U.S. Department of Justice

Office of Legal Counsel

Office of the Assistant Attorney General

Washington, D.C. 20530

July 16, 2010

MEMORANDUM FOR THE ATTORNEY GENERAL

Re: Applicability of Federal Criminal Laws and the Constitution to Contemplated Lethal Operations Against Shaykh Anwar al-Aulaqi

II.

We begin our legal analysis with a consideration of section 1119 of title 18, entitled "Foreign murder of United States nationals." Subsection 1119(b) provides that "[a] person who, being a national of the United States, kills or attempts to kill a national of the United States while such national is outside the United States but within the jurisdiction of another country shall be punished as provided under sections 1111, 1112, and 1113." 18 U.S.C. § 1119(b).[6] In light of the nature of the contemplated operations described above, and the fact that their target would be a "national of the United States" who is outside the United States, we must examine whether section 1119(b) would prohibit those operations. We first explain, in this part, the scope of section 1119 and why it must be construed to incorporate the public authority justification, which can render lethal action carried out by a governmental official lawful in some circumstances. We next explain in part III-A why that public authority justification would apply to the contemplated DoD operation. Finally, we explain in part III-B why that justification would apply to the contemplated CIA operation. As to each agency, we focus on the particular circumstances in which it would carry out the operation.

A.

Although section 1119(b) refers only to the "punish[ments]" provided under sections 1111, 1112, and 1113, courts have construed section 1119(b) to incorporate the substantive elements of those cross-referenced provisions of title 18. *See, e.g.*, *United States v. Wharton*, 320 F.3d 526, 533 (5th Cir. 2003); *United States v. White*, 51 F. Supp. 2d 1008, 1013-14 (E.D. Ca. 1997). Section 1111 of title 18 sets forth criminal penalties for "murder," and provides that "[m]urder is the unlawful killing of a human being with malice aforethought." *Id.* § 1111(a). Section 1112 similarly provides criminal sanctions for "manslaughter," and states that "[m]anslaughter is the unlawful killing of a human being without malice." *Id.* § 1112. Section 1113 provides criminal penalties for "attempts to commit murder or manslaughter." *Id.* § 1113. It is therefore clear that section 1119(b) bars only "unlawful killings."[7]

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[6] *See also* 18 U.S.C. § 1119(a) (providing that "national of the United States" has the meaning stated in section 101(a)(22) of the Immigration and Nationality Act, 8 U.S.C. § 1101(a)(22)).

[7] Section 1119 itself also expressly imposes various procedural limitations on prosecution. Subsection 1119(c)(1) requires that any prosecution be authorized in writing by the Attorney General, the Deputy Attorney General, or an Assistant Attorney General, and precludes the approval of such an action "if prosecution has been previously undertaken by a foreign country for the same conduct." In addition, subsection 1119(c)(2) provides that

This limitation on section 1119(b)'s scope is significant, as the legislative history to the underlying offenses that the section incorporates makes clear. The provisions section 1119(b) incorporates derive from sections 273 and 274 of the Act of March 4, 1909, ch. 321, 35 Stat. 1088, 1143. The 1909 Act codified and amended the penal laws of the United States. Section 273 of the enactment defined murder as "the unlawful killing of a human being with malice aforethought," and section 274 defined manslaughter as "the unlawful killing of a human being without malice." 35 Stat. 1143.[8] In 1948, Congress codified the federal murder and manslaughter provisions at sections 1111 and 1112 of title 18 and retained the definitions of murder and manslaughter in nearly identical form, *see* Act of June 25, 1948, ch. 645, 62 Stat. 683, 756, including the references to "unlawful killing" that remain in the statutes today—references that track similar formulations in some state murder statutes.[9]

"[n]o prosecution shall be approved under this section unless the Attorney General, in consultation with the Secretary of State, determines that the conduct took place in a country in which the person is no longer present, and the country lacks the ability to lawfully secure the person's return"—a determination that "is not subject to judicial review," *id.*

[8] A 1908 joint congressional committee report on the Act explained that "[u]nder existing law [i.e., prior to the 1909 Act], there [had been] no statutory definition of the crimes of murder or manslaughter." Report by the Special Joint Comm. on the Revision of the Laws, Revision and Codification of the Laws, Etc., H.R. Rep. No. 2, 60th Cong. 1st Sess., at 12 (Jan. 6, 1908) ("Joint Committee Report"). We note, however, that the 1878 edition of the Revised Statutes did contain a definition for manslaughter (but not murder): "Every person who, within any of the places or upon any of the waters [within the exclusive jurisdiction of the United States] unlawfully and willfully, but without malice, strikes, stabs, wounds, or shoots at, otherwise injures another, of which striking, stabbing, wounding, shooting, or other injury such other person dies, either on land or sea, within or without the United States, is guilty of the crime of manslaughter." Revised Statutes § 5341 (1878 ed.) (quoted in *United States v. Alexander*, 471 F.2d 923, 944-45 n.54 (D.C. Cir. 1972)). With respect to murder, the 1908 report noted that the legislation "enlarges the common-law definition, and is similar in terms to the statutes defining murder in a large majority of the States." Joint Committee Report at 24; *see also Revision of the Penal Laws: Hearings on S. 2982 Before the Senate as a Whole*, 60th Cong., 1st Sess. 1184, 1185 (1908) (statement of Senator Heyburn) (same). With respect to manslaughter, the report stated that "[w]hat is said with respect to [the murder provision] is true as to this section, manslaughter being defined and classified in language similar to that to be found in the statutes of a large majority of the States." Joint Committee Report at 24.

[9] *See, e.g.*, Cal. Penal Code § 187(a) (West 2009) ("Murder is the unlawful killing of a human being, or a fetus, with malice aforethought."); Fla. Stat. § 782.04(1)(a) (West 2009) (including "unlawful killing of a human being" as an element of murder); Idaho Code Ann. § 18-4001 (West 2009) ("Murder is the unlawful killing of a human being"); Nev. Rev. Stat. Ann. § 200.010 (West 2008) (including "unlawful killing of a human being" as an element of murder); R. I. Gen. Laws § 11-23-1 (West 2008) ("The unlawful killing of a human being with malice aforethought is murder."); Tenn. Code Ann. § 39-13-201 (West 2009) ("Criminal homicide is the unlawful killing of another person"). Such statutes, in turn, reflect the view often expressed in the common law of murder that the crime requires an "unlawful" killing. *See, e.g.*, Edward Coke, *The Third Part of the Institutes of Laws of England* 47 (London, W. Clarke & Sons 1809) ("Murder is when a man of sound memory, and of the age of discretion, unlawfully killeth within any county of the realm any reasonable creature *in rerum natura* under the king's peace, with malice fore-thought, either expressed by the party, or implied by law, so as the party wounded, or hurt, &c. die of the wound, or hurt, &c. within a year and a day after the same."); 4 William Blackstone, *Commentaries on the Laws of England* 195 (Oxford 1769) (same); *see also A Digest of Opinions of the Judge Advocates General of the Army* 1074 n.3 (1912) ("Murder, at common law, is the unlawful killing by a person of sound memory and discretion, of any reasonable creature in being and under the peace of the State, which malice aforethought either express or implied.") (internal quotation marks omitted).

As this legislative history indicates, guidance as to the meaning of what constitutes an "unlawful killing" in sections 1111 and 1112—and thus for purposes of section 1119(b)—can be found in the historical understandings of murder and manslaughter. That history shows that states have long recognized justifications and excuses to statutes criminalizing "unlawful" killings.[10] One state court, for example, in construing that state's murder statute explained that "the word 'unlawful' is a term of art" that "connotes a homicide with the absence of factors of excuse or justification," *People v. Frye*, 10 Cal. Rptr. 2d 217, 221 (Cal. App. 1992). That court further explained that the factors of excuse or justification in question include those that have traditionally been recognized, *id.* at 221 n.2. Other authorities support the same conclusion. *See, e.g.*, *Mullaney v. Wilbur*, 421 U.S. 684, 685 (1975) (requirement of "unlawful" killing in Maine murder statute meant that killing was "neither justifiable nor excusable"); *cf. also* Rollin M. Perkins & Ronald N. Boyce, *Criminal Law* 56 (3d ed. 1982) ("Innocent homicide is of two kinds, (1) justifiable and (2) excusable.").[11] Accordingly, section 1119 does not proscribe killings covered by a justification traditionally recognized, such as under the common law or state and federal murder statutes. *See White*, 51 F. Supp. 2d at 1013 ("Congress did not intend [section 1119] to criminalize justifiable or excusable killings.").

B.

Here, we focus on the potential application of one such recognized justification—the justification of "public authority"—to the contemplated DoD and CIA operations. Before examining whether, on these facts, the public authority justification would apply to those operations, we first explain why section 1119(b) incorporates that particular justification.

The public authority justification, generally understood, is well-accepted, and it is clear it may be available even in cases where the particular criminal statute at issue does not expressly

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[10] The same is true with respect to other statutes, including federal laws, that modify a prohibited act other than murder or manslaughter with the term "unlawfully." *See, e.g.*, *Territory v. Gonzales*, 89 P. 250, 252 (N.M. Terr. 1907) (construing the term "unlawful" in statute criminalizing assault with a deadly weapon as "clearly equivalent" to "without excuse or justification"). For example, 18 U.S.C. § 2339C makes it unlawful, *inter alia*, to "unlawfully and willfully provide[] or collect[] funds" with the intention that they be used (or knowledge they are to be used) to carry out an act that is an offense within certain specified treaties, or to engage in certain other terrorist acts. The legislative history of section 2339C makes clear that "[t]he term 'unlawfully' is intended to embody common law defenses." H.R. Rep. No. 107-307, at 12 (2001). Similarly, the Uniform Code of Military Justice makes it unlawful for members of the armed forces to, "without justification or excuse, unlawfully kill[] a human being" under certain specified circumstances. 10 U.S.C. § 918. Notwithstanding that the statute already expressly requires lack of justification or excuse, it is the longstanding view of the armed forces that "[k]illing a human being is *unlawful*" for purposes of this provision "when done without justification or excuse." Manual for Courts-Martial United States (2008 ed.), at IV-63, art. 118, comment (c)(1) (emphasis added).

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refer to a public authority justification.[12] Prosecutions where such a "public authority" justification is invoked are understandably rare, *see* American Law Institute, Model Penal Code and Commentaries § 3.03 Comment 1, at 24 (1985); *cf. VISA Fraud Investigation*, 8 Op. O.L.C. 284, 285 n.2, 286 (1984), and thus there is little case law in which courts have analyzed the scope of the justification with respect to the conduct of government officials.[13] Nonetheless, discussions in the leading treatises and in the Model Penal Code demonstrate its legitimacy. *See* 2 Wayne R. LaFave, *Substantive Criminal Law* § 10.2(b), at 135 (2d ed. 2003); Perkins & Boyce, *Criminal Law* at 1093 ("Deeds which otherwise would be criminal, such as taking or destroying property, taking hold of a person by force and against his will, placing him in confinement, or even taking his life, are not crimes if done with proper public authority."); *see also* Model Penal Code § 3.03(1)(a), (d), (e), at 22-23 (proposing codification of justification where conduct is "required or authorized by," inter alia, "the law defining the duties or functions of a public officer . . ."; "the law governing the armed services or the lawful conduct of war"; or "any other provision of law imposing a public duty"); National Comm'n on Reform of Federal Criminal Laws, A Proposed New Federal Criminal Code § 602(1) ("Conduct engaged in by a public servant in the course of his official duties is justified when it is required or authorized by law."). And this Office has invoked analogous rationales in several instances in which it has analyzed whether Congress intended a particular criminal statute to prohibit specific conduct that otherwise falls within a government agency's authorities.[14]

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[12] Where a federal criminal statute incorporates the public authority justification, and the government conduct at issue is within the scope of that justification, there is no need to examine whether the criminal prohibition has been repealed, impliedly or otherwise, by some other statute that might potentially authorize the governmental conduct, including by the authorizing statute that might supply the predicate for the assertion of the public authority justification itself. Rather, in such cases, the criminal prohibition simply does not apply to the particular governmental conduct at issue in the first instance because Congress intended that prohibition to be qualified by the public authority justification that it incorporates. Conversely, where another statute expressly authorizes the government to engage in the *specific* conduct in question, then there would be no need to invoke the more general public authority justification doctrine, because in such a case the legislature itself has, in effect, carved out a specific exception permitting the executive to do what the legislature has otherwise generally forbidden. We do not address such a circumstance in this opinion.

[13] The question of a "public authority" justification is much more frequently litigated in cases where a private party charged with a crime interposes the defense that he relied upon authority that a public official allegedly conferred upon him to engage in the challenged conduct. *See generally* United States Attorneys' Manual tit. 9, Criminal Resource Manual § 2055 (describing and discussing three different such defenses of "governmental authority"); National Comm'n on Reform of Federal Criminal Laws, A Proposed New Federal Criminal Code § 602(2); Model Penal Code § 3.03(3)(b); *see also United States v. Fulcher*, 250 F.3d 244, 253 (4th Cir. 2001); *United States v. Rosenthal*, 793 F.2d 1214, 1235-36 (11th Cir. 1986); *United States v. Duggan*, 743 F.2d 59, 83-84 (2d Cir. 1984); Fed. R. Crim. P. 12.3 (requiring defendant to notify government if he intends to invoke such a public authority defense). We do not address such cases in this memorandum, in which our discussion of the "public authority" justification is limited to the question of whether a particular criminal law applies to specific conduct undertaken by *government agencies* pursuant to their authorities.

[14] *See, e.g.*, Memorandum for

The public authority justification does not excuse all conduct of public officials from all criminal prohibitions. The legislature may design some criminal prohibitions to place bounds on the kinds of governmental conduct that can be authorized by the Executive. Or, the legislature may enact a criminal prohibition in order to delimit the scope of the conduct that the legislature has otherwise authorized the Executive to undertake pursuant to another statute.[15] But the recognition that a federal criminal statute may incorporate the public authority justification reflects the fact that it would not make sense to attribute to Congress the intent with respect to each of its criminal statutes to prohibit all covered activities undertaken by public officials in the legitimate exercise of their otherwise lawful authorities, even if Congress has clearly intended to make those same actions a crime when committed by persons who are not acting pursuant to such public authority. In some instances, therefore, the better view of a criminal prohibition may well be that Congress meant to distinguish those persons who are acting pursuant to public authority, at least in some circumstances, from those who are not, even if the statute by terms does not make that distinction express. *Cf. Nardone v. United States*, 302 U.S. 379, 384 (1937) (federal criminal statutes should be construed to exclude authorized conduct of public officers where such a reading "would work obvious absurdity as, for example, the application of a speed law to a policeman pursuing a criminal or the driver of a fire engine responding to an alarm").[16]

Here, we consider a federal murder statute, but there is no general bar to applying the public authority justification to such a criminal prohibition. For example, with respect to prohibitions on the unlawful use of deadly force, the Model Penal Code recommended that legislatures should make the public authority (or "public duty") justification available, though only where the use of such force is covered by a more particular justification (such as defense of others or the use of deadly force by law enforcement), where the use of such force "is otherwise expressly authorized by law," or where such force "occurs in the lawful conduct of war." Model Penal Code § 3.03(2)(b), at 22; *see also id.* Comment 3, at 26. Some states proceeded to adopt the Model Penal Code recommendation.[17] Other states, although not adopting that precise

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see also Visa Fraud Investigation, 8 Op. O.L.C. at 287-88 (concluding that civil statute prohibiting issuance of visa to an alien known to be ineligible did not prohibit State Department from issuing such a visa where "necessary" to facilitate important Immigration and Naturalization Service undercover operation carried out in a "reasonable" fashion).

[15] *See, e.g., Nardone v. United States*, 302 U.S. 379, 384 (1937) (government wiretapping was proscribed by federal statute);

[16] In accord with our prior precedents, each potentially applicable statute must be carefully and separately examined to discern Congress's intent in this respect—such as whether it imposes a less qualified limitation than section 1119 imposes. *See generally, e.g., United States Assistance to Countries that Shoot Down Civil Aircraft Involved in Drug Trafficking*, 18 Op. O.L.C. 148 (1994); *Application of Neutrality Act to Official Government Activities*, 8 Op. O.L.C. 58 (1984).

[17] *See, e.g.*, Neb. Rev. Stat. § 28-1408(2)(b); Pa. C.S.A. § 504(b)(2); Tex. Penal Code tit. 2, § 9.21(c).

formulation, have enacted specific statutes dealing with the question of when public officials are justified in using deadly force, which often prescribe that an officer acting in the performance of his official duties must reasonably have believed that such force was "necessary."[18] Other states have more broadly provided that the public authority defense is available where the government officer engages in a "reasonable exercise" of his official functions.[19] There is, however, no federal statute that is analogous, and neither section 1119 nor any of the incorporated title 18 provisions setting forth the substantive elements of the section 1119(b) offense, provide any express guidance as to the existence or scope of this justification.

Against this background, we believe the touchstone for the analysis of whether section 1119 incorporates not only justifications generally, but also the public authority justification in particular, is the legislative intent underlying this criminal statute. We conclude that the statute should be read to exclude from its prohibitory scope killings that are encompassed by traditional justifications, which include the public authority justification. There are no indications that Congress had a contrary intention. Nothing in the text or legislative history of sections 1111-1113 of title 18 suggests that Congress intended to exclude the established public authority justification from those that Congress otherwise must be understood to have imported through the use of the modifier "unlawful" in those statutes (which, as we explain above, establish the substantive scope of section 1119(b)).[20] Nor is there anything in the text or legislative history of section 1119 itself to suggest that Congress intended to abrogate or otherwise affect the availability under that statute of this traditional justification for killings. On the contrary, the relevant legislative materials indicate that in enacting section 1119 Congress was merely closing a gap in a field dealing with entirely different kinds of conduct than that at issue here.

The origin of section 1119 was a bill entitled the "Murder of United States Nationals Act of 1991," which Senator Thurmond introduced during the 102d Congress in response to the murder of an American in South Korea who had been teaching at a private school there. *See* 137 Cong. Rec. 8675-77 (1991) (statement of Sen. Thurmond). Shortly after the murder, another American teacher at the school accused a former colleague (who was also a U.S. citizen) of having committed the murder, and also confessed to helping the former colleague cover up the crime. The teacher who confessed was convicted in a South Korean court of destroying evidence and aiding the escape of a criminal suspect, but the individual she accused of murder had returned to the United States before the confession. *Id.* at 8675 The United States did not have

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[18] *See, e.g.*, Ariz. Rev. Stat. § 13-410.C; Maine Rev. Stat. Ann. tit 17, § 102.2.

[19] *See, e.g.*, Ala. Stat. § 13A-3-22; N.Y. Penal Law § 35.05(1); LaFave, *Substantive Criminal Law* § 10.2(b), at 135 n.15; *see also* Robinson, *Criminal Law Defenses* § 149(a), at 215 (proposing that the defense should be available only if the actor engages in the authorized conduct "when and to the extent necessary to protect or further the interest protected or furthered by the grant of authority" and where it "is reasonable in relation to the gravity of the harms or evils threatened and the importance of the interests to be furthered by such exercise of authority"); *id.* § 149(c), at 218-20.

[20] In concluding that the use of the term "unlawful" supports the conclusion that section 1119 incorporates the public authority justification, we do not mean to suggest that the absence of such a term would require a contrary conclusion regarding the intended application of a criminal statute to otherwise authorized government conduct in other cases. Each statute must be considered on its own terms to determine the relevant congressional intent. *See supra* note 16.

an extradition treaty with South Korea that would have facilitated prosecution of the alleged murderer and therefore, under then-existing law, "the Federal Government ha[d] no jurisdiction to prosecute a person residing in the United States who ha[d] murdered an American abroad except in limited circumstances, such as a terrorist murder or the murder of a Federal official." *Id.*

To close the "loophole under Federal law which permits persons who murder Americans in certain foreign countries to go punished," *id.*, the Thurmond bill would have added a new section to title 18 providing that "[w]hoever kills or attempts to kill a national of the United States while such national is outside the United States but within the jurisdiction of another country shall be punished as provided under sections 1111, 1112, and 1113 of this title." S. 861, 102d Cong. (1991) (incorporated in S. 1241, 102d Cong. §§ 3201-03 (1991)). The proposal also contained a separate provision amending the procedures for extradition "to provide the executive branch with the necessary authority, in the absence of an extradition treaty, to surrender to foreign governments those who commit violent crimes against U.S. nationals." 137 Cong. Rec. 8676 (1991) (statement of Sen. Thurmond) (discussing S. 861, 102d Cong., § 3).[21] The Thurmond proposal was incorporated into an omnibus crime bill that both the House and Senate passed, but that bill did not become law.

In the 103d Congress, a revised version of the Thurmond bill was included as part of the Violent Crime Control and Law Enforcement Act of 1994. H.R. 3355 § 60009, 103d Cong. (1994). The new legislation differed from the previous bill in two key respects. First, it prescribed criminal jurisdiction only where both the perpetrator and the victim were U.S. nationals, whereas the original Thurmond bill would have extended jurisdiction to all instances in which the victim was a U.S. national (based on so-called "passive personality" jurisdiction[22]). Second, the revised legislation did not include the separate provision from the earlier Thurmond legislation that would have amended the procedures for extradition. Congress enacted the revised legislation in 1994 as part of Public Law No. 103-322, and it was codified as section 1119 of title 18. *See* Pub. L. No. 103-322, § 60009, 108 Stat. 1796, 1972 (1994).

Thus, section 1119 was designed to close a jurisdictional loophole—exposed by a murder that had been committed abroad by a private individual—to ensure the possibility of prosecuting U.S. nationals who murdered other U.S. nationals in certain foreign countries that lacked the ability to lawfully secure the perpetrator's appearance at trial. This loophole had nothing to do with the conduct of an authorized military operation by U.S. armed forces or the sort of CIA counterterrorism operation contemplated here. Indeed, prior to the enactment of section 1119, the only federal statute expressly making it a crime to kill U.S. nationals abroad, at least outside the special and maritime jurisdiction of the United States,

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[21] The Thurmond proposal also contained procedural limitations on prosecution virtually identical to those that Congress ultimately enacted and codified at 18 U.S.C. § 1119(c). *See* S. 861, 102d Cong. § 2.

[22] *See* Geoffrey R. Watson, *The Passive Personality Principle*, 28 Tex. Int'l L.J. 1, 13 (1993); 137 Cong. Rec. 8677 (1991) (letter for Senator Ernest F. Hollings, from Janet G. Mullins, Assistant Secretary, Legislative Affairs, U.S. State Department (Dec. 26, 1989), submitted for the record during floor debate on the Thurmond bill) (S4752 ("The United States has generally taken the position that the exercise of extraterritorial criminal jurisdiction based solely on the nationality of the victim interferes unduly with the application of local law by local authorities.").

reflected what appears to have been a particular concern with protection of Americans from terrorist attacks. *See* 18 U.S.C. § 2332(a), (d) (criminalizing unlawful killings of U.S. nationals abroad where the Attorney General or his subordinate certifies that the "offense was intended to coerce, intimidate, or retaliate against a government or a civilian population").[23] It therefore would be anomalous to now read section 1119's closing of a limited jurisdictional gap as having been intended to jettison important applications of the established public authority justification, particularly in light of the statute's incorporation of substantive offenses codified in statutory provisions that from all indications were intended to incorporate recognized justifications and excuses.

It is true that here the target of the contemplated operations would be a U.S. citizen. But we do not believe al-Aulaqi's citizenship provides a basis for concluding that section 1119 would fail to incorporate the established public authority justification for a killing in this case. As we have explained, section 1119 incorporates the federal murder and manslaughter statutes, and thus its prohibition extends only to "unlawful" killings, 18 U.S.C. §§ 1111, 1112, a category that was intended to include, from all of the evidence of legislative intent we can find, only those killings that may not be permissible in light of traditional justifications for such action. At the time the predecessor versions of sections 1111 and 1112 were enacted, it was understood that killings undertaken in accord with the public authority justification were not "unlawful" because they were justified. There is no indication that, because section 1119(b) proscribes the unlawful killing abroad of U.S. nationals by U.S. nationals, it silently incorporated all justifications for killings *except* that public authority justification.

III.

Given that section 1119 incorporates the public authority justification, we must next analyze whether the contemplated DoD and CIA operations would be encompassed by that justification. In particular, we must analyze whether that justification would apply even though the target of the contemplated operations is a United States citizen. We conclude that it would—a conclusion that depends in part on our determination that each operation would accord with any potential constitutional protections of the United States citizen in these circumstances (*see infra* part VI). In reaching this conclusion, we do not address other cases or circumstances, involving different facts. Instead, we emphasize the sufficiency of the facts that have been represented to us here, without determining whether such facts would be necessary to the conclusion we reach.[24]

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[23] Courts have interpreted other federal homicide statutes to apply extraterritorially despite the absence of an express provision for extraterritorial application. *See, e.g.*, 18 U.S.C. § 1114 (criminalizing unlawful killings of federal officers and employees); *United States v. Al Kassar*, 582 F. Supp. 2d 488, 497 (S.D.N.Y. 2008) (construing 18 U.S.C. § 1114 to apply extraterritorially).

[24] In light of our conclusion that section 1119 and the statutes it cross-references incorporate this justification, and that the operations here would be covered by that justification, we need not and thus do not address whether other grounds might exist for concluding that the operations would be lawful.

A.

We begin with the contemplated DoD operation. We need not attempt here to identify the minimum conditions that might establish a public authority justification for that operation. In light of the combination of circumstances that we understand would be present, and which we describe below, we conclude that the justification would be available because the operation would constitute the "lawful conduct of war"—a well-established variant of the public authority justification.[25]

As one authority has explained by example, "if a soldier intentionally kills an enemy combatant in time of war and within the rules of warfare, he is not guilty of murder," whereas, for example, if that soldier intentionally kills a prisoner of war—a violation of the laws of war—"then he commits murder." 2 LaFave, *Substantive Criminal Law* § 10.2(c), at 136; *see also State v. Gut*, 13 Minn. 341, 357 (1868) ("That it is legal to kill an alien enemy in the heat and exercise of war, is undeniable; but to kill such an enemy after he laid down his arms, and especially when he is confined in prison, is murder."); Perkins & Boyce, *Criminal Law* at 1093 ("Even in time of war an alien enemy may not be killed needlessly after he has been disarmed and securely imprisoned").[26] Moreover, without invoking the public authority justification by terms, our Office has relied on the same notion in an opinion addressing the intended scope of a federal criminal statute that concerned the use of possibly lethal force. *See United States Assistance to Countries that Shoot Down Civil Aircraft Involved in Drug Trafficking*, 18 Op. O.L.C. 148, 164 (1994) ("*Shoot Down Opinion*") (concluding that the Aircraft Sabotage Act of 1984, 18 U.S.C. § 32(b)(2), which prohibits the willful destruction of a civil aircraft and otherwise applies to U.S. government conduct, should not be construed to have "the surprising and almost certainly

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[25] *See, e.g.*, 2 Paul H. Robinson, *Criminal Law Defenses* § 148(a), at 208 (1984) (conduct that would violate a criminal statute is justified and thus not unlawful "[w]here the exercise of military authority relies upon the law governing the armed forces or upon the conduct of war"); 2 LaFave, *Substantive Criminal Law* § 10.2(c), at 136 ("another aspect of the public duty defense is where the conduct was required or authorized by 'the law governing the armed services or the lawful conduct of war'") (internal citation omitted); Perkins & Boyce, *Criminal Law* at 1093 (noting that a "typical instance[] in which even the extreme act of taking human life is done by public authority" involves "the killing of an enemy as an act of war and within the rules of war"); *Frye*, 10 Cal. Rptr. 2d at 221 n.2 (identifying "homicide done under a valid public authority, such as execution of a death sentence or killing an enemy in a time of war," as one example of a justifiable killing that would not be "unlawful" under the California statute describing murder as an "unlawful" killing); *State v. Gut*, 13 Minn. 341, 357 (1868) ("that it is legal to kill an alien enemy in the heat and exercise of war, is undeniable"); *see also* Model Penal Code § 3.03(2)(b) (proposing that criminal statutes expressly recognize a public authority justification for a killing that "occurs in the lawful conduct of war," notwithstanding the Code recommendation that the use of deadly force generally should be justified only if expressly prescribed by law); *see also id.* at 25 n.7 (collecting representative statutes reflecting this view enacted prior to Code's promulgation); 2 Robinson, *Criminal Law Defenses* § 148(b), at 210-11 nn.8-9 (collecting post-Model Code state statutes expressly recognizing such a defense).

[26] *Cf. Public Committee Against Torture in Israel v. Government of Israel*, HCJ 769/02 ¶ 19, 46 I.L.M. 375, 382 (Israel Supreme Court sitting as the High Court of Justice, 2006) ("When soldiers of the Israel Defense Forces act pursuant to the laws of armed conflict, they are acting 'by law', and they have a good justification defense [to criminal culpability]. However, if they act contrary to the laws of armed conflict they may be, *inter alia*, criminally liable for their actions."); *Calley v. Calloway*, 519 F.2d 184, 193 (5th Cir. 1975) ("an order to kill unresisting Vietnamese would be an illegal order, and . . . if [the defendant] knew the order was illegal or should have known it was illegal, obedience to an order was not a legal defense").

unintended effect of criminalizing actions by military personnel that are lawful under international law and the laws of armed conflict").

In applying this variant of the public authority justification to the contemplated DoD operation, we note as an initial matter that DoD would undertake the operation pursuant to Executive war powers that Congress has expressly authorized. *See Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 635 (1952) (Jackson, J., concurring) ("When the President acts pursuant to an express or implied authorization of Congress, his authority is at its maximum, for it includes all that he possesses in his own right plus all that Congress can delegate."). By authorizing the use of force against "organizations" that planned, authorized, and committed the September 11th attacks, Congress clearly authorized the President's use of "necessary and appropriate" force against al-Qaida forces, because al-Qaida carried out the September 11th attacks. *See* Authorization for Use of Military Force ("AUMF"), Pub. L. No. 107-40, 115 Stat. 224, §2(a) (2001) (providing that the President may "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, or harbored such organizations or persons, in order to prevent any future acts of international terrorism against the United States by such nations, organizations, or persons.").[27] And, as we have explained, *supra* at 9, a decision-maker could reasonably conclude that this leader of AQAP forces is part of al-Qaida forces. Alternatively, and as we have further explained, *supra* at 10 n.5, the AUMF applies with respect to forces "associated with" al-Qaida that are engaged in hostilities against the U.S. or its coalition partners, and a decision-maker could reasonably conclude that the AQAP forces of which al-Aulaqi is a leader are "associated with" al Qaida forces for purposes of the AUMF. On either view, DoD would carry out its contemplated operation against a leader of an organization that is within the scope of the AUMF, and therefore DoD would in that respect be operating in accord with a grant of statutory authority.

Based upon the facts represented to us, moreover, the target of the contemplated operation has engaged in conduct as part of that organization that brings him within the scope of the AUMF. High-level government officials have concluded, on the basis of al-Aulaqi's activities in Yemen, that al-Aulaqi is a leader of AQAP whose activities in Yemen pose a "continued and imminent threat" of violence to United States persons and interests. Indeed, the facts represented to us indicate that al-Aulaqi has been involved, through his operational and leadership roles within AQAP, in an abortive attack within the United States and continues to plot attacks intended to kill Americans from his base of operations in Yemen. The contemplated DoD operation, therefore, would be carried out against someone who is within the core of individuals against whom Congress has authorized the use of necessary and appropriate force.[28]

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[27] We emphasize this point not in order to suggest that statutes such as the AUMF have superseded or implicitly repealed or amended section 1119, but instead as one factor that helps to make particularly clear why the operation contemplated here would be covered by the public authority justification that section 1119 (and section 1111) itself incorporates.

[28] *See Hamlily*, 616 F. Supp. at 75 (construing AUMF to reach individuals who "function[] or participate[] within or under the command structure of [al-Qaida]"); *Gherebi v. Obama*, 609 F. Supp. 2d 43, 68 (D.D.C. 2009); *see also al-Marri v. Pucciarelli*, 534 F.3d 213, 325 (4th Cir. 2008) (en banc) (Wilkinson, J., dissenting in part) (explaining that the ongoing hostilities against al-Qaida permit the Executive to use necessary and appropriate force

Al-Aulaqi is a United States citizen, however, and so we must also consider whether his citizenship precludes the AUMF from serving as the source of lawful authority for the contemplated DoD operation. There is no precedent directly addressing the question in circumstances such as those present here; but the Supreme Court has recognized that, because military detention of enemy forces is "by 'universal agreement and practice,' [an] 'important incident[] of war,'" *Hamdi v. Rumsfeld*, 542 U.S. 507, 518 (2004) (plurality opinion) (quoting *Ex parte Quirin*, 317 U.S. 1, 28, 30 (1942)), the AUMF authorized the President to detain a member of Taliban forces who was captured abroad in an armed conflict against the United States on a traditional battlefield. *See id.* at 517-19 (plurality opinion).[29] In addition, the Court held in

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under the AUMF against an "enemy combatant," a term Judge Wilkinson would have defined as a person who is (1) "a member of" (2) "an organization or nation against whom Congress has declared war or authorized the use of military force," and (3) who "knowingly plans or engages in conduct that harms or aims to harm persons or property for the purpose of furthering the military goals of the enemy nation or organization"), *vacated and remanded sub nom. al-Marri v. Spagone*, 129 S. Ct. 1545 (2009); Government March 13th *Guantánamo Bay Detainee* Brief at 1 (arguing that AUMF authorizes detention of individuals who were "part of, or substantially supported, Taliban or al-Qaida forces or associated forces that are engaged in hostilities against the United States or its coalition partners, including any person who has committed a belligerent act, or has directly supported hostilities, in aid of such enemy armed forces").

Several of the Guantánamo habeas petitioners, as well as some commentators, have argued that in a non-international conflict of this sort, the laws of war and/or the AUMF do not permit the United States to treat persons who are part of al-Qaida as analogous to members of an enemy's armed forces in a traditional international armed conflict, but that the United States instead must treat all such persons as civilians, which (they contend) would permit targeting those persons only when they are directly participating in hostilities. *Cf. also al-Marri*, 534 F.3d at 237-47 (Motz, J. concurring in the judgment, and writing for four of nine judges) (arguing that the AUMF and the Constitution, as informed by the laws of war, do not permit military detention of an alien residing in the United States whom the government alleged was "closely associated with" al-Qaida, and that such individual must instead be treated as a civilian, because that person is not affiliated with the military arm of an enemy nation); Philip Alston, *Report of the Special Rapporteur on extrajudicial, summary or arbitrary executions* ¶ 58, at 19 (United Nations Human Rights Council, Fourteenth Session, Agenda Item 3, May 28, 2010) ("*Report of the Special Rapporteur*") (reasoning that because "[u]nder the [international humanitarian law] applicable to non-international armed conflict, there is no such thing as a 'combatant'"—i.e., a non-state actor entitled to the combatant's privilege—it follows that "States are permitted to attack only civilians who 'directly participate in hostilities'"). Primarily for the reasons that Judge Walton comprehensively examined in the *Gherebi* case, *see* 609 F. Supp. 2d at 62-69, we do not think this is the proper understanding of the laws of war in a non-international armed conflict, or of Congress's authorization under the AUMF. *Cf. also* International Committee of the Red Cross, *Interpretive Guidance on the Notion of Direct Participation in Hostilities Under International Humanitarian Law* 28, 34 (2009) (even if an individual is otherwise a "citizen" for purposes of the laws of war, a member of a non-state armed group can be subject to targeting by virtue of having assumed a "continuous combat function" on behalf of that group); Alston, *supra*, ¶ 65, at 30-31 (acknowledging that under the ICRC view, if armed group members take on a continuous command function, they can be targeted anywhere and at any time); *infra* at 37-38 (explaining that al-Aulaqi is continually and "actively" participating in hostilities and thus not protected by Common Article 3 of the Geneva Conventions).

[29] *See also Al Odah v. Obama*, No. 09-5331, 2010 WL 2679752, at *1, and other D.C. Circuit cases cited therein (D.C. Cir. 2010) (AUMF gives United States the authority to detain a person who is "part of" al-Qaida or Taliban forces); *Hamlily*, 616 F. Supp. 2d at 74 (Bates, J.); *Gherebi*, 609 F. Supp. 2d at 67 (Walton, J.); *Mattan v. Obama*, 618 F. Supp. 2d 24, 26 (D.D.C. 2009) (Lamberth, C. J.); *Al Mutairi v. United States*, 644 F. Supp. 2d 78, 85 (D.D.C. 2009) (Kollar-Kotelly, J.); *Awad v. Obama*, 646 F. Supp. 2d 20, 23 (D.D.C. 2009) (Robertson, J.); *Anam v. Obama*, 653 F. Supp. 2d 62, 64 (D.D.C. 2009) (Hogan, J.); *Hatim v.* Obama, 677 F. Supp. 2d 1, 7, (D.D.C. 2009) (Urbina, J.); *Al-Adahi v. Obama*, No. 05-280, 2009 WL 2584685 (D.D.C. Aug. 21, 2009) (Kessler, J.), *rev'd on other grounds*, No. 09-5333 (D.C. Cir. July 13, 2010).

Hamdi that this authorization applied even though the Taliban member in question was a U.S. citizen. *Id.* at 519-24; *see also Quirin*, 317 U.S. at 37-38 ("[c]itizens who associate themselves with the military arm of the enemy government, and with its aid, guidance and direction enter [the United States] bent on hostile acts," may be treated as "enemy belligerents" under the law of war). Furthermore, lower federal courts have relied upon *Hamdi* to conclude that the AUMF authorizes DoD to detain individuals who are part of al-Qaida even if they are apprehended and transferred to U.S. custody while not on a traditional battlefield. *See, e.g.*, *Bensayah v. Obama*, No. 08-5537, 2010 WL 2640626, at *1, *5, *8 (D.C. Cir. June 28, 2010) (concluding that the Department of Defense could detain an individual turned over to the U.S. in Bosnia if it demonstrates he was part of al-Qaida); *Al-Adahi v. Obama*, No. 09-5333 (D.C. Cir. July 13, 2010) (DoD has authority under AUMF to detain individual apprehended by Pakistani authorities in Pakistan and then transferred to U.S.); *Anam v. Obama*, 2010 WL 58965 (D.D.C. 2010) (same); *Razak Ali v. Obama*, 2009 WL 4030864 (D.D.C. 2009) (same); *Sliti v. Bush*, 592 F. Supp. 2d 46 (D.D.C. 2008) (same).

In light of these precedents, we believe the AUMF's authority to use lethal force abroad also may apply in appropriate circumstances to a United States citizen who is part of the forces of an enemy organization within the scope of the force authorization. The use of lethal force against such enemy forces, like military detention, is an "'important incident of war,'" *Hamdi*, 542 U.S. at 518 (plurality opinion) (quotation omitted). *See, e.g.*, General Orders No. 100: Instructions for the Government of Armies of the Untied States in the Field ¶ 15 (Apr. 24, 1863) (the "Lieber Code") ("[m]ilitary necessity admits of all direct destruction of life or limb of armed enemies"); International Committee of the Red Cross, *Commentary on the Additional Protocols of 8 June 1977 to the Geneva Conventions of 12 Aug. 1949 and Relating to the Protection of Victims of Non-International Armed Conflicts (Additional Protocol II)* § 4789 (1987); Yoram Dinstein, *The Conduct of Hostilities Under the Law of International Armed Conflict* 94 (2004) ("*Conduct of Hostilities*") ("When a person takes up arms or merely dons a uniform as a member of the armed forces, he automatically exposes himself to enemy attack."). And thus, just as the AUMF authorizes the military detention of a U.S. citizen captured abroad who is part of an armed force within the scope of the AUMF, it also authorizes the use of "necessary and appropriate" lethal force against a U.S. citizen who has joined such an armed force. Moreover, as we explain further in Part VI, DoD would conduct the operation in a manner that would not violate any possible constitutional protections that al-Aulaqi enjoys by reason of his citizenship. Accordingly, we do not believe al-Aulaqi's citizenship provides a basis for concluding that he is immune from a use of force abroad that the AUMF otherwise authorizes.

In determining whether the contemplated DoD operation would constitute the "lawful conduct of war," LaFave, *Substantive Criminal Law* § 10.2(c), at 136, we next consider whether that operation would comply with the international law rules to which it would be subject—a question that also bears on whether the operation would be authorized by the AUMF. *See* Response for Petition for Rehearing and Rehearing En Banc, *Al Bihani v. Obama*, No. 09-5051 at 7 (D.C. Cir.) (May 13, 2010) (AUMF "should be construed, if possible, as consistent with international law") (citing *Murray v. Schooner Charming Betsy*, 6 U.S. (2 Cranch) 64, 118 (1804) ("an act of Congress ought never to be construed to violate the law of nations, if any other possible construction remains")); *see also F. Hoffman-La Roche Ltd. v. Empagran S.A.*, 542 U.S. 155, 164 (2004) (customary international law is "law that (we must assume) Congress ordinarily

seeks to follow"). Based on the combination of facts presented to us, we conclude that DoD would carry out its operation as part of the non-international armed conflict between the United States and al-Qaida, and thus that on those facts the operation would comply with international law so long as DoD would conduct it in accord with the applicable laws of war that govern targeting in such a conflict.

In *Hamdan v. Rumsfeld*, the Supreme Court held that the United States is engaged in a non-international armed conflict with al-Qaida. 548 U.S. 557, 628-31 (2006). In so holding, the Court rejected the argument that non-international armed conflicts are limited to civil wars and other internal conflicts between a state and an internal non-state armed group that are confined to the territory of the state itself; it held instead that a conflict between a transnational non-state actor and a nation, occurring outside that nation's territory, is an armed conflict "not of an international character" (quoting Common Article 3 of the Geneva Conventions) because it is not a "clash between nations." *Id.* at 630.

Here, unlike in *Hamdan*, the contemplated DoD operation would occur in Yemen, a location that is far from the most active theater of combat between the United States and al-Qaida. That does not affect our conclusion, however, that the combination of facts present here would make the DoD operation in Yemen part of the non-international armed conflict with al-Qaida.[30] To be sure, *Hamdan* did not directly address the geographic scope of the non-international armed conflict between the United States and al-Qaida that the Court recognized, other than to implicitly hold that it extended to Afghanistan, where Hamdan was apprehended. *See* 548 U.S. at 566; *see also id.* at 641-42 (Kennedy, J., concurring in part) (referring to Common Article 3 as "applicable to our Nation's armed conflict with al Qaeda in Afghanistan"). The Court did, however, specifically reject the argument that non-international armed conflicts are necessarily limited to internal conflicts. The Common Article 3 term "conflict not of an international character," the Court explained, bears its "literal meaning"—namely, that it is a conflict that "does not involve a clash between nations." *Id.* at 630 (majority opinion). The Court referenced the statement in the 1949 ICRC Commentary on the Additional Protocols to the Geneva Conventions that a non-international armed conflict "'is distinct from an international armed conflict *because of the legal status of the entities opposing each other*,'" *id.* at 631 (emphasis added). The Court explained that this interpretation—that the nature of the conflict depends at least in part on the status of the parties, rather than simply on the locations in which they fight—in turn accords with the view expressed in the commentaries to the Geneva Conventions that "the scope of application" of Common Article 3, which establishes basic protections that govern conflicts not of an international character, "must be as wide as possible.'" *Id.*[31]

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[30] Our analysis is limited to the circumstances presented here, regarding the contemplated use of lethal force in Yemen. We do not address issues that a use of force in other locations might present. *See also supra* note 1.

[31] We think it is noteworthy that the AUMF itself does not set forth an express geographic limitation on the use of force it authorizes, and that nearly a decade after its enactment, none of the three branches of the United States Government has identified a strict geographical limit on the permissible scope of the authority the AUMF confers on the President with respect to this armed conflict. *See, e.g.*, Letter from the President to the Speaker of the House of Representatives and the President Pro Tempore of the Senate (June 15, 2010) (reporting, "consistent with . . . the War Powers Resolution," that the armed forces, with the assistance of numerous international partners,

Invoking the principle that for purposes of international law an armed conflict generally exists only when there is "protracted armed violence between governmental authorities and armed groups," Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction, *Prosecutor v. Tadic*, Case No. IT-94-1AR72, ¶ 70 (ICTY App. Chamber Oct. 2, 1995) ("*Tadic* Jurisdictional Decision"), some commentators have suggested that the conflict between the United States and al-Qaida cannot extend to nations outside Afghanistan in which the level of hostilities is less intense or prolonged than in Afghanistan itself. *See, e.g.*, Mary Ellen O'Connell, *Combatants and the Combat Zone*, 43 U. Rich. L. Rev. 845, 857-59 (2009); *see also* Philip Alston, *Report of the Special Rapporteur on extrajudicial, summary or arbitrary executions* ¶ 54, at 18 (United Nations Human Rights Council, Fourteenth Session, Agenda Item 3, May 28, 2010) (acknowledging that a non-international armed conflict can be transnational and "often does" exist "across State borders," but explaining that the duration and intensity of attacks in a particular nation is also among the "cumulative factors that must be considered for the objective existence of an armed conflict"). There is little judicial or other authoritative precedent that speaks directly to the question of the geographic scope of a non-international armed conflict in which one of the parties is a transnational, non-state actor and where the principal theater of operations is not within the territory of the nation that is a party to the conflict. Thus, in considering this issue, we must look to principles and statements from analogous contexts, recognizing that they were articulated without consideration of the particular factual circumstances of the sort of conflict at issue here.

In looking for such guidance, we have not come across any authority for the proposition that when one of the parties to an armed conflict plans and executes operations from a base in a new nation, an operation to engage the enemy in that location can never be part of the original armed conflict—and thus subject to the laws of war governing that conflict—unless and until the hostilities become sufficiently intensive and protracted within that new location. That does not appear to be the rule, or the historical practice, for instance, in a traditional international conflict. *See* John R. Stevenson, Legal Adviser, Department of State, *United States Military Action in Cambodia: Questions of International Law* (address before the Hammarskjold Forum of the Association of the Bar of the City of New York, May 28, 1970), *in* 3 *The Vietnam War and International Law: The Widening Context* 23, 28-30 (Richard A. Falk, ed. 1972) (arguing that in an international armed conflict, if a neutral state has been unable for any reason to prevent violations of its neutrality by the troops of one belligerent using its territory as a base of operations, the other belligerent has historically been justified in attacking those enemy forces in that state). Nor do we see any obvious reason why that more categorical, nation-specific rule should govern in analogous circumstances in this sort of non-international armed conflict.[32]

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continue to conduct operations "against al-Qa'ida terrorists," and that the United States has "deployed combat-equipped forces to a number of locations in the U.S. Central . . . Command area[] of operation in support of those [overseas counter-terrorist] operations"); Letter for the Speaker of the House of Representatives and the President Pro Tempore of the Senate, from President Barack Obama (Dec. 16, 2009) (similar); *DoD May 18 Memorandum for OLC*, at 2 (explaining that U.S. armed forces have conducted AQAP targets in Yemen since December 2009, and that DoD has reported such strikes to the appropriate congressional oversight committees).

[32] In the speech cited above, Legal Adviser Stevenson was referring to cases in which the government of the nation in question is unable to prevent violations of its neutrality by belligerent troops.

Rather, we think the determination of whether a particular operation would be part of an ongoing armed conflict for purposes of international law requires consideration of the particular facts and circumstances present in each case. Such an inquiry may be particularly appropriate in a conflict of the sort here, given that the parties to it include transnational non-state organizations that are dispersed and that thus may have no single site serving as their base of operations.[33]

We also find some support for this view in an argument the United States made to the International Criminal Tribunal for Yugoslavia (ICTY) in 1995. To be sure, the United States was there confronting a question, and a conflict, quite distinct from those we address here. Nonetheless, in that case the United States argued that in determining *which* body of humanitarian law applies in a particular conflict, "the conflict must be considered as a whole," and that "it is artificial and improper to attempt to divide it into isolated segments, either geographically or chronologically, in an attempt to exclude the application of [the relevant] rules." Submission of the Government of the United States of America Concerning Certain Arguments Made by Counsel for the Accused in the Case of *The Prosecutor of the Tribunal v. Dusan Tadic*, Case No. IT-94-1AR72 (ICTY App. Chamber) at 27-28 (July 1995) ("U.S. *Tadic* Submission"). Likewise, the court in *Tadic*—although not addressing a conflict that was transnational in the way the U.S. conflict with al-Qaida is—also concluded that although "the definition of 'armed conflict' varies depending on whether the hostilities are international or internal . . . the scope of both internal and international armed conflicts *extends beyond the exact time and place of hostilities*." *Tadic* Jurisdictional Decision ¶ 67 (emphasis added); *see also* International Committee of the Red Cross, *International Humanitarian Law and the Challenges of Contemporary Armed Conflicts* 18 (2003) (asserting that in order to assess whether an armed conflict exists it is necessary to determine "whether the totality of the violence taking place between states and transnational networks can be deemed to be armed conflict in the legal sense"). Although the basic approach that the United States proposed in *Tadic*, and that the ICTY may be understood to have endorsed, was advanced without the current conflict between the U.S. and al-Qaida in view, that approach reflected a concern with ensuring that the laws of war, and the limitations on the use of force they establish, should be given an appropriate application.[34] And that same consideration, reflected in *Hamdan* itself, *see supra* at 24, suggests

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[33] The fact that the operation occurs in a new location might alter the way in which the military must apply the relevant principles of the laws of war—for example, requiring greater care in some locations in order to abide by the principles of distinction and proportionality that protect civilians from the use of military force. But that possible distinction should not affect the question of whether the laws of war govern the conflict in that new location in the first instance

[34] *See also* Geoffrey S. Corn & Eric Talbot Jensen, *Untying the Gordian Knot: A Proposal for Determining Applicability of the Laws of War to the War on Terror*, 81 Temp. L. Rev. 787, 799 (2008) ("If . . . the ultimate purpose of the drafters of the Geneva Conventions was to prevent 'law avoidance' by developing de facto law triggers—a purpose consistent with the humanitarian foundation of the treaties—then the myopic focus on the geographic nature of an armed conflict in the context of transnational counterterrorist combat operations serves to frustrate that purpose."); *cf. also* Derek Jinks, *September 11 and the Laws of War*, 28 Yale J. Int'l L. 1, 40-41 (2003) (arguing that if Common Article 3 applies to wholly internal conflicts, then it "applies a fortiori to armed conflicts with international or transnational dimensions," such as to the United States's armed conflict with al-Qaida).

a further reason for skepticism about an approach that would categorically deny that an operation is part of an armed conflict absent a specified level and intensity of hostilities in the particular location where it occurs.

For present purposes, in applying the more context-specific approach to determining whether an operation would take place within the scope of a particular armed conflict, it is sufficient that the facts as they have been represented to us here, in combination, support the judgment that DoD's operation in Yemen would be conducted as part of the non-international armed conflict between the United States and al-Qaida. Specifically, DoD proposes to target a leader of AQAP, an organized enemy force[35] that is either a component of al-Qaida or that is a co-belligerent of that central party to the conflict and engaged in hostilities against the United States as part of the same comprehensive armed conflict, in league with the principal enemy. *See supra at* 9-10 & n.5. Moreover, DoD would conduct the operation in Yemen, where, according to the facts related to us, AQAP has a significant and organized presence, and from which AQAP is conducting terrorist training in an organized manner and has executed and is planning to execute attacks against the United States. Finally, the targeted individual himself, on behalf of that force, is continuously planning attacks from that Yemeni base of operations against the United States, as the conflict with al-Qaida continues. *See supra at* 7-9. Taken together, these facts support the conclusion that the DoD operation would be part of the non-international armed conflict the Court recognized in *Hamdan*.[36]

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[35] *Cf. Prosecutor v. Haradnizaj*, No IT-04-84-T 60 (ICTY Trial Chamber I, 2008) ("an armed conflict can exist only between parties that are sufficiently organized to confront each other with military means—a condition that can be evaluated with respect to non-state groups by assessing "several indicative factors, none of which are, in themselves, essential to establish whether the 'organization' criterion is fulfilled," including, among other things, the existence of a command structure, and disciplinary rules and mechanisms within the group, the ability of the group to gain access to weapons, other military equipment, recruits and military training, and its ability to plan, coordinate, and carry out military operations).

[36] We note that the Department of Defense, which has a policy of compliance with the law of war "during all armed conflicts, however such conflicts are characterized, *and in all other military operations*," Chairman of the Joint Chiefs of Staff, Instruction 5810.01D, *Implementation of the DoD Law of War Program* ¶ 4.a, at 1 (Apr. 30, 2010) (emphasis added), has periodically used force—albeit in contexts different from a conflict such as this—in situations removed from "active battlefields," in response to imminent threats. *See, e.g.*, Nat'l Comm'n on Terrorist Attacks Upon the United States, *The 9/11 Commission Report* 116-17 (2004) (describing 1998 cruise missile attack on al-Qaida encampments in Afghanistan following al-Qaida bombings of U.S. embassies in East Africa); W. Hays Parks, *Memorandum of Law: Executive Order 12333 and Assassination*, Army Lawyer, at 7 (Dep't of Army Pamphlet 27-50-204) (Dec. 1989) ("*Assassination*") at 7 n.8 (noting examples of uses of military force in "[s]elf defense against a continuing threat," including "the U.S. Navy air strike against Syrian military objections in Lebanon on 4 December 1983, following Syrian attacks on U.S. Navy F-14 TARPS flights supporting the multinational peacekeeping force in Beirut the preceding day," and "air strikes against terrorist-related targets in Libya on the evening of 15 April 1986"); *see also id.* at 7 ("A national decision to employ military force in self defense against a legitimate terrorist or related threat would not be unlike the employment of force in response to a threat by conventional forces; only the nature of the threat has changed, rather than the international legal right of self defense. The terrorist organizations envisaged as appropriate to necessitate or warrant an armed response by U.S. forces are well-financed, highly-organized paramilitary structures engaged in the illegal use of force."); Advisory Opinion of 8 July 1996 on the Legality of the Threat or Use of Nuclear Weapons ¶ 42, 1996 I.C.J. 226, 245 ("Nuclear Weapons Advisory Opinion") (fundamental law-of-war norms are applicable even where military force might be employed outside the context of an armed conflict, such as when using powerful weapons in an act of national self-defense); *cf. also 9/11 Commission Report* at 116-17 (noting the Clinton Administration position—with respect to a presidential memorandum authorizing CIA assistance to an operation that could result in the killing of Usama Bin Ladin "if the CIA and the tribals judged that capture was not feasible"—that "under the law of armed

There remains the question whether DoD would conduct its operation in accord with the rules governing targeting in a non-international armed conflict—namely, international humanitarian law, commonly known as the laws of war. *See* Dinstein, *Conduct of Hostilities* at 17 (international humanitarian law "takes a middle road, allowing belligerent States much leeway (in keeping with the demands of military necessity) and yet circumscribing their freedom of action (in the name of humanitarianism").[37] The 1949 Geneva Conventions to which the United States is a party do not themselves directly impose extensive restrictions on the conduct of a non-international armed conflict—with the principal exception of Common Article 3, *see Hamdan*, 548 U.S. at 630-31. But the norms specifically described in those treaties "are not exclusive, and the laws and customs of war also impose limitations on the conduct of participants in non-international armed conflict." U.S. *Tadic* Submission at 33 n.53; *see also, e.g.*, Convention Respecting the Laws and Customs of War on Land, Oct. 18, 1907, Preamble ("Hague Convention (IV)"), 36 Stat. 2277, 2280 (in cases "not included" under the treaty, "the inhabitants and the belligerents remain under the protection and the rule of the principles of the law of nations, as they result from the usages among civilized peoples, from the laws of humanity, and the dictates of the public conscience").

In particular, the "fundamental rules" and "intransgressible principles of international customary law," Advisory Opinion of 8 July 1996 on the Legality of the Threat or Use of Nuclear Weapons ¶ 79, 1996 I.C.J. 226, 257 ("Nuclear Weapons Advisory Opinion"), which apply to all armed conflicts, include the "four fundamental principles that are inherent to all targeting decisions"—namely, military necessity, humanity (the avoidance of unnecessary suffering), proportionality, and distinction. United States Air Force, *Targeting*, Air Force Doctrine Document 2-1.9, at 88 (June 8, 2006); *see also generally id.* at 88-92; Dinstein, *Conduct of Hostilities* at 16-20, 115-16, 119-23. Such fundamental rules also include those listed in the annex to the Fourth Hague Convention, *see* Nuclear Weapons Advisory Opinion ¶ 80, at 258, article 23 of which makes it "especially forbidden" to, inter alia, kill or wound treacherously, refuse surrender, declare a denial of quarter, or cause unnecessary suffering, 36 Stat. at 2301-02.

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conflict, killing a person who posed an imminent threat to the United States would be an act of self-defense, not an assassination"). As we explain below, DoD likewise would conduct the operation contemplated here in accord with the laws of war and would direct its lethal force against an individual whose activities have been determined to pose a "continued and imminent threat" to U.S. persons and interests.

[37] *Cf.* Nuclear Weapons Advisory Opinion ¶ 25, 1996 I.C.J. at 240 (explaining that the "test" of what constitutes an "arbitrary" taking of life under international human rights law, such as under article 6(1) of the International Covenant of Civil and Political Rights (ICCPR), must be determined by "the law applicable in armed conflict which is designed to regulate the conduct of hostilities," and "can only be decided by reference to the law applicable in armed conflict and not deduced from terms of the Covenant itself"); Written Statement of the Government of the United States of America before the International Court of Justice, *Re: Request by the United Nations General Assembly for an Advisory Opinion on the Legality of the Threat or Use of Nuclear Weapons* at 44 (June 20, 1995) (ICCPR prohibition on arbitrary deprivation of life "was clearly understood by its drafters to exclude the lawful taking of human life," including killings "lawfully committed by the military in time of war"); Dinstein, *Conduct of Hostilities* at 23 (right to life under human rights law "does not protect persons from the ordinary consequences of hostilities"); *cf. also infra* Part VI (explaining that the particular contemplated operations here would satisfy due process and Fourth Amendment standards because, *inter alia*, capturing al-Aulaqi is currently infeasible).

DoD represents that it would conduct its operation against al-Aulaqi in compliance with these fundamental law-of-war norms. *See* Chairman of the Joint Chiefs of Staff, Instruction 5810.01D, *Implementation of the DoD Law of War Program* ¶ 4.a, at 1 (Apr. 30, 2010) ("It is DOD policy that . . . [m]embers of the DOD Components comply with the law of war during all armed conflicts, however such conflicts are characterized, and in all other military operations."). In particular, the targeted nature of the operation would help to ensure that it would comply with the principle of distinction, and DoD has represented to us that it would make every effort to minimize civilian casualties and that the officer who launches the ordnance would be required to abort a strike if he or she concludes that civilian casualties will be disproportionate or that such a strike will in any other respect violate the laws of war. *See DoD May 18 Memorandum for OLC*, at 1 ("Any official in the chain of command has the authority and duty to abort" a strike "if he or she concludes that civilian casualties will be disproportionate or that such a strike will otherwise violate the laws of war.").

Moreover, although DoD would specifically target al-Aulaqi, and would do so without advance warning, such characteristics of the contemplated operation would not violate the laws of war and, in particular, would not cause the operation to violate the prohibitions on treachery and perfidy—which are addressed to conduct involving a breach of confidence by the assailant. *See, e.g.*, Hague Convention IV, Annex, art. 23(b), 36 Stat. at 2301-02 ("[I]t is especially forbidden . . . to kill or wound treacherously individuals belonging to the hostile nation or army"); *cf. also* Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts, art. 37(1) (prohibiting the killing, injuring or capture of an adversary in an international armed conflict by resort to acts "inviting the confidence of [the] adversary. . . with intent to betray that confidence," including feigning a desire to negotiate under truce or flag of surrender; feigning incapacitation; and feigning noncombatant status).[38] Those prohibitions do not categorically preclude the use of stealth or surprise, nor forbid military attacks on identified, individual soldiers or officers, *see* U.S. Army Field Manual 27-10, ¶ 31 (1956) (article 23(b) of the Annex to the Hague Convention IV does not "preclude attacks on individual soldiers or officers of the enemy whether in the zone of hostilities, occupied territory, or else-where"), and we are not aware of any other law-of-war grounds precluding the use of such tactics. *See* Dinstein, *Conduct of Hostilities* at 94-95, 199; Abraham D. Sofaer, *Terrorism, The Law, and the National Defense*, 126 Mil. L. Rev. 89, 120-21 (1989).[39] Relatedly, "there is no prohibition under the laws of war on the use of technologically advanced weapons systems in armed conflict—such as pilotless aircraft or so-called smart

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[38] Although the United States is not a party to the First Protocol, the State Department has announced that "we support the principle that individual combatants not kill, injure, or capture enemy personnel by resort to perfidy." Remarks of Michael J, Matheson, Deputy Legal Adviser, Department of State, *The Sixth Annual American Red Cross-Washington College of Law Conference on International Humanitarian Law: A Workshop on Customary International Law and the 1977 Protocols Additional to the 1949 Geneva Conventions*, 2 Am. U. J. of Int'l L. & Pol'y 415, 425 (1987). (U)

[39] There is precedent for the United States targeting attacks against particular commanders. *See, e.g.*, Patricia Zengel, *Assassination and the Law of Armed Conflict*, 134 Mil. L. Rev. 123, 136-37 (1991) (describing American warplanes' shoot-down during World War II of plane carrying Japanese Admiral Isoroku Yamamoto); *see also* Parks, *Assassination*, Army Lawyer at 5.

bombs—as long as they are employed in conformity with applicable laws of war." Koh, *The Obama Administration and International Law*. DOD also informs us that if al-Aulaqi offers to surrender, DoD would accept such an offer.[40]

In light of all these circumstances, we believe DoD's contemplated operation against al-Aulaqi would comply with international law, including the laws of war applicable to this armed conflict, and would fall within Congress's authorization to use "necessary and appropriate force" against al-Qaida. In consequence, the operation should be understood to constitute the lawful conduct of war and thus to be encompassed by the public authority justification. Accordingly, the contemplated attack, if conducted by DoD in the manner described, would not result in an "unlawful" killing and thus would not violate section 1119(b).

B.

We next consider whether the CIA's contemplated operation against al-Aulaqi in Yemen would be covered by the public authority justification. We conclude that it would be; and thus that operation, too, would not result in an "unlawful" killing prohibited by section 1119. As with our analysis of the contemplated DoD operation, we rely on the sufficiency of the particular factual circumstances of the CIA operation as they have been represented to us, without determining that the presence of those specific circumstances would be necessary to the conclusion we reach.

[40] *See* Geneva Conventions Common Article 3(1) (prohibiting "violence to life and person, in particular murder of all kinds," with respect to persons "taking no active part in the hostilities" in a non-international armed conflict, "including members of armed forces who have laid down their arms"); *see also* Hague Convention IV, Annex, art. 23(c), 37 Stat. at 2301-02 ("it is especially forbidden . . . [t]o kill or wound an enemy who, having laid down his arms, or having no longer means of defence, has surrendered at discretion"); *id.* art. 23(d) (forbidding a declaration that no quarter will be given); 2 William Winthrop, *Military Law and Precedents* 788 (1920) ("The time has long passed when 'no quarter' was the rule on the battlefield, or when a prisoner could be put to death simply by virtue of his capture.").

We explain in Part VI why the Constitution would impose no bar to the CIA's contemplated operation under these circumstances, based on the facts as they have been represented to us. There thus remains the question whether that operation would violate any statutory restrictions, which in turn requires us to consider whether 18 U.S.C. § 1119 would apply to the contemplated CIA operation.[42] Based on the combination of circumstances that we understand would be present, we conclude that the public authority justification that section 1119 incorporates—and that would prevent the contemplated DoD operation from violating section 1119(b)—would also encompass the contemplated CIA operation.[43]

[42] We address potential restrictions imposed by two other criminal laws—18 U.S.C. §§ 956(a) and 2441—in Parts IV and V of this opinion.

[43] We note, in addition, that the "lawful conduct of war" variant of the public authority justification, although often described with specific reference to operations conducted by the armed forces, is not necessarily limited to operations by such forces; some descriptions of that variant of the justification, for example, do not imply such a limitation. *See, e.g.*, *Frye*, 10 Cal. Rptr. 2d at 221 n.2 ("homicide done under a valid public authority, such as execution of a death sentence or killing an enemy in a time of war"); Perkins & Boyce, *Criminal Law* at 1093 ("the killing of an enemy as an act of war and within the rules of war").

Specifically, we understand that the CIA, like DoD, would carry out the attack against an operational leader of an enemy force, as part of the United States's ongoing non-international armed conflict with al-Qaida.

the CIA—

—would conduct the operation in a manner that accords with the rules of international humanitarian law governing this armed conflict, and in circumstances

See supra at 10-11.[44]

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If the killing by a member of the armed forces would comply with the law of war and otherwise be lawful, actions of CIA officials facilitating that killing should also not be unlawful. *See, e.g.*, *Shoot Down Opinion* at 165 n. 33 ("[O]ne cannot be prosecuted for aiding and abetting the commission of an act that is not itself a crime.") (citing *Shuttlesworth v. City of Birmingham*, 373 U.S. 262 (1963)).

Nor would the fact that CIA personnel would be involved in the operation itself cause the operation to violate the laws of war. It is true that CIA personnel, by virtue of their not being part of the armed forces, would not enjoy the immunity from prosecution under the domestic law of the countries in which they act for their conduct in targeting and killing enemy forces in compliance with the laws of war—an immunity that the armed forces enjoy by virtue of their status. *See Report of the Special Rapporteur* ¶ 71, at 22; *see also* Dinstein, *Conduct of Hostilities*, at 31. Nevertheless, lethal activities conducted in accord with the laws of war, and undertaken in the course of lawfully authorized hostilities, do not violate *the laws of war* by virtue of the fact that they are carried out in part by government actors who are not entitled to the combatant's privilege. The contrary view "arises . . . from a fundamental confusion between acts punishable under international law and acts with respect to which international law affords no protection." Richard R. Baxter, *So-Called "Unprivileged Belligerency": Spies, Guerillas, and Saboteurs*, 28 Brit. Y.B. Int'l L. 323, 342 (1951) ("the law of nations has not ventured to require of states that they . . . refrain from the use of secret agents or that these activities upon the part of their military forces or civilian population be punished"). *Accord* Yoram Dinstein, *The Distinction Between Unlawful Combatants and War Criminals*, in *International Law at a Time of Perplexity: Essays in Honour of Shabtai Rosenne* 103-16 (Y. Dinstein ed., 1989);

Statements in the Supreme Court's decision in *Ex parte Quirin*, 317 U.S. 1 (1942), are sometimes cited for the contrary view. *See, e.g., id.* at 36 n.12 (suggesting that passing through enemy lines in order to commit "any hostile act" while not in uniform "renders the offender liable to trial for violation of the laws of war"); *id.* at 31 (enemies who come secretly through the lines for purposes of waging war by destruction of life or property "without uniform" not only are "generally not to be entitled to the status of prisoners of war," but also "to be offenders against the law of war subject to trial and punishment by military tribunals"). Because the Court in *Quirin* focused on conduct taken behind enemy lines, it is not clear whether the Court in these passages intended to refer only to conduct that would constitute perfidy or treachery. To the extent the Court meant to suggest more broadly that any hostile acts performed by unprivileged belligerents are *for that reason* violations of the laws of war, the authorities the Court cited (the Lieber Code and Colonel Winthrop's military law treatise) do not provide clear support. *See* John C. Dehn, *The* Hamdan *Case and the Application of a Municipal Offense*, 7 J. Int'l Crim. J. 63, 73-79 (2009); *see also* Baxter, *So-Called "Unprivileged Belligerency,"* 28 Brit. Y.B. Int'l L. at 339-40; Michael N. Schmitt, *Humanitarian Law and Direct Participation in Hostilities by Private Contractors or Civilian Employees*, 5 Chi. J. Int'l L. 511, 521 n.45 (2005); W. Hays Parks, *Special Forces' Wear of Non-Standard Uniforms*, 4 Chic. J. Int'l L. 493, 510-11 n.31 (2003). We note

Nothing in the text or legislative history of section 1119 indicates that Congress intended to criminalize such an operation. Section 1119 incorporates the traditional public authority justification, and did not impose any special limitation on the scope of that justification. As we have explained, *supra* at 17-19, the legislative history of that criminal prohibition revealed Congress's intent to close a jurisdictional loophole that would have hindered prosecutions of murders carried out by private persons abroad. It offers no indication that Congress intended to prohibit the targeting of an enemy leader during an armed conflict in a manner that would accord with the laws of war when performed by a duly authorized government agency. Nor does it indicate that Congress, in closing the identified loophole, meant to place a limitation on the CIA that would not apply to DoD.

Thus, we conclude that just as Congress did not intend section 1119 to bar the particular attack that DoD contemplates, neither did it intend to prohibit a virtually identical attack on the same target, in the same authorized conflict and in similar compliance with the laws of war, that the CIA would carry out in accord with

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in this regard that DoD's current Manual for Military Commissions does not endorse the view that the commission of an unprivileged belligerent act, without more, constitutes a violation of the international law of war. *See* Manual for Military Commissions, Part IV, § 5(13), Comment, at IV-11 (2010 ed., Apr. 27, 2010) (murder or infliction of serious bodily injury "committed while the accused did not meet the requirements of privileged belligerency" can be tried by a military commission "even if such conduct does not violate the international law of war").

[45] As one example, the Senate Report pointed to the Department of Justice's conclusion that the Neutrality Act, 18 U.S.C. § 960, prohibits conduct by private parties but is not applicable to the CIA and other government agencies. *Id.* The Senate Report assumed that the Department's conclusion about the Neutrality Act was premised on the assertion that in the case of government agencies, there is an "absence of the mens rea necessary to the offense." *Id.* In fact, however, this Office's conclusion about that Act was not based on questions of mens rea, but instead on a careful analysis demonstrating that Congress did not intend the Act, despite its words of general applicability, to apply to the activities of government officials acting within the course and scope of their duties as officers of the United States. *See Application of Neutrality Act to Official Government Activities*, 8 Op. O.L.C. 58 (1984).

See also infra at 38-41 (explaining that the CIA operation under the circumstances described to us would comply with constitutional due process and the Fourth Amendment's "reasonableness" test for the use of deadly force).

Accordingly, we conclude that, just as the combination of circumstances present here supports the judgment that the public authority justification would apply to the contemplated operation by the armed forces, the combination of circumstances also supports the judgment that the CIA's operation, too, would be encompassed by that justification. The CIA's contemplated operation, therefore, would not result in an "unlawful" killing under section 1111 and thus would not violate section 1119.

IV.

For similar reasons, we conclude that the contemplated DoD and CIA operations would not violate another federal criminal statute dealing with "murder" abroad, 18 U.S.C. § 956(a). That law makes it a crime to conspire within the jurisdiction of the United States "to commit at any place outside the United States an act that would constitute the offense of murder, kidnapping, or maiming if committed in the special maritime and territorial jurisdiction of the United States" if any conspirator acts within the United States to effect any object of the conspiracy.

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[46] *Cf. also VISA Fraud Investigation*, 8 Op. O.L.C. at 287 (applying similar analysis in evaluating the effect of criminal prohibitions on certain otherwise authorized law enforcement operations, and explaining that courts have recognized it may be lawful for law enforcement agents to disregard otherwise applicable laws "when taking action that is necessary to attain the permissible law enforcement objective, when the action is carried out in a reasonable fashion"); *id.* at 288 (concluding that issuance of an otherwise unlawful visa that was necessary for undercover operation to proceed, and done in circumstances—"for a limited purpose and under close supervision"—that were "reasonable," did not violate federal statute).

Like section 1119(b), section 956(a) incorporates by reference the understanding of "murder" in section 1111 of title 18. For reasons we explained earlier in this opinion, *see supra* at 12-14, section 956(a) thus incorporates the traditional public authority justification that section 1111 recognizes. As we have further explained both the CIA and DoD operations, on the facts as they have been represented to us, would be covered by that justification. Nor do we believe that Congress's reference in section 956(a) to "the special maritime and territorial jurisdiction of the United States" reflects an intent to transform such a killing into a "murder" in these circumstances—notwithstanding that our analysis of the applicability of the public authority justification is limited for present purposes to operations conducted abroad. A contrary conclusion would require attributing to Congress the surprising intention of criminalizing through section 956(a) an otherwise lawful killing of an enemy leader that another statute specifically prohibiting the murder of U.S. nationals abroad does not prohibit.

The legislative history of section 956(a) further confirms our conclusion that that statute should not be so construed. When the provision was first introduced in the Senate in 1995, its sponsors addressed and rejected the notion that the conspiracy prohibited by that section would apply to "duly authorized" actions undertaken on behalf of the federal government. Senator Biden introduced the provision at the behest of the President, as part of a larger package of anti-terrorism legislation. *See* 141 Cong. Rec. 4491 (1995) (statement of Sen. Biden). He explained that the provision was designed to "fill[] a void in the law," because section 956 at the time prohibited only U.S.-based conspiracies to commit certain property crimes abroad, and did not address crimes against persons. *Id.* at 4506. The amendment was designed to cover an offense "committed by terrorists" and was "intended to ensure that the government is able to punish those persons who use the United States as a base in which to plot such a crime to be carried out outside the jurisdiction of the United States." *Id.* Notably, the sponsors of the new legislation deliberately declined to place the new offense either within chapter 19 of title 18, which is devoted to "Conspiracy," or within chapter 51, which collects "Homicide" offenses (including those established in sections 1111, 1112, 1113 and 1119). Instead, as Senator Biden explained, "[s]ection 956 is contained in chapter 45 of title 18, United States Code, relating to interference with the foreign relations of the United States," and thus was intended to "cover[] those individuals who, without appropriate governmental authorization, engage in prohibited conduct that is harmful to the foreign relations of the United States." *Id.* at 4507. Because, as Senator Biden explained, the provision was designed, like other provisions of chapter 45, to prevent private interference with U.S. foreign relations, "[i]t is not intended to apply to duly authorized actions undertaken on behalf of the United States Government." *Id.*; *see also* 8 Op. O.L.C. 58 (1984) (concluding that section 5 of the Neutrality Act, 18 U.S.C. § 960, which is also in chapter 45 and which forbids the planning of, or participation in, military or naval expeditions to be carried on from the United States against a foreign state with which the United States is at peace, prohibits only persons acting in their private capacity from engaging in such conduct, and does not proscribe activities undertaken by government officials acting within the course and scope of their duties as United States officers). Senator Daschle expressed this same understanding when he introduced the identical provision in a different version of the anti-terrorism legislation a few months later. *See* 141 Cong. Rec. 11,960 (1995) (statement of Sen. Daschle). Congress enacted the new section 956(a) the following year, as part of the Antiterrorism and Effective Death Penalty Act, Pub. L. No. 104-132, tit. VII, § 704(a), 110 Stat. 1214, 1294-95 (1996). As far as

we have been able to determine, the legislative history contains nothing to contradict the construction of section 956(a) described by Senators Biden and Daschle.

Accordingly, we do not believe section 956(a) would prohibit the contemplated operations.

V.

We next consider the potential application of the War Crimes Act, 18 U.S.C. § 2441, which makes it a federal crime for a member of the Armed Forces or a national of the United States to "commit[] a war crime." *Id.* § 2441(a). Subsection 2441(c) defines a "war crime" for purposes of the statute to mean any conduct (i) that is defined as a grave breach in any of the Geneva Conventions (or any Geneva protocol to which the U.S. is a party); (ii) that is prohibited by four specified articles of the Fourth Hague Convention of 1907; (iii) that is a "grave breach" of Common Article 3 of the Geneva Conventions (as defined elsewhere in section 2441) when committed "in the context of and in association with an armed conflict not of an international character"; or (iv) that is a willful killing or infliction of serious injury in violation of the 1996 Protocol on Prohibitions or Restrictions on the Use of Mines, Booby-Traps and Other Devices. Of these, the only subsection potentially applicable here is that dealing with Common Article 3 of the Geneva Conventions.[47]

In defining what conduct constitutes a "grave breach" of Common Article 3 for purposes of the War Crimes Act, subsection 2441(d) includes "murder," described in pertinent part as "[t]he act of a person who intentionally kills, or conspires or attempts to kill . . . one or more persons taking no active part in the hostilities, including those placed out of combat by sickness, wounds, detention, or any other cause." 18 U.S.C. § 2441(d)(1)(D). This language derives from Common Article 3(1) itself, which prohibits certain acts (including murder) against "[p]ersons taking no active part in the hostilities, including members of armed forces who have laid down their arms and those placed '*hors de combat*' by sickness, wounds, detention, or any other cause." *See, e.g.*, Geneva Convention Relative to the Treatment of Prisoners of War, Aug. 12, 1949, [1955], art. 3(1), 6 U.S.T. 3316, 3318-20. Although Common Article 3 is most commonly applied with respect to persons within a belligerent party's control, such as detainees, the language of the article is not so limited—it protects all "[p]ersons taking no active part in the hostilities" in an armed conflict not of an international character.

Whatever might be the outer bounds of this category of covered persons, we do not think it could encompass al-Aulaqi. Common Article 3 does not alter the fundamental law-of-war principle concerning a belligerent party's right in an armed conflict to target individuals who are part of an enemy's armed forces. *See supra* at 23. The language of Common Article 3 "makes clear that members of such armed forces [of both the state and non-state parties to the conflict] . . . are considered as 'taking no active part in the hostilities' only once they have disengaged

[47] The operations in question here would not involve conduct covered by the Land Mine Protocol. And the articles of the Geneva Conventions to which the United States is currently a party *other than* Common Article 3, as well as the relevant provisions of the Annex to the Fourth Hague Convention, apply by their terms only to armed conflicts between two or more of the parties to the Conventions. *See, e.g.*, Geneva Convention Relative to the Treatment of Prisoners of War, Aug. 12, 1949, [1955], art. 2, 6 U.S.T. 3316, 3406.

from their fighting function ('have laid down their arms') or are placed *hors de combat*; mere suspension of combat is insufficient." International Committee of the Red Cross, *Interpretive Guidance on the Notion of Direct Participation in Hostilities Under International Humanitarian Law* 28 (2009); *cf. also id.* at 34 ("individuals whose continuous function involves the preparation, execution, or command of acts or operations amounting to direct participation in hostilities are assuming a continuous combat function," in which case they can be deemed to be members of a non-state armed group subject to continuous targeting); *accord Gherebi v. Obama*, 609 F. Supp. 2d 43, 65 (D.D.C. 2009) ("the fact that 'members of armed forces who have laid down their arms and those placed *hors de combat*' are not 'taking [an] active part in the hostilities' necessarily implies that 'members of armed forces' who have not surrendered or been incapacitated are 'taking [an] active part in the hostilities' simply by virtue of their membership in those armed forces"); *id.* at 67 ("Common Article 3 is not a suicide pact; it does not provide a free pass for the members of an enemy's armed forces to go to or fro as they please so long as, for example, shots are not fired, bombs are not exploded, and places are not hijacked"). Al-Aulaqi, an active, high-level leader of an enemy force who is continually involved in planning and recruiting for terrorist attacks, can on that basis fairly be said to be taking "an active part in hostilities." Accordingly, targeting him in the circumstances posited to us would not violate Common Article 3 and therefore would not violate the War Crimes Act.

VI.

We conclude with a discussion of potential constitutional limitations on the contemplated operations due to al-Aulaqi's status as a U.S. citizen, elaborating upon the reasoning in our earlier memorandum discussing that issue. Although we have explained above why we believe that neither the DoD or CIA operation would violate sections 1119(b), 956(a) and 2441 of title 18 of the U.S. Code, the fact that al-Aulaqi is a United States citizen could raise distinct questions under the Constitution. As we explained in our earlier memorandum, Barron Memorandum at 5-7, we do not believe that al-Aulaqi's U.S. citizenship imposes constitutional limitations that would preclude the contemplated lethal action under the facts represented to us by DoD, the CIA and the Intelligence Community.

Because al-Aulaqi is a U.S. citizen, the Fifth Amendment's Due Process Clause, as well as the Fourth Amendment, likely protects him in some respects even while he is abroad. *See Reid v. Covert*, 354 U.S. 1, 5-6 (1957) (plurality opinion); *United States v. Verdugo-Urquidez*, 494 U.S. 259, 269-70 (1990); *see also In re Terrorist Bombings of U.S. Embassies in East Africa*, 552 F.3d 157, 170 n.7 (2d Cir. 2008).

In *Hamdi*, a plurality of the Supreme Court used the *Mathews v. Eldridge* balancing test to analyze the Fifth Amendment due process rights of a U.S. citizen captured on the battlefield in Afghanistan and detained in the United States who wished to challenge the government's assertion that he was a part of enemy forces, explaining that "the process due in any given instance is determined by weighing 'the private interest that will be affected by the official action' against the Government's asserted interest, 'including the function involved' and the burdens the Government would face in providing greater process." 542 U.S. at 529 (plurality opinion) (quoting *Mathews v. Eldridge*, 424 U.S. 319, 335 (1976)).

We believe similar reasoning supports the constitutionality of the contemplated operations here. As explained above, on the facts represented to us, a decision-maker could reasonably decide that the threat posed by al-Aulaqi's activities to United States persons is "continued" and "imminent"

In addition to the nature of the threat posed by al-Aulaqi's activities, both agencies here have represented that they intend to capture rather than target al-Aulaqi if feasible; yet we also understand that an operation by either agency to capture al-Aulaqi in Yemen would be infeasible at this time.

Cf., e.g., Public Committee Against Torture in Israel v. Government of Israel, HCJ 769/02 ¶ 40, 46 I.L.M. 375, 394 (Israel Supreme Court sitting as the High Court of Justice, 2006) (although arrest, investigation and trial "might actually be particularly practical under the conditions of belligerent occupation, in which the army controls the area in which the operation takes place," such alternatives "are not means which can always be used," either because they are impossible or because they involve a great risk to the lives of soldiers).

Although in the "circumstances of war," as the *Hamdi* plurality observed, "the risk of erroneous deprivation of a citizen's liberty in the absence of sufficient process . . . is very real," 542 U.S. at 530, the plurality also recognized that "the realities of combat" render certain uses of force "necessary and appropriate," including against U.S. citizens who have become part of enemy forces—and that "due process analysis need not blink at those realities," *id.* at 531.

we conclude that at least where, as here, the target's activities pose a "continued and imminent threat of violence or death" to U.S. persons, "the highest officers in the Intelligence Community have reviewed the factual basis" for the lethal operation, and a capture operation would be infeasible—and where the CIA and DoD "continue to monitor whether changed circumstances would permit such an alternative,"

see also DoD May 18 Memorandum for OLC at 2—the "realities of combat" and the weight of the government's interest in using an authorized means of lethal force against this enemy are such that the Constitution would not require the government to provide further process to the U.S. person before using such force. *Cf. Hamdi* 542 U.S. at 535 (noting that Court "accord[s] the greatest respect and consideration to the judgments of military

authorities in matters relating to the actual prosecution of war, and . . . the scope of that discretion necessarily is wide") (plurality opinion).

Similarly, assuming that the Fourth Amendment provides some protection to a U.S. person abroad who is part of al-Qaida and that the operations at issue here would result in a "seizure" within the meaning of that Amendment,

The Supreme Court has made clear that the constitutionality of a seizure is determined by "balanc[ing] the nature and quality of the intrusion on the individual's Fourth Amendment interests against the importance of the governmental interests alleged to justify the intrusion." *Tennessee v. Garner*, 471 U.S. 1, 8 (1985) (internal quotation marks omitted); *accord Scott v. Harris*, 550 U.S. 372, 383 (2007). Even in domestic law enforcement operations, the Court has noted that "[w]here the officer has probable cause to believe that the suspect poses a threat of serious physical harm, either to the officer or to others, it is not constitutionally unreasonable to prevent escape by using deadly force." *Garner*, 471 U.S. at 11. Thus, "if the suspect threatens the officer with a weapon or there is probable cause to believe that he has committed a crime involving the infliction or threatened infliction of serious physical harm, deadly force may be used if necessary to prevent escape and if, where feasible, some warning has been given." *Id.* at 11-12.

The Fourth Amendment "reasonableness" test is situation-dependent. *Cf. Scott*, 550 U.S. at 382 (*Garner* "did not establish a magical on/off switch that triggers rigid preconditions whenever an officer's actions constitute 'deadly force'"). What would constitute a reasonable use of lethal force for purposes of domestic law enforcement operations will be very different from what would be reasonable in a situation like such as that at issue here. In the present circumstances, as we understand the facts, the U.S. citizen in question has gone overseas and become part of the forces of an enemy with which the United States is engaged in an armed conflict; that person is engaged in continual planning and direction of attacks upon U.S. persons from one of the enemy's overseas bases of operations; the U.S. government does not know precisely when such attacks will occur; and a capture operation would be infeasible. . at least where high-level government officials have determined that a capture operation overseas is infeasible and that the targeted person is part of a dangerous enemy force and is engaged in activities that pose a continued and imminent threat to U.S. persons or interests the use of lethal force would not violate the Fourth Amendment. and thus that the intrusion on any Fourth Amendment interests would be outweighed by "the importance of the governmental interests [that] justify the intrusion," *Garner*, 471 U.S. at 8, based on the facts that have been represented to us.

Please let us know if we can be of further assistance.

David J. Barron
Acting Assistant Attorney General