aulaqi*, 727 F. Supp. 2d at 6–9.

34. *See, e.g.*, Gleen Greenwald, *So Much Evidence, There's no Need to Show it*, SALON.COM (Oct. 2, 2011, 9:30 P.M.), http://politics.salon.com/2011/10/03/awlaki_7/singleton/; Suzanne Ito, *ACLU Lens: American Citizen Anwar Al-Aulaqi Killed Without Judicial Process*, ACLU.ORG (Sept. 30, 2011, 11:43 A.M.), http://www.aclu.org/blog/national-security/aclu-lens-american-citizen-anwar-al-aulaqi-killed-without-judicial-process; William Saletan, *Drones Are Death Warrants*, SLATE.COM (Oct. 3, 2011, 9:06 A.M.), http://www.slate.com/articles/news_and_politics/human_nature/2011/10/anwar_al_awlaki_and_drone_strikes_on_u_s_citizens_due_process_wo.html; Roger Simon, *Can Obama Legally Kill You?*, POLITICO.COM (Oct. 4, 2011, 3:45 A.M.), http://www.politico.com/news/stories/1011/65046.html; Dan Hirschhorn, *Obama Impeachment a Possibility, says Ron Paul*, POLITICO.COM (Oct. 3, 2011, 2:52 P.M.), http://www.politico.com/news/stories/1011/65035.html.

35. Glenn Greenwald, *On the Claimed "War Exception" to the Constitution*, SALON.COM (Feb. 4, 2010, 4:05 A.M.), http://www.salon.com/news/opinion/glenn_greenwald/2010/02/04/assassinations.

36. *Id.*

37. *See generally* Kinkopf, *supra* note 9. This argument is similar to the Bush Administration's position in the infamous Bybee Memo in which the Office of Legal Counsel argued that the torture statute—18 U.S.C.S. § 2340A—unconstitutionally infringes upon executive power. Kevin Jon Heller, *Let's Call*

Little scholarly attention has been given to the legality of the Obama Administration's actions under the foreign-murder statute, which prohibits a U.S. citizen from killing another U.S. citizen in a foreign jurisdiction.[39] Because the C.I.A. is a civilian governmental agency,[40] any C.I.A. operative who kills a U.S. citizen outside the United States is potentially guilty of foreign murder.[41] Indeed, high-ranking officials within the Administration, including the President, would share a certain measure of criminal responsibility, as well.[42] Therefore the issue is whether there are any legal grounds that would exempt the Administration's actions from the prohibition imposed by the foreign-murder statute.

One such exemption may be that the foreign-murder statute is inapplicable because the U.S. is currently involved in the "War on Terror."[43] The legality of actions taken in furtherance of the War on Terror must be judged under the laws of war, as opposed to domestic law.[44] The argument is simple: if al-Awlaki is a terrorist, then the laws of war might permit his assassination.[45]

The Obama Administration argues that the laws of war, coupled with the force authorized by Congress in the AUMF, provide legal justification for using lethal force against those whom the Administration designates as terrorists.[46] Legal Advisor

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Killing al-Awlaki What it is—Murder, OPINIO JURIS, (Apr. 8, 2010, 10:34 P.M), http://opiniojuris.org/2010/04/08/lets-call-killing-al-awlaki-what-it-is-murder/. Critics have attacked the memorandum for the poor quality of its legal arguments. *See* Morrison, *supra* note 9, at 1231.

38. *See generally* Kenneth Anderson, *Targeted Killing in U.S. Counterterrorism Strategy and Law* (Brookings Institution, Georgetown University Law Center & the Hoover Institution, Working Paper, 2009), *available at* http://ssrn.com/abstract=1415070.

39. 18 U.S.C. § 1119 (2006).

40. The National Security Act outlines the responsibilities of the Central Intelligence Agency (CIA). The CIA is under the umbrella of the National Security Council and reports to the President. *See* VICTOR MARCHETTI & JOHN D. MARKS, THE CIA AND THE CULT OF INTELLIGENCE 325–26 (1974); *see also* National Security Act of 1947, 80 Pub. L. No. 253, § 102, 61 Stat. 495, 497–99.

41. *See* Heller, *supra* note 37.

42. *Id.*; *see generally* 18 U.S.C. § 2 (2006) (aiding and abetting or otherwise inducing the commission of a federal crime is punishable); 18 U.S.C. § 371 (2006) (conspiracy to violate federal law is punishable).

43. *See* Heller, *supra* note 37.

44. *Id.*

45. *See id.*

46. *Cf.* Opposition to Plaintiff's Motion for Preliminary Injunction and Memorandum in Support of Defendant's Motion to Dismiss, *supra* note 26 at 4–5 ("In addition to the AUMF, there are other legal bases under U.S. and international law for the President to authorize the use of force against al-Qaeda and AQAP . . . ."); *see also* Shane, *supra* note 28 (noting that "Obama

to the U.S. Department of State Harold Koh made precisely such an argument:

> As I have explained, as a matter of international law, the United States is in an armed conflict with al-Qaeda, as well as the Taliban and associated forces . . . . [I]n this ongoing armed conflict, the United States has the authority under international law, and the responsibility to its citizens, to use force, including lethal force, to defend itself, including by targeting persons . . . . [I]ndividuals who are part of such an armed group are belligerents and, therefore, lawful targets under international law.[47]

This statement and others by the Obama Administration raise important issues about whether and to what extent the President may rely on international law to trump domestic law during wartime. In particular, the question of whether international law allows the President to ignore the foreign-murder statute has profound implications for the War on Terror.

B. Relevant Statutes & Treaties

1. The Foreign-murder Statute

Scholars have given little attention to the foreign-murder statute. The statute is implicated in a few cases, most notably in a Fifth Circuit decision in 2003.[48] The court summarized the "essential elements" of foreign murder: "[1] A person who, being a national of the United States, [2] kills or attempts to kill [3] a national of the United States [4] while such national is outside the United States but within the jurisdiction of another country shall be punished . . . ."[49]

2. Authorization for Use of Military Force (AUMF)

On September 11, 2001, al-Qaeda operatives hijacked commercial airliners and attacked prominent targets in the United

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administration officials have argued that Mr. Awlaki . . . has essentially joined the enemy in a time of war. The government does not need a court's permission to kill an enemy soldier . . . .").

47. Harold Hongju Koh, *Annual Meeting of the American Society of International Law: Washington, DC* (Mar. 25, 2010), http://www.state.gov/s/l/releases/remarks/139119.htm.

48. United States v. Wharton, 320 F.3d 526 (5th Cir. 2003).

49. *Id.* at 533.

States.[50] Approximately 3,000 people were killed.[51] One week later, Congress passed the AUMF, a joint resolution authorizing the President

> to use all necessary and appropriate force against those nations, organizations, or persons he determines planned, authorized, committed, or aided the terrorist attacks that occurred on September 11, 2001 . . . in order to prevent any future acts of international terrorism against the United States by such nations, organizations, or persons.[52]

The AUMF is the primary legal basis by which the Government has justified its military action in Afghanistan and other counter-terrorism operations.[53] It is therefore unsurprising that the AUMF has been central to a number of legal controversies over the exercise of executive power. One such controversy involves the President's claimed power to detain enemy combatants despite the fact that the AUMF does not expressly give him such authority.[54] The Supreme Court addressed this issue in *Hamdi v. Rumsfeld* and a plurality held that the AUMF provides an adequate legal basis for the President to detain enemy combatants.[55] The Court concluded that the statute confers powers—including detention—that are implicit to its fundamental purpose.[56]

3. International Law—The Geneva Conventions

The modern laws of war (sometimes called "the law of international armed conflict" or "international humanitarian law") have developed through a series of treaties, most notably the Hague Conventions of 1899 and the four Geneva Conventions of 1949.[57] These treaties govern the treatment of detainees and others subjected to enemy authority during an armed conflict.[58] The

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50. Hamdi v. Rumsfeld, 542 U.S. 507, 510 (2004).
51. *Id.*
52. Pub. L. No. 107-40, 115 Stat. 224 (2001).
53. David Mortlock, *Definite Detention: The Scope of the President's Authority to Detain Enemy Combatants*, 4 HARV. L. & POL'Y REV. 375, 377 (2010).
54. Pub. L. No. 107-40, 115 Stat. at 224.
55. *Hamdi*, 542 U.S. at 519.
56. *See id.*
57. Christopher Greenwood, *The Law of War (International Humanitarian Law)*, *in* INTERNATIONAL LAW 783, 784 (Malcolm D. Evans ed., 2d ed. 2006).
58. *See* Derek Jinks & David Sloss, *Is the President Bound by the Geneva Conventions?*, 90 CORNELL L. REV 97, 108–11 (2004).

United States ratified all four Geneva Conventions on August 2, 1955.[59]

In addressing who may take part in hostilities, the laws of war distinguish between lawful combatants and civilians.[60] The distinction is important for two reasons. First, combatants are legitimate targets, whereas civilians are not.[61] Second, combatants are afforded "combatant privilege"—combatants cannot be prosecuted for engaging in certain acts that would be unlawful for civilians (such as killing soldiers).[62]

Article 4 of the 1949 Geneva Convention III sets forth criteria distinguishing civilians from combatants. In general, to be a combatant, a person must be:

(a) commanded by a person responsible for his subordinates;
(b) [displaying] a fixed distinctive sign recognizable at a distance;
(c) carrying arms openly;
(d) conducting [his] operations in accordance with the laws and customs of war.[63]

In June 1977, two Additional Protocols to the 1949 Geneva Conventions were adopted.[64] Although the United States signed the Additional Protocols, the Senate has yet to ratify them.[65]

C. Recent Developments—Al-Bihani v. Obama

In January 2010, a three-judge panel for the D.C. Circuit Court issued its opinion in *al-Bihani v. Obama*—an opinion that could have profound implications on the extent to which international law affects the President's actions under the AUMF.[66] The facts of the case are fairly straightforward. Al-Bihani worked as a cook for the 55th Arab Brigade, a paramilitary group associated with the Taliban.[67] After a U.S.-led coalition invaded Afghanistan, the 55th retreated and eventually surrendered to the Northern Alliance.[68] The U.S. military sent al-Bihani to Guantánamo for detention and

59. ADAM ROBERTS & RICHARD GUELFF, DOCUMENTS ON THE LAWS OF WAR 361 (3d ed. 2000).
60. Greenwood, *supra* note 57, at 794.
61. *Id.*
62. *See id.*
63. *See* Geneva Convention Relative to the Treatment of Prisoners of War, art. 4, Aug. 12, 1949, 6 U.S.T. 3316, T.I.A.S. No. 3364; *see generally* INGRID DETTER, THE LAW OF WAR 136 (2000); ROBERTS & GUELFF, *supra* note 59, at 246.
64. DETTER, *supra* note 63, at 136.
65. Jinks & Sloss, *supra* note 58, at 111.
66. Al-Bihani v. Obama, 590 F.3d 866 (D.C. Cir. 2010).
67. *Id.* at 869.
68. *Id.*

interrogation.[69] Al-Bihani challenged his detention on multiple grounds.[70]

The D.C. Circuit Court ultimately affirmed the district court's denial of al-Bihani's petition for a writ of habeas corpus.[71] For the purposes of this Comment, the most important part of the opinion is the court's ruling on al-Bihani's contention that the laws of war prohibited his detention. Before discussing the substance of al-Bihani's international-law-based claims, the court rejected its central premise:

> [T]he war powers granted by the AUMF and other statutes are [not] limited by the international laws of war . . . . [W]hile the international laws of war are helpful to courts when identifying the general set of war powers to which the AUMF speaks, their lack of controlling legal force and firm definition render their use both inapposite and inadvisable when courts seek to determine the limits of the President's war powers.[72]

Judges Brown and Kavanaugh joined this part of the opinion in full, whereas Judge Williams wrote separately to express reservations.[73]

Al-Bihani petitioned for rehearing en banc.[74] The Government urged the court to leave its original ruling undisturbed. The Government argued that although the court found the laws of war inapplicable, the court nonetheless rejected the merits of al-Bihani's laws-of-war arguments.[75] Interestingly, however, the Government took a position wholly inconsistent with the majority's statement that the AUMF was unconstrained by international law: "The Government interprets its detention authority under the AUMF to be *informed* by the laws of war."[76] This interpretation, according to the Government, conformed with "longstanding Supreme Court precedent" that statutes should be construed "if possible" as consistent with international law, and

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69. *Id.*

70. *Id.* at 868 (Al-Bihani "claims his detention is unauthorized by statute and the procedures of his habeas proceeding were constitutionally infirm.").

71. *Id.* at 881.

72. *Id.* at 871 (internal citations omitted).

73. *See id.* at 885 (in his concurring opinion, Judge Williams questioned whether the majority's position that the AUMF is not limited by international law is consistent with the Supreme Court's decision in *Hamdi v. Rumsfeld*).

74. *See generally* Al-Bihani v. Obama, 619 F.3d 1 (D.C. 2010).

75. Response to Petition for Rehearing and Rehearing En Banc at 1, *Al-Bihani*, 619 F.3d 1 (No. 09-5051).

76. *Id.* at 7 (emphasis added).

with the Supreme Court's interpretation of the AUMF in *Hamdi v. Rumsfeld*.[77]

A full D.C. Circuit Court voted unanimously to deny al-Bihani's petition for rehearing.[78] Seven of the nine justices (none of whom were on the original three-judge panel) voted against en banc review "to determine the role of international law-of-war principles in interpreting the AUMF because, as the various opinions issued in this case indicate, *the panel's discussion of that question is not necessary to the disposition of the merits*."[79] Thus, the panel's discussion of the relationship between international law and the AUMF may have been undermined. Indeed, one commentator opined that "[t]he reality . . . is now that there is no controlling precedent in the Circuit on the role that international law plays in defining the President's powers of detention."[80]

II. YELLOW LIGHT: IS KILLING AL-AWLAKI PROHIBITED BY THE FOREIGN-MURDER STATUTE?

The *al-Bihani* decision demonstrates the lack of judicial consensus over whether a president's war powers under the AUMF are affected by the international laws of war. Resolution of this unsettled area of law has profound implications for the Government's conduct in the War on Terror, particularly with respect to U.S. citizens such as al-Awlaki.

If the Government is correct that the laws of war inform the President's authority under the AUMF, then it is not wholly illogical for the Obama Administration to invoke the laws of war to sanction the targeting of al-Awlaki.[81] If, however, the majority opinion in *al-Bihani* is a correct statement of law—if the laws of war do not limit the President's power under the AUMF—then invoking the laws of war seems problematic: for if those laws do not *constrain* the President's powers under the AUMF, then how can they provide *legal justification* for actions taken pursuant to the AUMF?

In addressing whether the laws of war affect the President's authority under the AUMF, this Comment extrapolates from the framework of Justice Kavanaugh's concurring opinion denying al-Bihani's petition for an en banc rehearing. Two fundamental

77. *Id.* at 7–8.
78. *Id.* at 1.
79. *Id.* (emphasis added).
80. Lyle Denniston, *Diminishing a Precedent*, SCOTUSBLOG (Aug. 31, 2010, 12:28 PM), http://www.scotusblog.com/2010/08/diminishing-a-precedent/.
81. In this scenario, the question then becomes whether the laws of war actually apply to al-Awlaki's case.

questions are addressed: (1) whether international law norms contained in treaties to which the U.S. is a party are automatically a part of U.S. domestic law, and (2) whether Congress has incorporated the relevant treaty norms in subsequent legislation.[82]

A. Are International Law Norms Automatically a Part of U.S. Domestic Law?

This section discusses the domestic status of treaties in the United States. The contemporary approach presumes that treaties are not self-executing absent evidence to the contrary.[83] The Supreme Court adopted this position in *Medellin v. Texas* and, in so, doing provided an authoritative framework for interpreting the effect of treaties in domestic law.[84] Under the treaty interpretation principles established in *Medellin*, the laws of war that the Obama Administration must invoke to justify violating the foreign-murder statute lack binding domestic force.[85]

*1. Pre-*Medellin *Treaty Status in U.S. Domestic Law*

The U.S. Constitution mentions "treaties" several times. One important reference is found in Article II, Section 2, which gives the President the power to negotiate treaties by and with the advice and consent of the Senate.[86] Perhaps the most significant reference is found in Article VI, Section 2 (the Supremacy Clause), which states that "[a]ll Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land."[87] The text of the Constitution thus suggests that all treaties negotiated by the President and ratified by the Senate are domestic law.

U.S. courts, however, have drawn a distinction between treaties that are self-executing and those that are non-self-executing.[88] The

82. *See Al-Bihani*, 619 F.3d at 9–10 (Kavanaugh, J., concurring).
83. *See* discussion *infra* Part II.A.1.
84. *See* discussion *infra* Part II.A.2.
85. *See* discussion *infra* Part II.A.3.
86. U.S. CONST. art II, § 2, cl. 2.
87. U.S. CONST. art VI, cl. 2.
88. *See, e.g.*, Medellin v. Texas, 552 U.S. 491, 504 (2008) ("This Court has long recognized the distinction between treaties that automatically have effect as domestic law, and those that—while they constitute international law commitments—do not by themselves function as binding federal law."); Igartua de la Rosa v. United States, 417 F.3d 145, 150 (1st Cir. 2005) ("[Treaties] may comprise international commitments, but they are not domestic law unless Congress has either enacted implementing statutes or the treaty itself conveys an intention that it be 'self-executing' and is ratified on these terms. The law to this

precise nature of this distinction, and indeed its very existence, has been a subject of intense debate.[89] Because this distinction is entrenched in U.S. law, any consideration of the domestic status of a treaty must address this issue.

The Supreme Court has defined self-executing treaties as "treaties that automatically have effect as domestic law" and non-self-executing treaties as treaties that "do not by themselves function as binding federal law."[90] The origin of the self-execution doctrine is often traced to Chief Justice Marshall's opinion in *Foster v. Neilson*, an 1829 Supreme Court case involving land rights under a treaty between Spain and the United States.[91] Courts frequently cite the following language in *Foster*: "[The U.S. Constitution] declares a treaty to be the law of the land. [A treaty] is, consequently, to be regarded in courts of justice as equivalent to an act of the legislature, *whenever it operates of itself* without the aid of any legislative provision."[92] As one commentator notes, "The *Foster* holding is easier to describe than to apply."[93] In particular, scholars and courts differ as to whether *Foster* merits a broad or narrow interpretation. A narrow interpretation of *Foster* supports a presumption in favor of treaties as self-executing:[94] A treaty should only be declared non-self-executing when there is affirmative evidence that the treaty was not intended to have domestic effect.[95]

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effect is longstanding."); Avero Belg. Ins. v. Am. Airlines, Inc., 423 F.3d 73, 78–79 (2d Cir. 2005) ("A self-executing treaty becomes 'the law of this land,' only after it has been (1) duly consented to by the Senate, and (2) ratified by the President.") (internal citations omitted); Flores v. S. Peru Copper Corp., 414 F.3d 233, 257 n.34 (2d Cir. 2003) ("Self-executing treaties are those that 'immediately create rights and duties of private individuals which are enforceable and [are] to be enforced by domestic tribunals.' Non-self-executing treaties 'require implementing action by the political branches of government or . . . are otherwise unsuitable for judicial application.'") (internal citations omitted).

89. *See generally* Carlos Manuel Vazquez, *The Four Doctrines of Self-executing Treaties*, 89 AM. J. INT'L L. 695 (1995); Yuji Iwasawa, *The Doctrine of Self-executing Treaties in the United States: A Critical Analysis*, 26 VA. INT'L L. J. 627 (1986); Alona E. Evans, *Some Aspects of the Problem of Self-executing Treaties*, 45 PROC. AM. SOC'Y INT'L L. 66 (1951).

90. *Medellin*, 552 U.S. at 504.

91. Aya Gruber, *Who's Afraid of Geneva Law*, 39 ARIZ. ST. L.J. 1017, 1042 (2007); Vazquez, *supra* note 89, at 700.

92. Foster v. Nielson, 27 U.S. 253, 314 (1829) (emphasis added).

93. Vazquez, *supra* note 89, at 703.

94. Curtis A. Bradley, *Agora:* Medellin*: Intent, Presumptions, and Non-self-executing Treaties*, 102 AM. J. INT'L L. 540, 545 (2008).

95. Gruber, *supra* note 91, at 1050.

Over the past 100 years, the Supreme Court has said very little about self-execution.[96] Lower courts, however, have recently developed a rather expansive view of the self-execution doctrine.[97] The "modern" self-execution doctrine requires evidence of intent to make treaties enforceable as domestic law.[98] In other words, a treaty is presumed non-self-executing absent any evidence that it was intended to be self-executing.[99] This development is significant because most nations do not address matters of domestic enforceability in the provisions of treaties.[100] A presumption in favor of or against self-execution will thus ultimately determine the judicial enforceability of the treaty in the vast majority of circumstances.[101] It appears that the Supreme Court in *Medellin v. Texas* endorsed the lower courts' presumption against self-execution and, in doing so, provided a framework for analyzing the domestic effect of treaties.

*2. Post-*Medellin *Treaty Status in U.S. Domestic Law*

In *Medellin v. Texas*, the Court addressed whether the International Court of Justice's (ICJ) Judgment in *Case Concerning Avena and Other Mexican Nationals* was binding on state and federal courts in the United States.[102] The petitioner argued that three treaties—the Optional Protocol of the Vienna Convention, Article 94 of the United Nations Charter, and the ICJ statute—obligated U.S. courts to treat the ICJ Judgment as binding law.[103] After examining the relevant treaties, the Court held that

96. *Id.* at 1044.
97. *See id.* at 1050.
98. *Id. See also* Igartua-de la Rosa v. United States, 417 F.3d 145, 150 (1st Cir. 2005) ("[treaties] are not domestic law unless Congress has either enacted implementing statutes or *the treaty itself conveys an intention that it be 'self-executing'* and is ratified on these terms.") (emphasis added); Sei Fujii v. State of Cal., 38 Cal. 2d 718, 722 (Cal. 1952) ("In order for a treaty provision to be operative without the aid of implementing legislation and to have the force and effect of a statute, *it must appear that the framers of the treaty intended to prescribe a rule that, standing alone, would be enforceable in the courts.*") (emphasis added). *Cf.* United States v. Nai Fook Li, 206 F.3d 56, 67 (1st Cir. 2000) ("The label 'self-executing' usually is applied to any treaty that *according to its terms takes effect upon ratification and requires no separate implementing statute.*") (emphasis added).
99. Vazquez, *supra* note 89, at 708.
100. *Id.* at 709.
101. *Id.*
102. Medellin v. United States, 552 U.S. 491, 504 (2008).
103. *Id.* at 507; *see also* Margaret E. McGuinness, *International Decisions:* Medellin v. Texas, 102 AM. J. INT'L L. 622, 624 (2008).

the ICJ judgment did not bind domestic courts.[104] The Court's analysis provides guidance for interpreting the domestic effect of treaties in the United States.

The Court's analysis began with a statement that "[t]he interpretation of a treaty, like the interpretation of a statute, begins with its text."[105] Although the Court focused primarily on the text of the relevant treaties, it did not adopt a purely textual approach.[106] Rather, the Court treated the self-execution issue as a matter of *intent*; the text being the primary indication of such intent.[107] The ultimate issue, the Court suggested, is whether the text of the treaty evinces an intent that its provisions be self-executing.[108]

One of the longstanding questions about the self-execution doctrine is whose intent matters.[109] Some commentators argue that the intent of all the ratifying nations should be considered, while others argue that only the intent of the President and Senate matter.[110] At first glance, it may appear that the Court adopted the former position.[111] However, careful scrutiny suggests that the decision is best read as endorsing the view that the intent of U.S. treaty-makers is most important. Curtis Bradley, a leading scholar in the area, offers persuasive arguments in support of this reading.[112] According to Bradley, many passages in the Court's opinion focus solely on the intent of the President and the Senate.[113] Second, in examining the ratification history of the U.N. Charter, the Court focuses on internal U.S. debates rather than on the collective negotiating history.[114] Third, the Court's test for

104. *Medellin*, 552 U.S. at 507.
105. *Id.*
106. Bradley, *supra* note 94, at 543.
107. *Id.*
108. *Id.*
109. *Id.*
110. *Id.*
111. *See id.* at 544.
112. *See id.* at 543–45.
113. *Id.* ("The Court stated that '[o]ur cases simply require courts to decide whether a treaty's terms reflect a determination *by the President who negotiated it and the Senate that confirmed it* that the treaty has domestic effect.' The Court also noted that 'we have held treaties to be self-executing when the textual provisions indicate that *the President and Senate* intended for the agreement to have domestic effect.' And, in summarizing its finding of non-self-execution, the Court explained that '[n]othing in the text, background, negotiating and drafting history, or practice among signatory nations suggests that the *President or Senate* intended the improbable result of giving the judgments of an international tribunal a higher status than that enjoyed by 'many of our most fundamental constitutional protections.'") (internal citations omitted).
114. *Id.* at 544.

whether a treaty is self-executing supports such a reading.[115] Finally, a U.S.-intent-based focus is persuasive because lower courts have consistently allowed the Senate to qualify its ratification of treaties with non-self-execution declarations.[116]

A more significant aspect of *Medellin* is its input in the ongoing debate over whether a treaty is presumptively self-executing or non-self-executing.[117] As Bradley notes, the Court certainly seems to have rejected a strong presumption in favor of self-execution.[118] He contends, however, that it would be a stretch to find that the Court has established a presumption against self-executing treaties.[119]

Bradley's contention is problematic for several reasons. First, some statements in the decision support a presumption against self-executing treaties.[120] Second, the Supreme Court's citation to the lower courts' decisions finding treaties presumptively non-self-executing suggests that the Court has implicitly endorsed the trend.[121] Third, lower courts cite *Medellin* as establishing that treaties, in the absence of affirmative evidence to the contrary, are

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115. The Court believed that its test for self-execution would not drastically affect U.S. treaty enforcement. However, because there is almost never an express collective intent by signatory nations that treaty provisions be self-executing, treaties would rarely be self-executing, and thus, the Court's test *would* drastically affect U.S. treaty enforcement. *Id.*

116. If self-execution were a matter of the parties' collective intent, then a non-self-execution declaration by the Senate would have to be interpreted as reflective of the sentiments of *all* ratifying parties, a dubious proposition. *Id.*

117. Some commentators contend that courts should apply a presumption in favor of treaties as self-executing. *Id.* at 545; *see, e.g.*, LOUIS HENKIN, U.S. FOREIGN AFFAIRS LAW AND THE UNITED STATES CONSTITUTION 201 (2d ed. 1996); Jordan J. Paust, *Self-executing Treaties*, 82 AM. J. INT'L L. 760, 768 (1988); Carlos Manuel Vazquez, *Agora:* Medellin*: Less Than Zero?*, 102 AM. J. INT'L L. 563, 572 (2008). Other commentators, most notably John Yoo, have argued that treaties are presumptively non-self-executing. Bradley, *supra* note 94, at 543; *see, e.g.*, John C. Yoo, *Rejoinder: Treaties and Public Lawmaking: A Textual and Structural Defense of Non-self-execution*, 99 COLUM. L. REV. 2218, 2254–57 (1999).

118. Bradley, *supra* note 94, at 546.

119. *Id.*

120. *See, e.g.*, Medellin v. Texas, 552 U.S. 491, 521 (2008) ("[O]ur cases simply require courts to decide whether a treaty's terms reflect a determination by the President who negotiated it and the Senate that confirmed it that the treaty has domestic effect."); *id.* at 519 ("[W]e have held treaties to be self-executing when the textual provisions indicate that the President and Senate intended for the agreement to have domestic effect."). *See also* Vazquez, *supra* note 117, at 570 (finding that "[t]here are several statements in [*Medellin*] suggesting that the majority believed treaties to be presumptively non-self-executing.").

121. *See, e.g.*, *Medellin*, 552 U.S. at 505 (quoting Igartua-De La Rosa v. United States, 417 F.3d 145 (1st Cir. 2005)).

non-self-executing.[122] Thus, it appears that a more accurate reading of *Medellin* establishes a presumption against self-executing treaties.

The *Medellin* decision raises yet another issue regarding treaties: If a treaty is non-self-executing, what effect, if any, does it have on domestic law?[123] The Court gives little guidance on this issue.[124] On one hand, the decision contains many statements equating non-self-execution with lack of domestic legal status.[125] On the other hand, the Court at times equates non-self-execution only with lack of judicial enforceability.[126] This distinction may be particularly important in a debate over whether the President is bound by the Constitution to comply with a non-self-executing treaty.[127] Ultimately, however, whether *non-self-executing* means lacking judicial enforceability or lacking the force of domestic law

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122. *See* Elsevier B.V. v. United Health Grp., Inc., 09 Civ. 2124 (WHP), 2010 U.S. Dist. LEXIS 3261, at *3–4 (S.D.N.Y. 2010) ("While treaties may comprise international commitment . . . they are not domestic law unless Congress has either enacted implementing statutes or the treaty itself conveys an intention that it be 'self-executing' and is ratified on these terms.") (quoting *Medellin*, 552 U.S. at 505); *see also* Al-Bihani v. Obama, 619 F.3d 1, 15 (D.C. Cir. 2010) ("A self-executing treaty is one that 'reflect[s] a determination by the President who negotiated and the Senate that confirmed it that the treaty has domestic effect.'") (quoting *Medellin*, 552 U.S. at 521) (Kavanaugh, J., concurring).

123. Bradley, *supra* note 94, at 547–48.

124. *Id.*

125. *Id.* at 548; *see also Medellin*, 552 U.S. at 505 (non-self-executing treaties "do not by themselves function as binding federal law"); *Id.* at n.2 ("What we mean by 'self-executing' is that the treaty has automatic domestic effect as federal law upon ratification.").

126. Bradley, *supra* note 94, at 548; *see also Medellin*, 552 U.S. at 505 ("[N]ot all international law obligations automatically constitute binding federal law *enforceable in United States courts*.") (emphasis added); *id.* at n.2 ("The question we confront here is whether the *Avena* judgment has automatic *domestic* legal effect such that the judgment of its own force *applies in state and federal courts*.") (emphasis added); *id.* at 513 ("The pertinent international agreements, therefore, do not provide for implementation of ICJ judgments through *direct enforcement in domestic courts*.") (emphasis added).

127. Bradley, *supra* note 94, at 548. One argument is that Article II of the Constitution requires the President to faithfully execute the laws of the United States. If a non-self-executing treaty means only that the treaty is not judicially enforceable, then the treaty is nonetheless a law of the United States, as dictated by the Supremacy Clause. Therefore, the President must enforce the treaty as the supreme law of the land, regardless of whether it is self-executing. *See* Mortlock, *supra* note 53, at 380. *See also* HENKIN, *supra* note 117, at 203–04 (explaining that in *Foster*, Marshall did not suggest that a non-self-executing treaty "[i]s not law for the President or for Congress. [Rather,] [it] is their obligation to see to it that [the treaty] is faithfully implemented; it is their obligation to do what is necessary to make it a rule for the courts.").

could be purely an academic issue.[128] For if a treaty is not enforceable in court, there is little to stop the legislature or executive from violating it.

In summary, *Medellin* sets forth an authoritative framework for interpreting the effect of a treaty on U.S. domestic law. The most important issue is whether the text of a treaty provides affirmative evidence of intent by U.S. treaty-makers that the treaty is to have domestic effect. In the absence of such evidence, a treaty is presumed non-self-executing in which case it has little, if any, domestic legal effect. The treaty interpretation principles articulated in *Medellin* are important in determining how to interpret the treaty provisions at issue in al-Awlaki's case.

3. The Medellin *Paradigm and the International Laws of War*

Because the Obama Administration has invoked the law regarding legal combatants as a justification for its targeted killing program, 1949 Geneva Convention III is implicated.[129] Using the *Medellin* analysis, it is necessary to examine whether the rules regarding legal combatants are self-executing.[130]

The first step is to examine the text. Common Article 1 states that "[t]he High Contracting Parties undertake to respect and to ensure respect for the present Conventions in all circumstances."[131] As Judge Kavanaugh argues in his concurring opinion in *al-Bihani*, the phrase "undertake to respect" is similar to the phrase "undertakes to comply," the operative language of Article 94 of the U.N. Charter.[132] The Court in *Medellin* found that such language in Article 94, as opposed to the use of words such as "shall" or "must," envisaged further action by the legislature in order to give effect to the ICJ judgment.[133] Under this analysis, it is likely that the language in Common Article 1 also contemplates future legislative action and is therefore non-self-executing.[134] Even if the foregoing analysis of Common Article 1 is flawed, the text does

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128. *Cf.* Carlos Manuel Vazquez, *Laughing at Treaties*, 99 COLUM L. REV. 2154, 2185 (1999) ("I am inclined to question the status as 'law' of a norm that can be disregarded with no legal consequences.").

129. *See supra* note 47.

130. Note that it is well established that some parts of a treaty may be self-executing while others may not. *See* Vazquez, *supra* note 128, at 2188.

131. ROBERTS & GUELFF, *supra* note 59, at 244.

132. Al-Bihani v. Obama, 619 F.3d 1, 20 (D.C. Cir. 2010) (Kavanaugh, J., concurring). Article 94 reads as follows: "Each Member of the United Nations undertakes to comply with the decision of the International Court of Justice in any case to which it is a party." U.N. Charter art. 94, para. 1.

133. *Al-Bihani*, 619 F.3d at 20 (Kavanaugh, J., concurring).

134. *Id.* at 19–20.

not provide affirmative evidence of an intent for self-execution as required by *Medellin*.

Article 4 of 1949 Geneva Convention III sets forth criteria that must be satisfied for a civilian to attain lawful combatant status.[135] The text does not suggest that the article was intended to be self-executing.[136] Again, operating under the *Medellin* presumption that treaties are non-self-executing, it is unlikely that Article 4 would be deemed self-executing.

Although *Medellin* emphasizes textual analysis, it also allows for the use of other sources, particularly ratification history, to ascertain the intent of U.S. treaty-makers.[137] There are no explicit declarations in the congressional record indicating that the Senate intended the Geneva Conventions to be self-executing.[138]

B. Circumventing Non-self-execution—Has Congress Incorporated the Laws of War?

Even though the relevant provisions of the Geneva Conventions are non-self-executing, they may become U.S. domestic law if they are incorporated by separate legislation.[139] As the Supreme Court notes: "the responsibility for transforming an international obligation arising from a non-self-executing treaty into domestic law falls to Congress."[140] It is undeniable that this responsibility belongs solely to Congress. Once a non-self-executing treaty is ratified, "[i]t can only become domestic law in the same way as any other law—through passage of legislation by both Houses of Congress, combined with either the President's signature or a congressional override of a Presidential veto."[141]

Thus, the issue is whether Congress has incorporated in separate legislation the particular laws of war on which the Obama

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135. *See* discussion *infra* Part I.A.3.

136. *See generally* Geneva Convention Relative to the Treatment of Prisoners of War, art. 4, Aug. 12, 1949, 6 U.S.T. 3316, T.I.A.S. No. 3364

137. Medellin v. Texas, 552 U.S. 491, 507 (2008) ("Because a treaty ratified by the United States is 'an agreement among sovereign powers,' *we have also considered as 'aids to its interpretation' the negotiation and drafting history of the treaty.*") (emphasis added).

138. Gruber, *supra* note 91, at 1054; *see also* David Sloss, *Availability of U.S. Court to Detainee at Guantánamo Bay Naval Base—Reach of Habeas Corpus—Executive Power in War on Terror,* 98 AM. J. INT'L L. 788, n.66 (2004).

139. *Cf.* Whitney v. Robertson, 124 U.S. 190, 194 (1888) ("When the stipulations [of a treaty] are not self-executing they can only be enforced pursuant to legislation to carry them into effect.").

140. *Medellin*, 552 U.S. at 525–26. *See also Whitney*, 124 U.S. at 194.

141. *Medellin*, 552 U.S. at 526.

Administration must rely to justify violating the foreign-murder statute. Neither the UCMJ nor the AUMF incorporates those laws.

1. Incorporation of the Laws of War in the UCMJ

One may argue that the laws of war have attained the status of U.S. domestic law because Congress has incorporated those laws in the UCMJ.[142] Proponents of this view will point to the Supreme Court's holding in *Hamdan v. Rumsfeld*.[143]

The plaintiff in *Hamdan* was captured during the 2001 military invasion of Afghanistan and was later transferred to Guantánamo Bay.[144] Over a year later, the President deemed him eligible for trial by military commission.[145] Hamdan argued that the military commission convened by the President lacked the authority to try him.[146] The Supreme Court granted certiorari not only to determine this issue but also whether Hamdan could seek protection under the Geneva Conventions.[147] The Court eventually invalidated Hamdan's tribunal on the basis that it violated both domestic law and the Geneva Conventions.[148]

The Court began its analysis by stating that the AUMF and the UCMJ sanctioned the use of military commissions.[149] Article 21 of the UCMJ reads as follows:

> 21. Jurisdiction of courts-martial not exclusive.
>
> The provisions of this code conferring jurisdiction upon courts-martial shall not be construed as depriving military commissions, provost courts, or other military tribunals of concurrent jurisdiction in respect of offenders or offenses that by statute or *by the law of war* may be tried by such

142. *See e.g.*, Anthony Clark Arend, *Who's Afraid of the Geneva Conventions? Treaty Interpretation in the Wake of* Hamdan v. Rumsfeld, 22 AM. U. INT'L L. REV. 709, 718 (2007).

143. *See, e.g.*, Oona A. Hathaway, Hamdan v. Rumsfeld*: Domestic Enforcement of International Law* in INTERNATIONAL LAW STORIES 28 (October 15, 2007) (arguing that the Court found that the Geneva Conventions were applicable to Hamdan's case "whether or not they are independently judicially enforceable because Congress [chose] to incorporate the international laws of war into the Uniform Code"); Arend, *supra* note 142, at 718.

144. Hamdan v. Rumsfeld, 548 U.S. 557, 566 (2006).

145. *Id.*

146. *Id.* at 567.

147. Gruber, *supra* note 91, at 1034.

148. *Id.*

149. *Hamdan*, 548 U.S. at 594.

> military commissions, provost courts, or other military tribunals.[150]

The Court construed the reference to the law of war in Article 21 as mandating compliance with procedural requirements of the law of war.[151] The commissions established by the President did not meet these requirements.[152]

There are a number of reasons to interpret the Court's holding as establishing that the laws of war apply *only* in the context of military tribunals. First, one can reason *pro subjecta materia* by examining the placement of Article 21 in the UCMJ. The Article is located in Part IV entitled "Courts-martial Jurisdiction," a section that describes the jurisdiction of different types of courts-martial.[153] Second, one can arrive at this conclusion by examining the text of Article 21, which asserts that the overlapping of jurisdiction between military commissions and courts-martial does not deprive the former of concurrent jurisdiction.[154] One way that these tribunals obtain jurisdiction is when the offender is accused of violating a law of war.[155] Thus the law-of-war reference controls only when assessing whether one of the enumerated tribunals has jurisdiction. Third, most, if not all, of the Court's references to the relationship between Article 21 and the laws of war occur in the context of a discussion about the circumstances in which military commissions are justified.[156]

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150. Uniform Code of Military Justice of 1950, Pub. L. No. 107-40, 64 Stat. 107, 115 (1950) (emphasis added).

151. Curtis A. Bradley, *Military Commissions Act of 2006: The Military Commissions Act, Habeas Corpus, and the Geneva Conventions*, 101 AM. J. INT'L L. 322, 326 (2007). *See also Hamdan*, 548 U.S. at 631–32.

152. *Hamdan*, 548 U.S. at 635.

153. Pub. L. No. 107-40, 64 Stat. 107, 115 (1950).

154. *Id. Cf.* Christopher C. Burris, *Time For Congressional Action: The Necessity of Delineating the Jurisdictional Responsibilities of Federal District Courts, Courts-Martial, and Military Commissions to Try Violations of the Laws of War*, 2005 FED. CTS. L. REV. 4, 18 (2005) ("[I]n Article 21 [of the] UCMJ, Congress specifically acknowledged that military commissions' jurisdiction can and will overlap with courts-martial.").

155. Pub. L. No. 107-40, 64 Stat. 107, 115 (1950).

156. *Hamdan*, 548 U.S. at 594–55 ("[T]he UCMJ . . . acknowledge[s] a general Presidential authority to convene military commissions in circumstances where justified under the 'Constitution and laws,' including the law of war."); *id.* at n.31 ("If nothing else, Article 21 of the UCMJ requires that the President comply with the law of war in his use of military commissions."); *id.* at 603 ("At a minimum, the Government must make a substantial showing that the crime for which it seeks to try a defendant by military commission is acknowledged to be an offense against the law of war."); *id.* at 613 ("The UCMJ conditions the President's use of military commissions on compliance . . . with the 'rules and precepts of the law of nations.'") (quoting *Ex parte* Quirin, 317 U.S. 1, 28 (1942)).

Shortly after the Supreme Court decided *Hamdan*, President Bush began consulting with Congress about possible legislation that would grant a broader authorization for use of military commissions.[157] In October 2006, Congress passed the Military Commissions Act (MCA).[158] In many ways, the MCA repudiated the *Hamdan* decision.[159] The MCA explicitly sanctions the use of military commissions and makes clear that the UCMJ does not apply to such commissions unless the MCA specifically allows it.[160] Whereas the Court in *Hamdan* found that the UCMJ imposed international law-based restrictions on military commissions, the MCA rendered the Geneva Conventions judicially unenforceable.[161] Furthermore, whereas the Court insisted on independently determining whether a government's acts were consistent with international law, the MCA gives the President exclusive authority to interpret the Geneva Conventions beyond grave breaches.[162] Thus, the MCA casts serious doubt over the extent to which international law applies in the context of military commissions.

In summary, the UCMJ cannot be read to incorporate the 1949 Geneva Conventions *in toto*. Instead, the UCMJ has incorporated the laws of war only to the extent that they are applicable in the context of military commissions. In fact, even this characterization of the applicability of the laws of war may be an overstatement in light of the MCA's apparent repudiation of the *Hamdan* decision.

2. Incorporation of the Laws of War in the AUMF

A more plausible argument is that the laws of war have been incorporated in the AUMF. Ultimately, however, this argument is unconvincing as well.

The starting point for discerning Congress's intent to incorporate the laws of war in the AUMF is the text of the statute.[163] The AUMF affords the President broad discretion with respect to methods of force, use of military resources, choice of

157. Hathaway, *supra* note 143, at 31.

158. Military Commissions Act of 2006, Pub. L. 109-366, 120 Stat. 2600 (2006); *see also* Hathaway, *supra* note 143, at 32.

159. Hathaway, *supra* note 143, at 32.

160. Bradley, *supra* note 151, at 327. *See also* Pub. L. No. 109-366, 120 Stat. 2600, 2602 (2006), § 948(b), (c).

161. *See* Hathaway, *supra* note 143, at 32; Al-Bihani v. Obama, 619 F.3d 1, 21–22 (D.C. Cir. 2010) (Kavanaugh, J., concurring); *see also* Pub. L. 109-366, 120 Stat. 2600 (2006), SEC.5.(a).

162. Hathaway, *supra* note 143, at 32; Gruber, *supra* note 91, at 1057; *see also* Pub. L. 109-366, 120 Stat. 2600, 2632 (2006), SEC.6(a)(3)(A).

163. *Cf.* Lamie v. United States, 540 U.S. 526, 534 (2004) ("The starting point in discerning congressional intent is the existing statutory text.").

targets, and timing.[164] The scope of authority is comparable to previous congressional authorizations of force.[165] Congress has enacted many statutes, including war-related statutes, which expressly incorporate international law norms.[166] Thus, it is hardly surprising that the Supreme Court has recognized that "[C]ongress knows how to accord domestic effect to international obligations when it desires such a result."[167] Crucially, the AUMF does not explicitly reference international law.[168] Viewed against this background, "the silence strongly suggests that Congress did not intend to impose . . . international-law constraints on the President's war-making authority."[169]

Some scholars, such as Derek Jinks and David Sloss, suggest that the phrase "necessary and appropriate" in the AUMF implicitly demonstrates congressional intent to impose international law-based limits on the President's authority.[170] Their first argument is that, because U.S. law criminalizes many violations of the Geneva Conventions, it would be difficult to read the AUMF as repealing these statutes "with a single, sweeping resolution."[171] But, even if this argument is tenable, the criminalization of certain violations of the laws of war surely does not imply that Congress intended to incorporate all remaining laws of war with the simple phrase "necessary and appropriate." A related contention by Jinks and Sloss is that, because Congress has separately incorporated multiple U.S. treaty obligations, "the best reading of the [AUMF] is that the law of war delimits the scope of 'appropriate' force."[172] However, it is questionable whether incorporation of certain treaty norms supports the notion that

164. *Al-Bihani*, 619 F.3d at 24 (Kavanaugh, J., concurring); *see generally* Pub. L. No. 107-40, 115 Stat. 224 (2001).

165. Curtis A. Bradley & Jack L. Goldsmith, *Congressional Authorization and the War on Terrorism*, 118 HARV. L. REV. 2047, 2071 (2005); *see also Al-Bihani*, 619 F.3d at 24–25 ("[T]he AUMF resembles several prior American war declarations and authorizations, such as those during World War II.") (Kavanaugh, J., concurring).

166. *Al-Bihani*, 619 F.3d at 25 (Kavanaugh, J., concurring). One example is the War Crimes Act, which criminalizes certain wartime conduct that violates common Article 3 of the Geneva Conventions. 18 U.S.C. § 2441(c)(3) (2006); *see generally Al-Bihani*, 619 F.3d at 13–16 (describing various statutes in which Congress codified international law norms) (Kavanaugh, J., concurring).

167. Medellin v. Texas, 552 U.S. 491, 522 (2008).

168. *See generally* Pub. L. No. 107-40, 115 Stat. 224 (2001).

169. *Al-Bihani*, 619 F.3d at 25 (Kavanaugh, J., concurring).

170. *See* Jinks & Sloss, *supra* note 58, at 130–32.

171. *Id.* at 130.

172. *Id.*

Congress intended to incorporate in the AUMF those laws of war that were not previously incorporated.

A more plausible argument is that the phrase "necessary and appropriate" emphasizes the breadth of Congress's authorization, rather than limits the President's power. A similar phrase in the Constitution provides reliable support for this proposition.[173] Specifically, in light of wide acceptance that the Necessary and Proper Clause enlarges rather than diminishes Congress' power,[174] it seems incongruous to conclude that Congress used similar language in the AUMF to constrain presidential authority.[175] Rather, the phrase "necessary and appropriate" supports the conclusion that Congress intended to create broad authorization as to the means and use of force.[176]

At the very least, the words "necessary and appropriate" are ambiguous. A look at the AUMF's legislative history helps to resolve this ambiguity. Specifically, there is scant evidence that Congress intended the laws of war to constrain presidential authority under the AUMF.[177] To the contrary, the House and Senate debates suggest that Congress intended to grant the President broad authority.[178] These debates reinforce the AUMF's

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173. Bradley & Goldsmith, *supra* note 165, at 2081.

174. *See id.*; McCulloch v. Maryland, 17 U.S. 316, 420 (1819) (finding that the Necessary and Proper Clause "purport[s] to enlarge, not to diminish the powers vested in the government. It purports to be an additional power, not a restriction on those already granted."); United States v. Comstock, 130 S. Ct. 1949, 1956 (2010) ("[T]he Necessary and Proper Clause grants Congress broad authority to enact federal legislation . . . . [it] makes clear that the Constitution's grants of specific federal legislative authority are accompanied by broad power to enact laws."); *see generally* U.S. CONST. art I, § 8, cl. 18.

175. *See* Bradley & Goldsmith, *supra* note 165, at 2081.

176. *See* Al-Bihani v. Obama, 619 F.3d 1, 25 (D.C. Cir. 2010) (Kavanaugh, J., concurring).

177. There are, however, a few isolated references to the laws of war in the House and Senate debates surrounding the AUMF: "There is one way and one way only, Mr. Speaker, to respond to acts of war, and that is to declare war. Give the President the tools, the absolute flexibility he needs under international law and The Hague Convention."147 CONG. REC. 17,126 (2001) (statement of Rep. Barr.); "The authorization we give the President today is not unlimited. Congress will monitor progress of our military actions and work with the President to ensure that our actions under this resolution are necessary and appropriate, consistent with our values, in conjunction with our friends and allies, and in accordance with international laws." *Id.* at 17,146 (statement of Rep. Clayton).

178. *Al-Bihani*, 619 F.3d at 26–27 (Kavanaugh, J., concurring); *see, e.g.*, 147 CONG. REC. 17,111 (2001) (statement of Rep. Hyde) ("[W]e as Members of Congress now have a duty to perform. We must grant the President the fullest authority to employ all of the resources of the United States . . . to make war on our enemy."); *id.* (statement of Rep. Lantos) ("The resolution before us

text and do not indicate that Congress intended to incorporate the laws of war.[179]

In its brief in opposition to al-Bihani's petition for an en banc rehearing, the Government made two separate arguments as to why the AUMF incorporates the laws of war.[180] One argument focused on the plurality's opinion in *Hamdi*, in which the Government cited the following sentence: "[W]e understand Congress' grant of authority for the use of 'necessary and appropriate force' [in the AUMF] to include the authority to detain for the duration of the relevant conflict, and our understanding is *based on longstanding law-of-war principles*."[181]

This argument loses force when examined in the full context of the Court's opinion. The highlighted sentence was a response to Hamdi's contention that the AUMF did not authorize indefinite or perpetual detention.[182] Although the plurality agreed with Hamdi that Congress did not intend to authorize indefinite detention, it found that Congress *did* intend to include the authority to detain for a limited duration.[183] One of the interpretive aids in coming to this conclusion was the law of war. In other words, "[a]cknowledging that the AUMF says nothing about detention, the Court reasoned that because of the universality of the 'law of war,' which includes the detention of fighters, Congress must have intended the President to have the power to detain U.S. citizen enemy combatants."[184] Thus the Court looked to the laws of war not because they had been incorporated by the AUMF, but rather as a tool of statutory interpretation.[185]

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empowers the President to bring to bear the full force of American power abroad in our struggle against the scourge of international terrorism."); *id.* at 17,114 (statement of Rep. Norton) ("The point is to give the President the authority to do what he has to do . . . . But the truth is that under our Constitution and existing law, when the country is attacked, the President's power is almost limitless."); *id.* at 17,130 (statement of Rep. Crowley) ("Tonight we consider another measure, this one to enable the President, our Commander in Chief, to use what ever means required to bring this crime to justice.").

179. *Al-Bihani*, 619 F.3d at 27 (Kavanaugh, J., concurring).

180. Response to Petition for Rehearing and Rehearing En Banc, *supra* note 26, at 7–8.

181. *Id.* at 8 (quoting Hamdi v. Rumsfeld, 542 U.S. 507, 520–21 (2004)).

182. Hamdi v. Rumsfeld, 542 U.S. 507, 521 (2004).

183. *Id.*

184. Gruber, *supra* note 91, at 1030.

185. *Cf. id.* ("This imputed knowledge of the 'law of war' was the only interpretive technique the Court used to determine congressional intent. In short, the Court held that because Congress authorized military action, it must have assumed that action could be as broad in scope as permitted by customs and laws of war, including the exercise of military detention.").

In support of its position that the AUMF incorporates the laws of war, the Government also argued that "generally, statutes should be construed, if possible, as consistent with international law."[186] This argument refers to what has become known as the *Charming Betsy* canon of statutory interpretation. This canon should not be used to interpret the AUMF for multiple reasons.

Advocates of the canon generally argue that it gains support from the early Supreme Court decision of *Murray v. Schooner Charming Betsy*,[187] where Chief Justice Marshall famously held that "[a]n act of Congress ought never be construed to violate the law of nations if any other possible construction remains."[188] Though the canon has become an important part of the U.S. interpretive tradition,[189] the validity of the canon is a matter of controversy.[190]

There are at least four different versions of the canon. The first tracks the language of *Charming Betsy* and holds that domestic statutes should never be interpreted to violate international law if any other possible construction remains.[191] The second version of the canon is expressed in the Restatement (Second): "If a domestic law of the United States may be interpreted either in a manner consistent with international law or in a manner that is in conflict with international law, a court in the United States will interpret it in a manner that is consistent with international law."[192] The Restatement (Third) has a different formulation: "Where fairly possible, a United States statute is to be construed so as not to conflict with international law or with an international agreement of the United States."[193] The fourth version dictates that the canon should not apply to governmental actors, because its purpose is to assure that only the political branches may decide to violate

186. Response to Petition for Rehearing and Rehearing En Banc, *supra* note 21, at 7.

187. John O. McGinnis & Ilya Somin, *Should International Law be a Part of Our Law?*, 59 STAN. L. REV. 1175, 1192 (2007).

188. 6 U.S. 64, 118 (1804).

189. *See* Curtis A. Bradley, *The* Charming Betsy *Canon and Separation of Powers: Rethinking the Interpretive Role of International Law*, 86 GEO. L.J. 479, 482 (1998) ("[T]his canon of construction has become an important component of the legal regime defining the U.S. relationship with international law.").

190. McGinnis & Somin, *supra* note 187, at 1193.

191. *Id.*

192. Bradley, *supra* note 189, at 490 (quoting the Second Restatement of the Foreign Relations Law of the United States).

193. *Id.* at 490–91 (quoting the Third Restatement of the Foreign Relations Law of the United States).

international law.[194] The Government perhaps advocates a fifth interpretation according to which statutes should "generally" be construed "if possible" as consistent with international law.[195]

These inconsistent phrasings demonstrate a lack of agreement as to how ambiguous a statute must be before the *Charming Betsy* canon may be used as an interpretative aid.[196] Thus, the canon's availability as a viable method of interpretation is intimately tied to which formulation the interpreter adopts.

When applied to the AUMF, the first version favors interpreting the statute as consistent with international law, because this interpretation is one of many "possible constructions." In contrast, interpreting the AUMF using the canon as formulated in the Restatement (Third) yields a different result. Construing domestic law as consistent with international law "where fairly possible" is a much narrower standard than doing so "if any other possible construction remains." Given that Congress intended to emphasize the breadth of its authorization in the AUMF through the phrase "necessary and appropriate," and that the ratification history of the AUMF tends to support this interpretation, it may not be "fairly possible" to construe the AUMF consistently with international law.

In sum, there are many interpretations of the *Charming Betsy* canon. Whether the canon may be properly invoked depends on which interpretation is employed. Such uncertainty suggests that courts should be cautious in relying on the canon to interpret domestic legislation.

A second argument that militates against using the *Charming Betsy* canon to interpret the AUMF focuses on the status of the international law being invoked vis-à-vis domestic law. In order to justify killing al-Awlaki, the Obama Administration needs to argue that the AUMF must be interpreted consistently with the laws of war, particularly Article 4 of the 1949 Geneva Convention III.[197] As demonstrated above, this Article is non-self-executing.[198] With respect to non-self-executing treaties, there is a strong presumption that the United States did not intend to incorporate such treaties into

194. McGinnis & Somin, *supra* note 187, at 1193.

195. *See* Response to Petition for Rehearing and Rehearing En Banc, *supra* note 21, at 7.

196. *Cf.* Bradley, *supra* note 189, at 491 ("If these different phrasings reflect a substantive difference, it may concern the degree of clarity required in a statute before a court will conclude that the statute violates international law.").

197. *See* discussion *supra* Part II.

198. *See* discussion *supra* Part II.A.

domestic law.[199] This presumption finds support in the Senate's ratification of the Geneva Conventions and in the fact that no separate statute has incorporated Article 4.[200] Therefore, "[i]t . . . makes sense to conclude that Congress would not want courts to smuggle [non-incorporated international law norms] into domestic U.S. law through the back door by using them as a basis to alter . . . interpretation of a federal statute."[201]

Another reason why the *Charming Betsy* canon should not be used to interpret the AUMF is that the canon is most often invoked as a justification for limiting extraterritorial application of domestic law in ways that may violate international law norms of prescriptive jurisdiction.[202] It is debatable whether the canon should apply in the very different context of a congressional authorization of force, especially considering that the authorization overlaps with the President's independent constitutional powers.[203]

C. The Showdown: Foreign-murder Statute v. AUMF

The C.I.A.'s use of lethal force against a U.S. citizen is likely barred by the foreign-murder statute.[204] Despite the Administration's assertions to the contrary, this extrajudicial killing cannot be justified by invoking the laws of war, because the relevant provisions are not domestic law.[205] Thus, the Administration must rely on the AUMF, which results in a showdown between the AUMF and the foreign-murder statute. Both the legislative history of the AUMF and the long-recognized ban against implicitly repealing legislation weigh against

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199. Al-Bihani v. Obama, 619 F.3d 1, 32 (D.C. Cir. 2010) (Kavanaugh, J., concurring).

200. *Id.* at 32–33. A common conception of the *Charming Betsy* canon is that "[i]t facilitates the implementation of Congressional intent." Bradley, *supra* note 184, at 495.

201. *Al-Bihani*, 619 F.3d at 33 (Kavanaugh, J., concurring).

202. Bradley & Goldsmith, *supra* note 165, at 2097–98.

203. *Id.*; *see also Al-Bihani*, 619 F.3d at 38 ("The *Charming Betsy* canon may not be invoked against the Executive *to limit the scope of a congressional authorization of war*—that is, to limit a war-authorizing statute to make it conform with non-self-executing treaties and customary international law. The Supreme Court has never held that the *Charming Betsy* canon applies to a statute that authorizes the President to use military force against a foreign enemy.") (Kavanaugh, J., concurring). *Cf.* Auth. of the Fed. Bureau of Investigation to Override Int'l Law in Extraterritorial Law Enforcement Activities, 13 Op. O.L.C. 163, 172 (1989) (arguing that the *Charming Betsy* cannon does not apply to "broad authorizing statutes 'carrying into execution' core executive powers") (quoting U.S. CONST. art I, § 8, cl. 18.).

204. *See* discussion *supra* Part I.A.2.

205. *See* discussion *supra* Part II.A–B.

interpreting the AUMF as authorizing a violation of the foreign-murder statute.

In *Morton v. Mancari*, the Supreme Court held that Congress did not intend to repeal the 1934 Indian Reorganization Act when it passed the Equal Employment Opportunity Act of 1972.[206] The Court's analysis is instructive in examining whether the AUMF repealed the foreign-murder statute.

In *Mancari*, the Court noted the "cardinal rule . . . that repeals by implication are not favored,"[207] and that "[i]n the absence of some affirmative showing of an intention to repeal, the only permissible justification for a repeal by implication is when the earlier and later statutes are irreconcilable.[208] And further, "[w]here there is no clear intention otherwise, a specific statute will not be controlled or nullified by a general one, regardless of the priority of enactment."[209]

Applying these principles to the statutes at issue begins with a search for an "affirmative showing" in the AUMF that Congress intended to repeal the foreign-murder statute.[210] There is certainly no such showing in the text of the AUMF.[211] The AUMF's ratification history is also devoid of any such "affirmative showing."[212] To the contrary, there is an abundance of evidence indicating that Congress intended for the President to act in accordance with the Constitution and existing federal statutes such as the foreign-murder statute.[213]

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206. 417 U.S. 535, 547 (1974).

207. *Id.* at 549 (quoting Posadas v. Nat'l City Bank, 296 U.S. 497, 503 (1936)).

208. *Id.* at 550; *see also* State of Ga. v. Pa. R. Co., 324 U.S. 439, 456–57 (1945) ("[R]epeals by implication are not favored. Only a clear repugnancy between the old law and the new results in the former giving way and then only *pro tanto* to the extent of the repugnancy.").

209. *Mancari*, 417 U.S. at 550–51; *see also* Bullova Watch Co. v. United States, 365 U.S. 753, 758 (1961) ("[I]t is familiar law that a specific statute controls over a general one 'without regard to priority of enactment.'"). This canon of statutory interpretation is known by the legal maxim *lex specialis derogat lex generalis*. *See In re* Lazarus, 478 F.3d 12, 18–19 (1st Cir. 2007).

210. *See supra* note 209.

211. *See generally* Pub. L. No. 107-40, 115 Stat. 224 (2001).

212. Legislative history is a permissible source to search for Congressional intent. *See Mancari*, 417 U.S. at 550 (holding that the legislative history of a statute at issue in that case did not affirmatively indicate that Congress intended to repeal the 1934 preference).

213. *See, e.g.*, 147 CONG. REC. 17,112 (2001) (statement of Rep. Paul) ("We are placing tremendous trust in our President to pursue our enemies as our commander-in-chief but Congress must remain vigilant as to not allow our civil liberties here at home to be eroded."); *id.* at 17,148 (statement of Rep. Jackson) ("I'm not willing to give President Bush carte blanche authority to fight

Even if it could be argued that the AUMF's legislative history is ambiguous, the AUMF would still not impliedly repeal the foreign-murder statute unless the two statutes were "irreconcilable."[214] That is hardly the case here. The two statutes can "readily coexist" by construing the AUMF so as not to authorize the President to give orders that violate the foreign-murder statute.[215]

Yet another argument against implicit repeal concerns the nature of the two statutes. The foreign-murder statute is a specific statute while the AUMF is more broad.[216] When there is no clear intention otherwise, a specific statute will not supersede a general statute.[217] As explained above, there is no indication that Congress intended for the AUMF to control or nullify the foreign-murder statute.[218] Therefore, because the foreign-murder statute is a specific statute and the AUMF is a broader statute, the latter should not be construed as repealing the former.

CONCLUSION

The central issue addressed in this Comment is whether the Obama Administration may invoke the laws of war, in particular the laws regarding legal combatants, to justify a violation of the foreign-murder statute. The preceding analysis suggests several reasons that militate against such a justification.

The Supreme Court in *Medellin* has established that treaties are presumptively non-self-executing. Because Article 4 of the 1949 Geneva Convention III is devoid of affirmative evidence that the U.S. intended it to have immediate effect as domestic law, Article

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terrorism. We need to agree to fight it together within traditional constitutional boundaries."); *id.* at 17,121 (statement of Rep. Bentsen) ("Passage of this bill tonight will signal to these ruthless forces that the United States is fully committed and has done so without compromising our Constitution, laws or ideals."); *id.* at 17,150 (statement of Rep. McGovern) ("I want those responsible for these heinous crimes to be hunted down and held accountable—in full compliance with our Constitution and our laws.").

214. *See supra* note 209.

215. In *Mancari*, The Court emphasized that the statutes at issue in the case were reconcilable because they could "readily coexist." 417 U.S. at 550.

216. The foreign-murder statute prohibits one U.S. citizen from killing another U.S. citizen in a foreign jurisdiction. 18 U.S.C. § 1119 (2006). The AUMF, by contrast, authorizes force that affords the President broad discretion as to use of military resources, choice of targets, methods of force, and timing. *See supra* note 167; Pub. L. No. 107-40, 115 Stat. 224 (2001).

217. *See supra* note 209.

218. *See supra* note 212.

4 acquires domestic-law status only through its incorporation in separate legislation. It is unlikely, however, that Article 4 has been incorporated either in the UCMJ or the AUMF. Thus, the President may not invoke the laws of war regarding legal combatants to justify his actions domestically, which creates an unavoidable tug-of-war between the AUMF and the foreign-murder statute. And because the AUMF cannot reasonably be interpreted to repeal the foreign-murder statute, it is difficult to avoid the conclusion that any C.I.A. operative that executed President Obama's order to kill al-Awlaki is guilty of murder under the foreign-murder statute. An equally unavoidable conclusion is that certain high-ranking executive officials, including the President, would share in that criminal culpability.

The analysis in this Comment has important ramifications for the United States and for the future of the War on Terror. Unless the presumption against self-executing treaties is reversed, it will become increasingly difficult for treaties to gain traction as judicially enforceable domestic law. Thus, in acting pursuant to the AUMF, it will be challenging for presidents to justify actions based on certain international law when those norms do not enjoy the same legal status as domestic laws. Furthermore, other countries may be reticent to enter into international agreements with the United States if treaties lack privileged status in our legal system. These developments may serve to isolate the United States at a time when the country needs all the assistance it can get in its fight against international terrorism.

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