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The Twin Perils of the *al-Aulaqi* Case: The Treason Clause and the Equal Protection Clause

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NOTES

The Twin Perils of the *al-Aulaqi* Case

THE TREASON CLAUSE AND THE EQUAL PROTECTION CLAUSE

“Civis Romanus sum”¹

INTRODUCTION

During March 2013, a legal question dominated the U.S. news cycle: “Does the President have the authority to use a weaponized drone to kill an American not engaged in combat on American soil?”² This inquiry represents the paramount question in American constitutional balancing: the total deprivation of a citizen’s life, liberty, and property³ by secret,

¹ In Rome, a citizen accused of any crime would need merely utter “*civis Romanus sum*,” “I am a Roman citizen,” to avoid judicial process as a non-citizen. See *Acts 22, 27* (King James). While preaching in Damascus, the apostle Paul avoids being immediately whipped by a centurion for zealous demagoguery by asserting his citizenship and, in subsequent chapters, is afforded appellate process—all the way to Caesar. *Id.* at 22-28.

² Letter from Eric H. Holder, Attorney General to Sen. Rand Paul (Mar. 7, 2013) [hereinafter March 7 Holder Letter], reprinted in Daniel Hapler, *Holder’s Letter to Rand Paul*, WKLY. STANDARD (Mar. 7, 2013), http://www.weeklystandard.com/blogs/holders-letter-rand-paul-no-us-cant-use-drone-kill-citizen-not-engaged-combat-us-soil_706587.html.

³ For example, the Government handling of Anwar al-Aulaqi resulted in the deprivation of: his life, by virtue of his death by droning; his liberty, e.g., by the restriction on his right to travel; and his property, by the subjection of his assets to total seizure and forfeiture (and to the disinheritance of his heir working a prohibited corruption of blood). Mark Mazzetti et al., *Two-Year Manhunt Led to Killing of Awlaki in Yemen*, N.Y. TIMES (Sept. 30, 2011) (describing al-Aulaqi’s droning by U.S. order and process), available at <http://www.nytimes.com/2011/10/01/world/middleeast/anwar-al-awlaki-is-killed-in-yemen.html?pagewanted=all>; see *infra* Part V.A.2.b (discussing the restrictions on liberty of movement by virtue of governmental lethal targeting in Yemen); Designation of ANWAR AL-AULAQI Pursuant to Executive Order 13224 and the Global Terrorism Sanctions Regulations, 31 C.F.R. Part 594, 75 Fed. Reg. 43233-01 (July 23, 2010) [hereinafter al-Aulaqi Designation]; *infra* Parts I.A.3 & IV.B (discussing the constitutional guarantee that a traitor’s forfeited assets will go to the traitor’s heirs).

unreviewable executive order⁴ weighted against the presidential duty and power to defend the people from warlike assault.⁵ In responding to this question, Attorney General Eric Holder denied that the President had this authority to kill Americans without process, but his response contained the seemingly innocuous qualifier that “[the American must] not [be] engaged in combat.”⁶ Moreover, on March 4, 2013, Holder affirmed that in response to circumstances like the Pearl Harbor or September 11 attacks, the President may “authorize lethal force, such as a drone strike, against a U.S. citizen on U.S. soil, and without trial.”⁷ The distinction between when the President may and may not so deprive a citizen’s liberty appears to hinge upon whether the citizen is conducting a war or engaging in combat against the United States.

While drawing this important distinction, Holder likely was cognizant of the favorable case law on the federal power to conduct drone strikes—case law that would almost undoubtedly permit the unreviewable, executively ordered droning of CIA designated terrorist suspects on U.S. soil without trial,⁸ and that absolutely permits doing so on foreign soil.⁹ Federal case law defines terrorist acts by enemy combatants as “levying war [against the United States],”¹⁰ and declares the lethal targeting of terrorist subjects a nonjusticiable political

⁴ *Al-Aulaqi v. Obama*, 727 F. Supp. 2d 1, 46-47 (D.D.C. 2010) (finding that the lethal targeting of U.S. citizen Anwar al-Aulaqi is a nonjusticiable political question).

⁵ U.S. CONST. art II, § 1, cl. 8; 3 (“I do solemnly swear (or affirm) that I will faithfully execute the Office of President of the United States, and will to the best of my Ability, preserve, protect and defend the Constitution of the United States,” and respectively, “take care that the laws be faithfully executed.”).

⁶ March 7 Holder Letter, *supra* note 2.

⁷ Letter from Eric H. Holder, Attorney General to Sen. Rand Paul (Mar. 4, 2013), available at <http://www.paul.senate.gov/files/documents/BrennanHolderResponse.pdf>.

⁸ *Al-Aulaqi*, 727 F. Supp. 2d at 46-47 (applying the political question doctrine); John C. Dehn & Kevin John Heller, Debate, *Targeted Killing: The Case of Anwar al-Aulaqi*, 159 U. PA. L. REV. PENNUMBRA 175, 185-87 (2011), available at <http://www.pennumbra.com/debates/pdfs/TargetedKilling.pdf>.

⁹ See *Al-Aulaqi*, 727 F. Supp. 2d at 46-47.

¹⁰ *United States v. Rahman*, 189 F.3d 88, 149-60 (2d Cir. 1999) (per curiam), *cert. denied*, 528 U.S. 1094 (2000); *accord* *United States v. Augustin*, 661 F.3d 1105, 1117 (11th Cir. 2011), *cert. denied*, 132 S. Ct. 2444 (2012); *United States v. Awadallah*, 349 F.3d 42, 59 (2d Cir. 2003), *cert. denied*; *Awadallah v. United States*, 543 U.S. 1056 (2005) (“The particular governmental interests at stake therefore were the indictment and successful prosecution of terrorists whose attack, if committed by a sovereign, would have been tantamount to war, and the discovery of the conspirators’ means, contacts, and operations in order to forestall future attacks”); *United States v. Rodriguez*, 803 F.2d 318, 320 (7th Cir. 1986), *cert. denied*, 480 U.S. 908 (1987).

question.¹¹ The legal basis for this power was recently affirmed in the 2010 case *al-Aulaqi v. Obama*.¹²

On September 30, 2011, Anwar al-Aulaqi¹³ was struck “by ‘a barrage of Hellfire missiles’ fired from a [predator] drone.”¹⁴ At the time, he was traveling by car on a deserted Yemeni highway with fellow U.S. citizen, and “proud” traitor, Samir Khan.¹⁵ The killing followed a fact-finding and a legal determination by the CIA that al-Aulaqi should die.¹⁶ No U.S. court ever found al-Aulaqi guilty of any violent crime.¹⁷

Nevertheless, the President ordered al-Aulaqi’s killing¹⁸ because he was the “leader of external operations” in the terrorist organization al-Qaeda in the Arabian Peninsula (AQAP), al-Qaeda’s “most active operational affiliate.”¹⁹ Al-Aulaqi’s killing prompted his family²⁰ to bring two federal lawsuits as representatives, *al-Aulaqi v. Obama* and *al-Aulaqi v.*

¹¹ *Al-Aulaqi*, 727 F. Supp. 2d at 46-47 (applying the political question doctrine).

¹² *Id.* at 1.

¹³ Anwar’s last name has been spelled many ways, most commonly “al-Awlaki,” “Awlaki,” “al-Awlaqi,” or “al-Aulaki.” Mazzetti et al., *supra* note 3 (quoting Samir Khan). This note uses “al-Aulaqi” because this is how the family and the District Court for the District of Columbia spells the name. *See, e.g., Al-Aulaqi*, 727 F. Supp. 2d at 1; Complaint at ¶ 9, *Al-Aulaqi*, 727 F. Supp. 2d 1 (No. 1:10-cv-01469) [hereinafter *Al-Aulaqi* Complaint].

¹⁴ Mark V. Vlastic, *Assassination & Targeted Killing—A Historical and Post-Bin Laden Legal Analysis*, 43 GEO. J. INT’L L. 259, 330 (2011) (citing Mazzetti et al., *supra* note 3).

¹⁵ Mazzetti et al., *supra* note 3 (quoting Samir Khan).

¹⁶ Benjamin McKlevey, Note, *Due Process Rights and the Targeted Killing of Suspected Terrorists: The Unconstitutional Scope of Executive Killing Power*, 44 VAND. J. TRANSNAT’L L. 1353, 1358-59 (2011) (describing briefly the CIA process for approving kill list status). *See generally* Tara McKlevey, *Inside the Killing Machine*, NEWSWEEK, Feb. 21, 2011, available at <http://www.thedailybeast.com/newsweek/2011/02/13/inside-the-killing-machine.html>.

¹⁷ *See infra* note 97 and accompanying text (describing the entirety of al-Aulaqi’s criminal record).

¹⁸ *Islamist Cleric Anwar al-Awlaki Killed in Yemen*, B.B.C. NEWS (Sept. 30, 2011), <http://www.bbc.co.uk/news/world-middle-east-15121879>; *see also* McKlevey, *Due Process Rights*, *supra* note 16, at 1358 (noting the National Security Council’s approval of the use of lethal force).

¹⁹ Mazzetti et al., *supra* note 3 (“The death of Awlaki is a major blow to Al Qaeda’s most active operational affiliate . . . [al-Aulaqi took] the lead role in planning and directing the efforts to murder innocent Americans.” (quoting Barack Obama, President, Remarks at the Swearing-In Ceremony for Chairman of the Joint Chiefs of Staff Gen. Martin E. Dempsey (Sept. 30, 2011))).

²⁰ These lawsuits were filed by family members purporting to be the representatives of the individuals allegedly placed on the CIA’s kill list, *see Al-Aulaqi* Complaint, *supra* note 13, at ¶ 9 (asserting third party standing); however, the question of third-party standing to bring such challenges, like the merits of the challenge, remains open. Complaint at ¶¶ 10, 41-3, *Al-Aulaqi v. Panetta*, No. 1:12-cv-01192-RMC (D.C. Cir. 2012) [hereinafter *Panetta* Complaint]. The implications of third-party standing are discussed *infra* at Part IV.B.

Panetta.²¹ The first of these suits, *al-Aulaqi v. Obama*, sought to enjoin the CIA from placing al-Aulaqi on a “kill list[.]”²² The suit posed novel questions regarding the constitutionality of using such force against U.S. citizens overseas.²³ *Al-Aulaqi v. Panetta* has not yet been resolved. Many scholars have questioned the Executive’s unilateral—and apparently unreviewable—power to order the targeted killing of citizens who have not been found guilty of any crime by any U.S. court.²⁴

Fear over the abuse of government power to execute citizens for capital offenses motivated the inclusion of the Treason Clause in the Constitution:

²¹ See generally, e.g., *Al-Aulaqi*, 727 F. Supp. 2d 1; *Panetta* Complaint, *supra* note 20.

²² *Al-Aulaqi*, 727 F. Supp. 2d at 11.

²³ See *Al-Aulaqi*, 727 F. Supp. 2d at 8 (“Stark, and perplexing, questions readily come to mind, including the following: How is it that judicial approval is required when the United States decides to target a U.S. citizen overseas for electronic surveillance, but that, according to defendants, judicial scrutiny is prohibited when the United States decides to target a U.S. citizen overseas for death?”); see also *N.Y. Times Co. v. U.S. Dep’t of Justice*, 915 F. Supp. 2d 508, 515-16 (S.D.N.Y. 2013) (“[T]he Government . . . cannot be compelled by this court of law to explain . . . the reasons why its actions do not violate the Constitution and laws of the United States. The Alice-in-Wonderland nature of this pronouncement is not lost on me; but after careful and extensive consideration, I find myself stuck in a paradoxical situation in which I cannot solve a problem because of contradictory constraints and rules—a veritable Catch-22. I can find no way around the thicket of laws and precedents that effectively allow the Executive Branch . . . to proclaim as perfectly lawful certain actions that seem on their face incompatible with our Constitution and laws, while keeping the reasons for its conclusion a secret.”).

²⁴ See generally, e.g., Ryan Patrick Alford, *The Rule of Law at the Crossroads: Consequences of Targeted Killing of Citizens*, 2011 UTAH L. REV. 1203, 1206 (2011) (discussing the parallels between medieval law and modern treason law); Carlton F.W. Larson, *The Forgotten Constitutional Law of Treason and the Enemy Combatant Problem*, 154 U. PA. L. REV. 863 (2006) (arguing that the Treason Clause provides for criminal process of how U.S. citizen-enemy combatants should be treated); Michael Ramsey, *Meet the New Boss, Continuity in Presidential War Powers*, 35 HARV. J. L. & PUB. POL’Y 863 (2012) (arguing that the Constitution requires that persons in al-Aulaqi’s situation be tried for Treason under Article III); Philip Dore, Comment, *Greenlighting American Citizens: Proceed With Caution*, 72 LA. L. REV. 255, 257 (2011) (arguing that “the foreign murder statute prohibits the targeted killing of Anwar al-Awlaki.”); Mike Dreyfuss, Note, *My Fellow Americans, We Are Going to Kill You: The Legality of Targeting and Killing U.S. Citizens Abroad*, 65 VAND. L. REV. 249, 273 (2012) (arguing that Procedural Due Process demands only that a person in al-Aulaqi’s situation receives notice, and an opportunity to be heard if that person surrenders to authorities); Abraham U. Kannof, Comment, *Dueling Nationalities: Dual Citizenship, Dominant and Effective Nationality, And The Case of Anwar Al-Aulaqi*, 25 EMORY INT’L L. REV. 1371, 1415 (2011) (arguing that al-Aulaqi should not be treated as a U.S. citizen for constitutional purposes, but a Yemeni citizen, and afforded the attendant protections); Lindsay Kwoka, Comment, *Trial By Sniper: The Legality of Targeted Killing In the War on Terror*, 14 U. PA. J. CONST. L. 301 (2011) (arguing that under the *Mathews* test and *Hamdi*, there is a minimum Fifth Amendment Due Process right to appear before a neutral decision-maker); McKlevey, *supra* note 16 (arguing that under the *Mathews* test and *Hamdi*, the current policy regarding targeted killing without notice and an opportunity to be heard violates minimum due process rights).

Treason against the United States, shall consist only in levying War against them, or in adhering to their Enemies, giving them Aid and Comfort. No Person shall be convicted of Treason unless on the Testimony of two Witnesses to the same overt Act, or on Confession in open Court. The Congress shall have Power to declare the Punishment of Treason, but no Attainder of Treason shall work Corruption of Blood, or Forfeiture except during the Life of the Person attainted.²⁵

Enshrined in the Constitution is a single, necessary and sufficient definition of what acts constitute treason. The word “traitor” is a powerful epithet that conjures images of historic villains like Benedict Arnold, Ephialtes,²⁶ or Judas Iscariot. It is this animus—and the historically demonstrable potential for tyrannical abuse of a government’s power to punish treacherous wrongdoers²⁷—that galvanized the Founding Fathers to include the “fundamentally restrictive” Treason Clause²⁸ and to tout it as an instrument of liberty.²⁹

It is, however, unclear precisely what the Treason Clause demands in a situation like al-Aulaqi’s.³⁰ All other things equal,

²⁵ U.S. CONST. art. III, § 3.

²⁶ Ephialtes showed the Persians the path to route the Spartans at Thermopylae. HERODOTUS, *THE HISTORIES*, bk. 7, ch. 213, § 1 (John Marincola, ed., Aubrey De Selincourt, trans., Penguin ed., 1996).

²⁷ Larson, *supra* note 24 at 873 (quoting James Wilson) (“This punishment [execution], and the description of this crime, are the great sources of danger and persecution, on the part of government, against the citizen. Crimes against the state! and against the officers of the state! History informs us that more wrong may be done on this subject than on any other whatsoever.”); JAMES WILLARD HURST, *THE LAW OF TREASON IN THE UNITED STATES: COLLECTED ESSAYS*, 143 (Stanley I. Kitler, ed., 1971) (quoting Rufus King). As to animus, one merely needs to look at the statute to understand the severity society attaches to this crime. 18 U.S.C. § 2381 (2012) (codifying that traitors “shall suffer death”).

²⁸ HURST, *supra* note 27, at 132.

²⁹ See, e.g., THE FEDERALIST NO. 43 (James Madison), *reprinted in* PENN STATE, *Electronic Classics Series, The Federalist Papers* (2001) (“As treason may be committed against the United States, the authority of the United States ought to be enabled to punish it. But as new-fangled and artificial treasons have been the great engines by which violent factions, the natural offspring of free government, have usually wreaked their alternate malignity on each other, the convention have, with great judgment, opposed a barrier to this peculiar danger, by inserting a constitutional definition of the crime, fixing the proof necessary for conviction of it, and restraining the Congress, even in punishing it, from extending the consequences of guilt beyond the person of its author.”).

³⁰ Compare, e.g., Dreyfuss, *supra* note 24, at 273 (“[G]uarantee of a jury trial is a protection available if the designated individual decides to avail himself of it. With regard to targeted killings, the Constitution, however, does not demand that a person who is a military threat to the United States remain at large because he is good at avoiding arrest.”), with Ramsey, *supra* note 24 at 869-70 (“Absent exigent circumstances, the Constitution provides a specific way for acting against U.S. citizens . . . [like al-Aulaqi]: the Treason Clause.”), and Larson, *supra* note 24 (arguing that the Treason Clause provides for criminal process of how U.S. citizen-enemy combatants should be treated).

the Constitution discriminates between citizens and non-citizens who levy war against the United States³¹ by affording citizens additional procedural protections beyond, and, as a constitutional due process constraint, preceding³² what the Fifth Amendment provides.³³ Al-Aulaqi engaged in terrorist activities, but he was also a citizen—a citizen-terrorist.³⁴ It is possible, therefore, that his actions constituted treason. It is also possible that his actions merely constituted speech protected by the First Amendment, as it is curious how a supporter of George W. Bush—who addressed a Pentagon luncheon for the Department of Defense in February 2002—could become the global leader of al Qaeda’s newest form by 2010.³⁵ However, this note presumes all facts favorable to the government, in an attempt to isolate the issues of law from issues of fact.

Commentators have discussed the broad Treason Clause claim generated by the unique circumstances of the al-Aulaqi situation: the restrictive intent behind the Treason Clause means it is constitutionally appropriate to treat citizen-terrorists as traitors.³⁶ However, by broadly focusing on the

³¹ It is a settled matter of constitutional law that the Treason Clause applies only persons owing allegiance, a category that includes every U.S. citizen and those non-citizens who owe allegiance. *See infra* note 125.

³² *Cf. Ex parte Quirin*, 317 U.S. 1, 39 (1942) (per curiam) (finding Article III protections not “enlarge[d]” by additional amendments to the Constitution).

³³ *Compare* U.S. CONST. art. III, § 3 (providing specifically for the unique requirement of two witnesses to the same overt acts as a procedural protection), *with id.* at amend. V (providing for “due process” in all other crimes).

³⁴ The use of “citizen-terrorist” throughout this note serves as shorthand for U.S. citizens conducting politically or religiously motivated war against the United States in connection with a terrorist organization. In the most convenient definition, citizen-terrorists are the class of people affected by the *al-Aulaqi* case based on factually similar positioning. *See generally* Richard H. Fallon, *As-Applied and Facial Challenges and Third Party Standing*, 113 HARV. L. REV. 1321 (2000); *id.* at 1368 (“as-applied challenges reflect entrenched though often unarticulated presuppositions that the full meaning of a statute frequently is not obvious on the occasion of its first application, but can be left to emerge through case-by-case *specification* . . .”). Portions of those notes may arguably apply to non-citizens owing allegiance, and indeed the arguments that relate solely to the Treason Clause indubitably would. This note, however, does not explore the effect of the Equal Protection Clause in the context a non-citizen-terrorists owing allegiance.

³⁵ JEREMY SCAHILL, *DIRTY WARS: THE WORLD IS A BATTLEFIELD* 36, 45 (Nation Books, 2013). For a general description of the narrative were al-Aulaqi was hounded by the government—unfairly and in violation of his rights—into finally fighting against his country, see generally *id.* at chs. 2, 5, 18, 23, 33, 34, 37, 38, 44, 50, 55, 57.

³⁶ Emily C. Kendall, *Guy Fawkes’s Dangerous Remedy: The Unconstitutionality of Government-Ordered Assassination Against U.S. Citizens and Its Implications For Due Process in America*, 45 J. MARSHALL L. REV. 1121, 1136 (2012) (arguing that “[the] Treason Clause is the constitutionally appropriate remedy for bringing domestic terrorists to justice”); *see also, e.g.*, Larson, *supra* note 24, at 863 (“The Article also argues that many terrorist actions are appropriately punished as treason, either as acts of levying war against the United States or of adhering to their

general restrictive intention, this scholarship overlooks the more basic threshold question: is it even constitutionally *permissible* for the Government to treat citizen-terrorists differently than traitors?

Considering the al-Aulaqi killing in conjunction with a reading of either the Treason Clause or, in most cases, the Equal Protection Clause of the Fourteenth Amendment makes clear that the answer to this question is no.³⁷ The Supreme Court has consistently held that the prosecution of criminals without the procedural and substantive protections of the Treason Clause under a crime that is substantively treason, but differently named, is an unconstitutional prosecution for a constructive treason offense.³⁸ Similarly, in *Skinner v. Oklahoma ex rel. Williamson*, the Supreme Court held that under the Equal Protection Clause of the Fourteenth Amendment, the Government may not “lay[] an unequal hand” on criminals who have committed “intrinsically the same . . . offense.”³⁹ In that case, the Court considered a lesser right than the right to life, the right to reproduce.⁴⁰

In *Hamdi v. Rumsfeld*,⁴¹ a plurality of the Supreme Court addressed the liberty of Guantanamo detainees and held that citizen-terrorists (even those termed enemy combatants in the War on Terror) are entitled to due process. The actions considered by the Supreme Court, if committed by citizens, would be punishable as treason.⁴² Thus, there are twin perils confronting any court adjudicating a modern terrorism case where the defendant is a U.S. citizen. First, a court must avoid the temptation to draw immaterial distinctions between the constitutional definition of treason and modern statutes

enemies. Rather than representing a fundamental departure from the ordinary criminal law paradigm, terrorist actions fit comfortably within it.”); Benjamin A. Lewis, *An Old Means To A Different End: The War On Terror, American Citizens . . . and the Treason Clause*, 34 HOFSTRA L. REV. 1215 (2006); Ramsey, *supra* note 24.

³⁷ For the purposes of this discussion, it is assumed that the Government gave al-Aulaqi all process due under the law for similarly situated non-citizen terrorist organization operatives. Those due process claims have been discussed by many commentators, *see supra* note 24. This discussion is bracketing off those claims to focus on other arguments that have not been given their due examination. The issue taken here is not with treating terrorists in general this way, but treating in this way citizen-terrorists.

³⁸ *See Cramer v. United States*, 325 U.S. 1, 45 (1945) (“[The Court does not] . . . intimate that Congress could dispense with the two-witness rule merely by giving the same offense [treason] another name.”); *see infra* Part I.A (describing the contours of this rule and its jurisprudential history in detail).

³⁹ *Skinner v. Oklahoma ex rel. Williamson*, 316 U.S. 535, 541 (1942) (Douglas, J.).

⁴⁰ *Skinner*, 316 U.S. at 536.

⁴¹ 542 U.S. 507 (2004) (O’Connor, J.) (plurality opinion).

⁴² *See infra* Part III.C.

criminalizing terrorism or else it risks ignoring the prohibition against prosecuting constructive treasons. Then, it must take care to avoid the second peril of ensuring that any differential treatment of a citizen-terrorist and a traitor does not violate the Equal Protection Clause. Courts have yet to confront the second peril because every court to consider the interplay between the Treason Clause and citizen-terrorists to date has faltered at the first peril. Therefore, and based on citizenship alone, the execution of a U.S. citizen without judicial process—even for committing terrorist acts—violates the prohibitions of both the Treason Clause and the Equal Protection Clause.

In Part I, this note briefly summarizes jurisprudence surrounding the two constitutional provisions relevant to the issues raised by *al-Aulaqi*: the Treason Clause and the Equal Protection Clause. Part II reviews the relevant facts of the *al-Aulaqi* case. Part III examines the elements of the crimes of treason by levying war and terrorism, and establishes that when committed by a citizen, treason by levying war and terrorism are essentially the same offense with only immaterial and legally inconsequential variances. In Part IV, this note discusses the first peril of *al-Aulaqi*: that the law of treason precludes the Government from charging citizens with terrorism offenses that are not materially different from treason, yet fails to provide the constitutional protections afforded to traitors. Part V discusses the second peril: that denying citizen-terrorists the same constitutional protections as traitors violates the Equal Protection Clause⁴³ and would therefore subject the Government's actions in *al-Aulaqi*'s case to strict scrutiny review.⁴⁴ Finally, this note concludes that the Treason Clause precludes the Executive from issuing kill orders against citizen-terrorists without being processed by an Article III court. It further suggests a specific remedy.

⁴³ See *infra* Part V.A.

⁴⁴ See *infra* Part V.B.

I. TREASON AND EQUAL PROTECTION JURISPRUDENCE IN THE UNITED STATES

A. *The Law of Treason*

1. The Treason Clause and the Rule Against Constructive Treasons

American treason law borrows heavily from English treason law, as evinced by the influence of the then-prevailing English treason statute⁴⁵ upon the constitutional drafters.⁴⁶ Before the Statute of Edward III codified a restrictive definition of treason, the English courts had the power to create what James Madison called a “new-fangled and artificial treason[.]”⁴⁷ Madison was referring to an English court’s power to invent a constructive treason by expanding the common law definition of treason to accommodate novel facts.⁴⁸ That is to say, the courts had the power to declare acts treasonable that had never been so before.⁴⁹

Madison further described constructive treasons as “the great engines by which violent factions, the natural offspring of free government, have usually wreaked their alternate malignity on each other.”⁵⁰ In Revolutionary Era England, this malignity typically took the form of public hanging, drawing, and quartering.⁵¹ Not surprisingly, the abusive use of constructive treason became disfavored in England; and the Statute of Edward III altered the law, codifying the definition of treason and requiring that novel treason cases must go before Parliament, instead of the courts.⁵²

⁴⁵ Treason Act, 1351, 25 Edw. 3, c. 2.

⁴⁶ *Cramer v. United States*, 325 U.S. 1, 67 (1945) (Douglas, J., dissenting) (“The most relevant source of materials for interpretation of the [T]reason [C]lause of the Constitution is the statute of 25 Edw. III, Stat. 5, ch. 2 (1351) and the construction which was given it.”); HURST, *supra* note 27 at 138-40; Larson, *supra* note 24, at 870 (“No provision of the Constitution is as rooted in English legal history as the Treason Clause. It would likely surprise most Americans to learn that a portion of the United States Constitution is taken almost verbatim from an English statute [25 Edw. 3 c. 2] enacted when Geoffrey Chaucer was eight years old. The phrases ‘levying war’ and ‘adhering to their enemies, giving them aid and comfort’ in the Treason Clause come directly from the treason statute of 25 Edward III, enacted in 1351.”).

⁴⁷ See THE FEDERALIST NO. 43, *supra* note 29; see also HURST, *supra* note 27, at 143.

⁴⁸ HURST, *supra* note 27, at 139.

⁴⁹ *Id.*

⁵⁰ See THE FEDERALIST NO. 43, *supra* note 29.

⁵¹ Treason Act, 1351, 25 Edw. 3, c. 2; *United States v. Rahman*, 189 F.3d 88, 112 (2d Cir. 1999) (per curiam) (citing 4 WILLIAM BLACKSTONE, COMMENTARIES *92).

⁵² HURST, *supra* note 27, at 139.

While the Statute of Edward III was certainly an improvement over the use of constructive treasons by a handpicked judiciary serving at the pleasure of the King,⁵³ the Founding Fathers thought that this was not enough protection for treason defendants. Mindful of their status as traitors while fighting the rule of England,⁵⁴ they sought to eliminate the potential for abusive prosecution of treason against groups with public grievances by including systemic, constitutional restrictions.⁵⁵ First they created a fixed, restrictive definition of treason by limiting it to the two offenses enumerated in the Constitution—levying war and adhering to the enemy.⁵⁶ Second, they deliberately moved the Treason Clause to its final position in Article III from its draft position in Article I so that the Judiciary would “administer the clause” and Congress would have no power with respect to the scope of the offense.⁵⁷ Third, they established an evidentiary requirement that two witnesses testify to the same overt treasonous act, which further reflected the “fundamentally restrictive attitude” behind the Drafters’ inclusion of the Clause.⁵⁸ Finally, regarding the scope of the punishment, corruption of blood,⁵⁹ the forfeiture of the convicted traitor’s estate and disinheritance of successors,⁶⁰ were prohibited entirely. In the broadest sense, the Drafters sought to disable the Government from either amending the definition of treason, or from punishing traitors without first satisfying a high burden of proof.⁶¹

⁵³ BLACK’S LAW DICTIONARY 439 (9th ed. 2009) (defining “*Curia Regis*,” the King’s court of appeals); see also Alford, *supra* note 24, at 1205-06, 1215.

⁵⁴ *United States v. Rodriguez*, 803 F.2d 318, 320 (“[T]hey themselves were traitors in the eyes of England.”), *cert. denied*, 480 U.S. 908; *N.Y. Times Co. v. U.S. Dep’t of Justice*, 915 F. Supp. 2d 508, 523 (S.D.N.Y. 2013).

⁵⁵ *Rodriguez*, 803 F.2d at 320 (“The reason for the restrictive definition is apparent from the historical backdrop of the treason clause. The framers of the Constitution were reluctant to facilitate such prosecutions because they were well aware of abuses . . .”).

⁵⁶ The language in the Treason Clause intentionally reflects that of the prevailing English treason statute, the Statute of Edward III, in order to limit the definition of the crime to the “old terms.” HURST, *supra* note 27, at 131; see also Jon Roland, *Hurst’s Law of Treason*, 35 UWLA L. REV. 297, 297-98 (2003).

⁵⁷ HURST, *supra* note 27, at 139.

⁵⁸ *Id.*, at 132.

⁵⁹ “[A] ‘corruption of blood’ is the perpetual forfeiture of the convicted person’s estate to the disinheritance of his or her heirs or children.” See *infra* note 77 and accompanying text.

⁶⁰ See *infra* note 77.

⁶¹ U.S. CONST. art. III, § 3 (requiring two witnesses to the same overt act); HURST, *supra* note 27, at 130 (“At one stroke, the basis of the restrictive policy had been laid: all authority is taken from any other agency to define the extent of the crime . . .”).

Interpreting the Clause with an eye toward its restrictive nature, Chief Justice Marshall acknowledged in *Ex parte Bollman* that:

To prevent the possibility of those calamities . . . that great fundamental law which defines and limits the various departments of our government has given a rule on the subject both to the legislature and the courts of America, *which neither can be permitted to transcend.*

Treason against the United States shall consist only in levying war against them, or in adhering to their enemies, giving them aid and comfort.⁶²

Accordingly, the Court created a doctrinal rule to reflect the comprehensive yet precisely circumscribed treason definition enshrined in the Constitution: from *Bollman* in 1807 to *Cramer v. United States* in 1947, the Court has consistently held that treason may not be extended beyond its constitutional definition.⁶³ By virtue of this rule against constructive treasons, merely immaterial variations in the elements of treason that leave the gravamen of the offense intact will not create a separate offense which avoids bringing the additional procedural protections of the Treason Clause into play.⁶⁴

2. Separation of Powers: The State's Role in Crimes against the State

Although the relocation of the Treason Clause from Article I to Article III was intended to constrain the legislature, "The treason clause[] [is] clearly [a] limitation[] upon all the agencies of government, instead of . . . the legislative branch

⁶² *Ex parte Bollman*, 8 U.S. (4 Cranch) 75, 125-26 (1807) (emphasis added) (quoting U.S. CONST. art III, § 3) (holding that conspiracy to levy war is a separate offense from that of treason by levying war, and is not subject to the constitutional restrictions of Article III); *see also infra* note 70 and accompanying text.

⁶³ *Bollman*, 8 U.S. (4 Cranch) at 127 ("[T]he crime of treason should not be extended by construction to doubtful cases; and that crimes not clearly within the constitutional definition, should receive such punishment as the legislature in its wisdom may provide."); *see also id.* at 118 ("The intention of having a constitutional definition of the crime, was to put it out of the power of congress to invent treasons."); *Cramer v. United States*, 325 U.S. 1, 45 (1945) ("[The Court does not] . . . intimate that Congress could dispense with the two-witness rule merely by giving the same offense [treason] another name."); HURST, *supra* note 27, at 239 (stating that the Drafters "[A]cknowledg[ed] that the [T]reason [C]lause . . . set the exclusive definitions of treason; Congress might not vary the elements of treason or escape the substantive constitutional definition . . . by attaching a different label to [treason].").

⁶⁴ *See supra* note 63.

only.”⁶⁵ Congress only has the power to prescribe a limited punishment and has no power to redefine treason as such or to expand that category of behavior that falls within the ambit of “treason.”⁶⁶ The Judiciary is given the responsibility to administer the law of treason, yet cannot expand the definition of treason.⁶⁷ The Executive has no express grant of responsibility with respect to treason, but one may reasonably presume that the President’s Article II “take care” powers⁶⁸ would encompass, for example, the incidental role of serving as prosecutor, custodian, or executioner. The Constitution’s lack of any express grant should be read as giving the President the least authority in the administration of treason.⁶⁹

Further, in *Ex parte Garland*, the Supreme Court read the prohibition against corruptions of blood as a constitutional charge to the Judiciary: “[T]herefore, to still further guard against this odious form of punishment, it is provided, in section three of article iii, concerning the judiciary [that Congress may not work a corruption of blood]”⁷⁰ This reading by the Court—that the placement of the Treason Clause and its prohibition on corruptions of blood in Article III charges the Judiciary to guard against its use—further bolsters the conclusion that the placement of treason within Article III textually commits the role of administering treason law to the Judiciary.⁷¹ This reading of Article III as a separation of powers regarding the administration of treason law was most recently

⁶⁵ HURST, *supra* note 27, at 165; *see also* Alford, *supra* note 24, at 1215; *infra* Part V.A.

⁶⁶ U.S. CONST. art. III, § 3.

⁶⁷ HURST, *supra* note 27, at 165.

⁶⁸ U.S. CONST. art. II, § 3.

⁶⁹ *See* Alford, *supra* note 24, at 1215 (“The fact that the Constitution prohibits bills of attainder and not royal proclamations of attainder (by then long obsolete), should not be taken as evidence that the Framers endorsed the idea *ex silentio* that the president should have the power of judging [citizens guilty of treason]—especially since Hamilton felt that this would mean that there would be ‘no liberty.’ This absence merely indicated that in 1787 this idea had already been expressly rejected. By then it was the consensus position that the common law could not countenance such an anti-constitutionalist idea, and the idea was hardly worth mentioning.”); *cf.* *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 637 (1952) (Jackson, J., concurring) (“When the President acts in absence of [] a . . . denial of authority, he can only rely upon his own independent powers, but there is a zone of twilight in which he and . . . [another branch] may have concurrent authority, or in which its distribution is uncertain.”).

⁷⁰ *Ex parte Garland*, 71 U.S. (4 Wall.) 333, 387 (1867) (Field, J.) (emphasis added).

⁷¹ *See supra* Part I.A.2.

affirmed in the 2013 case *New York Times Co. v. U.S. Department of Justice*.⁷²

3. The Evidentiary Requirement and the Protection against “Corruptions of Blood”

The Treason Clause contains a stringent, disjunctive evidentiary requirement that is clear in its meaning—either the Government must produce two witnesses to the same overt act of treason, or the traitor must confess in open court.⁷³ The strict requirement of two witnesses to the same overt act is unique to American treason jurisprudence.⁷⁴ No federal defendant has exercised the open confession option, but courts likely will interpret it by its plain meaning.⁷⁵

⁷² 915 F. Supp. 2d at 523 (quoting *Hamdi v. Rumsfeld*, 542 U.S. 507, 554 (2004) (Scalia, J., dissenting) and citing Larson, *supra* note 24 (internal citations omitted)) (“Interestingly, the Treason Clause appears in the Article of the Constitution concerning the Judiciary—not in Article 2, which defines the powers of the Executive Branch. This suggests that the Founders contemplated that traitors would be dealt with by the courts of law, not by unilateral action of the Executive. As no less a constitutional authority than Justice Antonin Scalia noted, in his dissenting opinion in *Hamdi*, ‘Where the Government accuses a citizen of waging war against it, our constitutional tradition has been to prosecute him in federal court for treason or some other crime.’”). For a discussion of how this separation of powers principle affects Political Question Doctrine analysis, see *infra* Part IV.D.

⁷³ U.S. CONST. art. III, § 3. Notably, nowhere in the text of the Treason Clause is there a guarantee of trial and, in fact, such a blanket requirement may seriously hinder the President’s ability to act in self-defense. The drafters did, however, include an exhaustive enumeration of the specific procedural protections afforded to traitors. Under the *expressio unius est exclusio alterius* canon of construction, this would mean that the Treason Clause then excludes the specific protection of a jury trial for traitors. *But see* Ramsey, *supra* note 24, at 869-70 (citations omitted) (“The Treason Clause requires that they be brought to trial under specific conditions . . .”). Conversely, under *noscitur a sociis* (it will be known by the company it keeps), the drafters at the time were also likely cognizant of the immediately preceding text in Article III, Section ii, providing that “The Trial of all Crimes . . . shall be by Jury.” However, this right clearly would apply to treason for reasons discussed, *infra*, Part V.A.2.a. For a thorough discussion of the right to a jury trial in a civilian jurisdiction for traitors, see Larson, *supra* note 24. Larson argues very convincingly that “[u]nder the constitutional law of treason, any person who is potentially subject to an American treason prosecution must be tried in a civilian court and may not be detained by the military as an enemy combatant or subjected to military tribunals.” *Id.* at 867.

⁷⁴ Originally, in the 1695 Statute of William III, The Treason Act 1695, 7 & 8 Will. 3, c. 3., English law required that there be two witnesses to the crime of treason, but not to the same overt act. The Founding Fathers, presumably finding this to be insufficient, made the requirement stricter in American law. This particular requirement has proven to be difficult for prosecutors. For example, in the trial of Aaron Burr, Burr was acquitted based on the fact that there were no two witnesses to the *same* overt act of treason by levying war. *United States v. Burr*, 25 F. Cas. 2, 13-15 (Marshall, Circuit Justice, C.C.D. Va., 1807) (No. 14692a); *United States v. Burr*, 25 F. Cas. 55, 181 (Marshall, Circuit Justice, C.C.D. Va., 1807) (No. 14693).

⁷⁵ See *Lamie v. U.S. Trustee*, 540 U.S. 426, 534 (2004) (“It is well established that when the statute’s language is plain, the sole function of the courts—at least

The Treason Clause also creates a unique protection for property interests. A traitor's assets may only be subjected to temporary forfeiture, not perpetual forfeiture: "[N]o Attainder of Treason shall work Corruption of Blood, or Forfeiture except during the Life of the Person attainted."⁷⁶ In the context of treason, a "corruption of blood" is the perpetual forfeiture of the convicted person's estate to the disinheritance of his or her heirs or children.⁷⁷ Corruptions of blood were particularly disfavored, both by the drafters of the Constitution⁷⁸ and in England at the time that Blackstone wrote his *Commentaries*.⁷⁹ Many state constitutions also showed an express disfavor for corruptions of blood.⁸⁰

During the Reconstruction Era, the Supreme Court faced several challenges relating to disposition of government-confiscated Confederate property.⁸¹ In *Wallach v. Van Riswick*,⁸² the Court interpreted the 1862 Confiscation Act.⁸³ The Court discussed the meaning of the Act and its relation to the Article III bar on perpetual forfeitures: "[B]oth

where the disposition required by the text is not absurd—is to enforce it according to its terms." (internal quotation marks omitted); *Caminetti v. United States*, 242 U.S. 470, 485 (1917) (Day, J.) ("Where the language is plain and admits of no more than one meaning the duty of interpretation does not arise and the rules which are to aid doubtful meanings need no discussion."); *see also* *Cramer v. United States*, 325 U.S. 1, 39, 44, 60-61, 65-66 (1945) (giving dicta about the two-witness rule).

⁷⁶ U.S. CONST. art. III, § 3.

⁷⁷ *See Ex parte Garland*, 71 U.S. (4 Wall.) 333, 387 (1866); *see also* BLACK'S LAW DICTIONARY 397 (9th ed. 2009) (defining "corruption of blood" as "[a] defunct doctrine, now considered unconstitutional, under which a person loses the ability to inherit or pass property as a result of an attainder . . .").

⁷⁸ Max Stier, Note, *Corruption of Blood and Equal Protection: Why the Sins of the Parents Should Not Matter*, 44 STAN. L. REV. 727, 730-31 (1992). The reasons for the disfavor are clear: it harms innocent children. *Wallach v. Van Riswick*, 92 U.S. 202, 210 (1876) ("What was intended by the constitutional provision [The Treason Clause] is free from doubt. In England, attainders of treason worked corruption of blood and perpetual forfeiture of the estate of the person attainted, to the disinherison of his heirs, or of those who would otherwise be his heirs. Thus *innocent children were made to suffer because of the offence of their ancestor*. When the Federal Constitution was framed, *this was felt to be a great hardship, and even rank injustice*." (emphasis added)).

⁷⁹ Stier, *supra* note 78, at 729-30; *id.* at 729 (quoting 2 WILLIAM BLACKSTONE, COMMENTARIES *254).

⁸⁰ *See id.* at 731-32 & nn. 35-36 (compiling an impressive list of similar state prohibitions).

⁸¹ *E.g.*, *Bigelow v. Forrest*, 76 U.S. (9 Wall.) 339, 343-46 (1869) (interpreting the forfeiture clauses of the 1862 Confiscation Act).

⁸² 92 U.S. 202 (1876), *modifying Bigelow*, 76 U.S. (9 Wall.).

⁸³ An Act to Suppress Insurrection, To Punish Treason and Rebellion, To Seize and Confiscate the Property of Rebels, and For Other Purposes, 12 Stat. 589, 589-92 (1863). Originally, the Act was interpreted in 1869 in *Bigelow v. Forrest*, 76 U.S. (9 Wall.) at 339. However, *Van Riswick* later refined the "incautious[]" *Bigelow* language. 92 U.S. at 211.

have the same meaning, and both seek to limit the extent of forfeitures [a]nd there is no reason why one should receive a construction different from that given to the other.”⁸⁴ The Court held that, although it is constitutionally permissible to subject a convicted traitor’s estate to complete divestiture upon conviction and to eliminate a traitor’s property interests,⁸⁵ the Government’s interest is limited to the natural life of the traitor; at the cessation of which, the estate divests completely from the Government and passes on to the decedent traitor’s successors in interest.⁸⁶

B. The Equal Protection Clause and Skinner

In *Skinner v. Oklahoma ex rel. Williamson*, the Supreme Court considered a Fourteenth Amendment equal protection challenge to a statute that mandated the forced sterilization of one class of criminals—common thieves—but not embezzlers, a class of criminals that committed essentially the same crime.⁸⁷ The *Skinner* Court left behind a very simple and powerful legacy regarding equal protection under the law: “[W]hen the law lays an unequal hand on those who have committed intrinsically the same quality of offense . . . it has made as invidious a discrimination as if it had selected a particular race or nationality for oppressive treatment.”⁸⁸ By charging citizen-terrorist defendants under terrorism statutes that impermissibly distinguish between the criminal classes of traitors and terrorists, the government works a constructive treason. Moreover, by not affording the additional protections granted to defendants, the government disparately impacts each defendant.

⁸⁴ *Wallach v. Van Riswick*, 92 U.S. 202, 209-10 (1876).

⁸⁵ *Id.* at 211 (“The [*Bigelow*] language was, perhaps, incautiously used. We certainly did not intend to hold that there was any thing left in the person whose estate had been confiscated. The question was not before us. We were not called upon to decide any thing respecting the quantity of the estate carved out; and what we said upon the subject had reference solely to its duration.”).

⁸⁶ *Id.* at 209.

⁸⁷ U.S. CONST. amend. XIV, § 1; *Skinner v. Oklahoma ex rel. Williamson*, 316 U.S. 535, 541-42 (1942).

⁸⁸ *Skinner*, 316 U.S. at 541.

II. TINKER, TERRORIST, CITIZEN, TRAITOR: A STORY OF ANWAR AL-AULAQI

Born in America⁸⁹ to a Yemeni father,⁹⁰ Anwar al-Aulaqi was a dual American and Yemeni citizen at birth.⁹¹ Al-Aulaqi lived in the United States until he was seven years old, when his family returned to Yemen.⁹² In 1991, he returned to the United States, where he earned a bachelor's degree at Colorado State University, wed a Yemeni cousin, and later received a master's degree in Educational Leadership from San Diego State University.⁹³ Al-Aulaqi permanently departed from the United States in 2002.⁹⁴ He spent two years in the United Kingdom before finally settling in Yemen in 2004.⁹⁵ Al-Aulaqi remained a U.S. citizen until he died.⁹⁶

Before his departure from the United States, al-Aulaqi was not a dangerous criminal. His U.S. criminal record contains two charges in San Diego from 1996 and 1997, both for soliciting prostitution.⁹⁷ The Government never indicted

⁸⁹ Anwar al-Aulaqi was born April 21, 1971, in Las Cruces, New Mexico. *Al-Awlaki: Who Was He?*, CNN (Sept. 30, 2011, 7:56 AM), <http://security.blogs.cnn.com/2011/09/30/al-awlaki-who-was-he/>.

⁹⁰ Nasser al-Aulaqi is a Yemeni National. *Al-Aulaqi* Complaint, *supra* note 13, at ¶ 9.

⁹¹ 8 U.S.C. § 1401(a) (2012) (“[A] person born in the United States, and subject to the jurisdiction thereof [is a U.S. citizen]”); Yemeni Nationality Law, Law No. (6) of 1990, art. III § (a), *available at* <http://www.yemenembassy.org/consulate/nationality.htm> (granting citizenship by birth to those whose fathers are Yemeni Nationals). Anwar al-Aulaqi's father was a Yemeni National. *Al-Aulaqi* Complaint, *supra* note 13, at ¶ 9.

⁹² Scott Shane & Souad Mekhennet, *From Condemning Terror to Preaching Jihad*, N.Y. TIMES, May 9, 2010, at A2. His father was a prominent Yemeni figure, serving as chancellor of two universities and a government official. *Id.*

⁹³ *Al-Aulaqi*, 727 F. Supp. 2d at 10; Kannof, *supra* note 24, at 1415-16. “Peculiarly, despite his family's relative wealth, al-Aulaqi falsely claimed that he was born in Yemen, rather than the United States, in order to receive \$20,000 in scholarship money from a U.S. government program for which . . . (even as a dual citizen), he should not have been eligible.” *Id.* (citations and quotation marks omitted).

⁹⁴ Kannof, *supra* note 24, at 1416.

⁹⁵ *Al-Aulaqi*, 727 F. Supp. 2d at 10; *see also* Kannof, *supra* note 24, at 1416.

⁹⁶ *Al-Aulaqi*, 727 F. Supp. 2d at 8; *see also* *Anwar al-Awlaki*, N.Y. TIMES (July 18, 2012), http://topics.nytimes.com/topics/reference/timestopics/people/a/anwar_al_awlaki/index.html.

⁹⁷ *Al-Awlaki: Who Was He?*, CNN (Sept. 30, 2011, 7:56 AM), <http://security.blogs.cnn.com/2011/09/30/al-awlaki-who-was-he/>. In 1999, the FBI took notice of his role in an Islamic charity assumed to be funneling money to terrorists. Shane & Mekhennet, *supra* note 92, at A2. He was questioned about his association with Khalid al-Midhar and Nawaq Alhazmi, both of whom were 9/11 Hijackers. *Id.* The FBI released him and no action was taken because they determined his contacts were “random” and the “inevitable consequence of living in the small world of Islam in America.” *Id.* The FBI did, however, consider invoking the Mann Act to prosecute al-Aulaqi, as he “had been observed crossing state lines with prostitutes in the D.C. area.” Joseph Rhee & Mark Schone, *How Anwar Awlaki Got Away*, ABC NEWS (Nov. 30,

him for any “terrorism-related crimes.”⁹⁸ Al-Aulaqi transformed into a traitor and a terrorist during his time in Yemen.⁹⁹ While al-Aulaqi was there, the United States grew increasingly concerned and requested that the Yemeni authorities hold him in custody. After his 18-month detainment in a Yemeni prison between 2006 and 2007 at the behest of U.S. authorities—without trial—al-Aulaqi became a violent, active jihadist.¹⁰⁰

In 2009, al-Aulaqi became a leader in AQAP, assuming an operational role in the group and purportedly inspiring more than a dozen terrorist plots with his clerical rhetoric.¹⁰¹ He provided “instructions” to Umar Farouk Abdulmutallab for his attempted bombing of a Christmas-day Northwest Airlines flight;¹⁰² exchanged e-mails with Major Nidal Hasan, the U.S. soldier who perpetrated the Fort Hood Massacre in 2009;¹⁰³ and influenced Faisal Shahzad, the attempted May 2010 Times Square Bomber.¹⁰⁴ Al-Aulaqi was accused of attempting to send bombs via the U.S. mail in October 2010.¹⁰⁵

Al-Aulaqi “made numerous public statements [as a cleric and AQAP leader] calling for ‘jihad against the West,’ praising the actions of ‘his students’ Abdulmutallab and Hasan, and asking others to ‘follow suit.’”¹⁰⁶ His public statements included many YouTube videos that reached a wide, English-speaking audience.¹⁰⁷ Al-Aulaqi called for a holy war against

2009), <http://abcnews.go.com/Blotter/FtHoodInvestigation/anwar-awlaki/story?id=9200720&page=1#.UIbJaLRW3Ek>. An arrest warrant was issued for him on passport fraud charges, but was later vacated. *Id.* In Yemen, he was held for eighteen months between 2006 and 2007 on kidnapping charges, but released without trial. *Al-Awlaki: Who Was He?*, CNN (Sept. 30, 2011, 7:56 AM), <http://security.blogs.cnn.com/2011/09/30/al-awlaki-who-was-he/>. He was charged and sentenced to ten years *in absentia* for “incitement to kill foreigners,” relating to his material connection with the Fort Hood shooter and Christmas Day Bomber. *Al-Aulaqi*, 727 F. Supp. 2d at 10; *Al-Awlaki: Who Was He?*, CNN (Sept. 30, 2011, 7:56 AM), <http://security.blogs.cnn.com/2011/09/30/al-awlaki-who-was-he/>.

⁹⁸ *Al-Aulaqi* Complaint, *supra* note 13, at ¶ 24.

⁹⁹ Dreyfuss, *supra* note 24, at 270 (concluding that “Al-Aulaqi was a traitor” for the charge of levying of war and adhering to the enemies of the United States based on his advocacy for, operative and managerial participation in, and recruitment on behalf of the enemy organization AQAP); *cf.* *N.Y. Times Co. v. U.S. Dep’t of Justice*, 915 F. Supp. 2d 508, 517, 519-20, 530 (S.D.N.Y. 2013).

¹⁰⁰ Shane & Mekhennet, *supra* note 92; *see also supra* note 97.

¹⁰¹ Designation of ANWAR AL-AULAQI Pursuant to Executive Order 13224 and the Global Terrorism Sanctions Regulations, 31 C.F.R. Part 594, 75 Fed. Reg. 43233-01 (July 16, 2010) [hereinafter *Al-Aulaqi* Designation]; Kannof, *supra* note 24, at 1381.

¹⁰² *Al-Aulaqi* Designation, *supra* note 101, at 43234.

¹⁰³ *Al-Aulaqi*, 727 F. Supp. 2d at 10 (citations omitted). The incident resulted in 13 dead and 22 wounded. Kannof, *supra* note 24, at 1382.

¹⁰⁴ Kannof, *supra* note 24, at 1382.

¹⁰⁵ *Id.* at 1383.

¹⁰⁶ *Al-Aulaqi*, 727 F. Supp. 2d at 10 (citations omitted).

¹⁰⁷ Kannof, *supra* note 24, at 1381.

the United States, claiming that “America is evil . . . [J]ihad against America is binding upon myself just as it is binding on every other Muslim . . .”¹⁰⁸ He also proclaimed “that he ‘[would] never surrender’ to the United States.”¹⁰⁹

In classified proceedings, the CIA secretly approved al-Aulaqi as the target for a “lethal operation” in April 2010.¹¹⁰ Al-Aulaqi was termed a “Specially Designated Global Terrorist” by the Treasury Department in July 2010.¹¹¹ In the summer of 2010, the CIA tried to eliminate al-Aulaqi through the creative use of a Croatian video-order bride, a predator drone, and a Danish double agent.¹¹² Nasser al-Aulaqi, Anwar’s father, filed a complaint in the District Court for the District of Columbia seeking to enjoin the lethal targeting of his son.¹¹³ On December 7, 2010, the matter was dismissed on a motion for summary judgment for a lack of standing.¹¹⁴ After failing to kill al-Aulaqi in a drone attack in May 2011,¹¹⁵ the United States ended his life when, on September 30, 2011, a drone fired a “barrage of Hellfire missiles” at his car.¹¹⁶ In July 2012, the ACLU re-filed the case as *al-Aulaqi v. Panetta*, asserting standing based on Nassar al-Aulaqi’s status as executor of his son’s estate.¹¹⁷

¹⁰⁸ Paula Newton, *Purported al-Awlaki Message Calls for Jihad Against U.S.*, CNN (Mar. 17, 2010) (quoting Anwar al-Aulaqi, YouTube Speech), <http://www.cnn.com/2010/WORLD/europe/03/17/al.awlaki.message/index.html>.

¹⁰⁹ *Al-Aulaqi*, 727 F. Supp. 2d at 10-11 (citations omitted).

¹¹⁰ Greg Miller, *Muslim Cleric Aulaqi Is 1st U.S. Citizen on List of Those CIA Is Allowed to Kill*, WASH. POST (Apr. 7, 2010), <http://www.washingtonpost.com/wp-dyn/content/article/2010/04/06/AR2010040604121.html>.

¹¹¹ *Al-Aulaqi* Designation, *supra* note 101, at 43233-34.

¹¹² Paul Cruickshank et al., *The Danish Agent, the Croatian Blonde and the CIA Plot to Get al-Awlaki*, CNN WORLD (Oct. 24, 2012, 8:54 pm), <http://www.cnn.com/2012/10/15/world/al-qaeda-cia-marriage-plot/index.html>. In sum, the CIA used a Danish double agent to arrange a marriage between al-Aulaqi and a blonde Croatian devotee who interacted with him via video. *Id.* When al-Aulaqi and his fiancée were to meet up, her luggage was to be bugged and then the CIA would send in a drone to kill the entire party, likely with Hellfire missiles; however, her luggage was separated and the plot failed. Brian Ross & Lee Ferran, *Report: CIA Arranged Bride for Terrorist in Plot to Kill Him*, ABC NEWS (Oct. 15, 2012), <http://abcnews.go.com/Blotter/report-cia-arranged-bride-terrorist-plot-kill/story?id=17437763#.UJShWml27-Y>. The marriage, however, was successful. *Id.* al-Aulaqi’s widow, after deciding against going on a revenge suicide bombing, is currently an editor for the al-Qeada publication *Inspire*. *Id.*

¹¹³ See generally *Al-Aulaqi* Complaint, *supra* note 13, at ¶ 6.

¹¹⁴ *Al-Aulaqi*, 727 F. Supp. 2d at 28, 30.

¹¹⁵ Mazzetti et al., *supra* note 3.

¹¹⁶ *Id.*

¹¹⁷ *Panetta* Complaint, *supra* note 20, at ¶¶ 6, 10, 41-3. Samir Kahn’s family joined the lawsuit. *Id.*

III. THE CRIMES OF TREASON BY LEVYING WAR AND TERRORISM

A. *Treason by Levying War: The Offense*

James Willard Hurst, author of the seminal treatise *The Law of Treason in the United States*,¹¹⁸ defined treason through levying war as the “direct effort to overthrow the government, or wholly to supplant its authority in some part or all of its territory.”¹¹⁹ The law of levying war has been subject to several constructions that parse the law into three components: the actus reus element, the mens rea element and attendant allegiance requirement, and the geographic bounds. Levying war requires that an assemblage of men make an overt act of force to execute a treasonable design.¹²⁰ The overt act requirement may be met where the assembly itself is forceful.¹²¹

¹¹⁸ HURST, *supra* note 27. This work is considered the “classic legal treatise on this constitutional topic.” Roland, *supra* note 56, at 297.

¹¹⁹ HURST, *supra* note 27, at 199.

¹²⁰ Whether the force used is tantamount to levying war is a question of fact. *Ex parte Bollman*, 8 U.S. (4 Cranch) 75, 118 (1807) (“[I]t [i]s impossible to define what should in every case be deemed a levying of war. It is a question of fact to be decided by the jury from all the circumstances.”). Fortunately, however, the sparse federal treason jurisprudence can offer some direct and quite blunt light on the relationship between acts of levying of war and terrorism. In deciding the fate of the 1993 World Trade Center bombers, the Second Circuit held in *Rahman*, that terrorist acts (factually analogous to those al-Aulaqi was engaged in) are “ample evidence . . . [of] levy[ing] war.” 189 F.3d 88, 149-61 (2d Cir. 1999) (per curiam); *see id.* at 149-60 (affirming that facts such as calling for jihad and participating in the 1993 World Trade Center bombing were sufficient evidence for sustaining a conviction of seditious conspiracy to levy war and that the sentencing guidelines for treason by levying war were the “most analogous.”); *accord* *United States v. Augustin*, 661 F.3d 1105 (11th Cir. 2011), *cert. denied*, 132 S. Ct. 2444 (2012); *United States v. Rodriguez*, 803 F.2d 318 (7th Cir. 1986), *cert. denied*, 480 U.S. 908 (1987).

¹²¹ Originally, Chief Justice Marshall defined the actus reus of treason by levying of war as “an assemblage of persons for the purpose of effecting *by force* a treasonable purpose.” *Bollman*, 8 U.S. (4 Cranch) at 75 (Marshall, C.J.). He later clarified this part of his *Bollman* opinion, holding that an assembly is a precondition for the overt acts and, if the assembly is in force, then it will constitute the overt act itself. *United States v. Burr*, 25 F. Cas. 2, 13 (Marshall, Circuit Justice, C.C.D. Va., 1807) (No. 14692a) (discussing the meaning of the Supreme Court in *Bollman*); *see also* *Opinion on The Motion To Introduce Certain Evidence in the Trial of Aaron Burr, For Treason, United States v. Burr*, 8 U.S. (4 Cranch) 455, 487 (1807) (Marshall, Circuit Justice) (“[A]n assemblage of men which should constitute the fact of levying war, must be an assemblage in force [as Chief Justice Marshall understands his opinion in *Bollman*]. . . .”). The likely reason for this distinction is that peaceable assemblies also exist. *See* U.S. CONST. amend. I. Justice Story’s later interpretation of the actus reus of treason in 1842 upholds this distinction. *In re Charge to Grand Jury – Treason*, 30 F. Cas. 1046, 1047 (Story, Circuit Justice, C.C. D.R.I. 1842) (“To constitute an actual levy of war, there must be an assembly of persons, met for the treasonable purpose, and some overt act done, or some attempt made by them [the assembly] with force to execute, or towards executing, that purpose.”).

The assemblage portion of the actus reus element requires that there be more than one participant assembled to levy war because, historically, levying war alone would have been factually impossible—a single person was “not in a condition to levy war.”¹²² Although this assumption has been questioned in the wake of technological advances in the destructive potential of modern weapons,¹²³ an assemblage remains an element of treason.

Turning to the mens rea element: “The character of the intention . . . rather than any difference in the overt acts, marks the line between riot and treason by levying war.”¹²⁴ The mens rea element has two prongs: first, one must betray an owed allegiance to the United States; second, the actor must have a treasonable, or public, purpose or intent. The first prong requires a pre-existing allegiance; there can be no betrayal without an initial allegiance.¹²⁵ Further, to betray, one must intend “to benefit the enemy’s war effort and to harm that of the United States.”¹²⁶ An intent to betray may be inferred by presuming the actor intended the natural consequences of his or her actions.¹²⁷ The treasonable design or purpose prong can be established through the demonstration that an alleged traitor had a non-private motive to disrupt Government administration of laws, or to coerce or change its policy.¹²⁸ Holy war likely is not a private motivation.¹²⁹

¹²² *United States v. Burr*, 25 F. Cas. 55, 169 (Marshall, Circuit Justice, C.C.D. Va., 1807) (No. 14693).

¹²³ *Larson*, *supra* note 24, at 913-14 (“[S]uch a person can be said to levy war against the United States; it would strain all credulity to assert, for example, that there must be at least two people in the cockpit of the plane in order for war to be levied.”).

¹²⁴ *HURST*, *supra* note 27, at 200.

¹²⁵ *Cramer v. United States*, 325 U.S. 1, 29 (1944); *accord Augustin*, 661 F.3d 1105; *Rahman*, 189 F.3d 88; *Rodriguez*, 803 F.2d 318; *HURST*, *supra* note 27, at 193.

¹²⁶ *HURST*, *supra* note 27, at 244.

¹²⁷ *Cramer*, 325 U.S. at 32 (“Since intent must be inferred from conduct of some sort, we think it is permissible to draw usual reasonable inferences as to intent The law of treason . . . assumes every man to intend the natural consequences which one standing in his circumstances and possessing his knowledge would reasonably expect to result from his acts.”).

¹²⁸ *In re Charge to the Grand Jury – Treason*, 30 F. Cas. 1046, 1047 (Story, Circuit Justice, C.C. D.R.I. 1842); *United States v. Hanway*, 26 F. Cas. 105, 115 (C.C. E.D. Pa. 1851).

¹²⁹ See John Brown’s Speech to the Court at His Trial, NAT’L CTR. FOR PUB. POL’Y RESEARCH, <http://www.nationalcenter.org/JohnBrown%27sSpeech.html> (last visited Jan. 15, 2013) (internal citations omitted) (“[The Bible] [t]hat teaches me that all things whatsoever I would that men should do to me, I should do even so to them. It teaches me, further, to remember them that are in bonds, as bound with them. I endeavored to act up to that instruction. I say I am yet too young to understand that God is any respecter of persons. I believe that to have interfered as I have done—as I

Regarding geography, courts have consistently held that treason may be committed anywhere by anyone who owes allegiance to the United States.¹³⁰ That is to say, there is no place where acts constituting treason would be immunized from prosecution.

B. The Crime of Terrorism in the Era of the War on Terror

Terrorism is defined in a variety of U.S. statutes.¹³¹ Many of these laws contain nearly identical text.¹³² This note will consider two definitions of terrorism: the most popular one,¹³³ the FISA definition, and the definition of the “Federal crime of terrorism.”¹³⁴

The FISA definition contains three elements: an *actus reus*, a violent crime that is a violation of the laws of the United States or its individual states;¹³⁵ the proper *mens rea*, an intent to “influence the policy of a government by

have always freely admitted I have done—in behalf of His despised poor was not wrong, but right. Now, if it is deemed necessary that I should forfeit my life for the furtherance of the ends of justice, and mingle my blood further with the blood of my children and with the blood of millions in this slave country whose rights are disregarded by wicked, cruel, and unjust enactments—I submit; so let it be done!”). Despite his religious motivations, John Brown was executed for treason against the State of Virginia. *Id.*

¹³⁰ *Kawakita v. United States*, 343 U.S. 717, 734-35 (1952) (citing *Ex parte Bollman*, 8 U.S. (4 Cranch) 75, 126 (1807)).

¹³¹ *E.g.*, 18 U.S.C. § 2332b(g)(5) (2012) (defining the “Federal crime of terrorism”); see also Nicholas J. Perry, *The Numerous Federal Legal Definitions of Terrorism: The Problem of Too Many Grails*, 30 J. LEGIS. 249, 255 & n.48 (2004) (listing the statutes).

¹³² *Compare, e.g.*, 50 U.S.C. § 1801(c) (2011) (defining “international terrorism”), with 18 U.S.C. § 2331(1) (defining “international terrorism” with a slightly different jurisdictional element in subsection (C) than the one at 50 U.S.C. § 1801(c)(3)). For a thorough discussion of the prevalence of this language in terrorism definitions, see Perry, *supra* note 131, at 256-57.

¹³³ Perry, *supra* note 131, at 256.

¹³⁴ The statute reads in relevant part:

(5) the term “Federal crime of terrorism” means an offense that—

(A) is calculated to influence or affect the conduct of government by intimidation or coercion, or to retaliate against government conduct; and

(B) is a violation of—

(i) . . . [relating to various violent crimes]

(ii) . . . [relating to atomic weapons crime]

(iii) . . . [relating to various aircraft crimes]

(iv) . . . [relating to narco-terrorism].

18 U.S.C. § 2332b(g)(5).

¹³⁵ *Id.* § 1801(c)(1).

intimidation or coercion”;¹³⁶ and the requirement that the act occurs “outside the United States, or transcend[s] national boundaries.”¹³⁷ The federal crime definition has two elements: an actus reus, a violent crime; and the mens rea requirement that the act be “calculated to influence or affect the conduct of government by intimidation or coercion, or to retaliate against government conduct.”¹³⁸

C. *The Same Offense: Treason By Levying War and Terrorism*

Although Equal Protection Clause and Treason Clause decisions use different language—“intrinsically the same quality of offense”¹³⁹ and immaterially varying the substance of treason,¹⁴⁰ respectively—both sets of language mean that analysis under either is triggered if the two offenses are substantively the same.

Comparing the actus reus of treason by levying war and that of the two terrorism definitions, there is obvious commonality. Both require some sort of violent act or force.¹⁴¹ Although the FISA definition stands apart in requiring that the act be criminal, this distinction does not create a material difference between the definitions of treason by levying war and terrorism. Most violent acts are criminal; or, more specifically, any act that is tantamount to terrorism would be tantamount to levying war. Therefore, FISA’s additional requirement does not narrow the scope of acts that fall within the definition of terrorism.

Comparing the mens rea element—the most important element¹⁴²—it becomes even clearer that the crimes are substantively indistinguishable. Treason by levying war requires the intent to coerce or force change in government policy, or to usurp government power in all or part of its territory.¹⁴³ FISA’s terrorism definition requires the intent to

¹³⁶ *Id.* § 1801(c)(2)(B).

¹³⁷ *Id.* § 1801(c)(3).

¹³⁸ *Id.* § 2332b(g)(5)(A)–(B).

¹³⁹ *Skinner v. Oklahoma ex rel. Williamson*, 316 U.S. 535, 541 (1942).

¹⁴⁰ *See supra* note 63 and accompanying text.

¹⁴¹ *Compare* Part III.A (discussing the actus reus of treason by levying war, the violent force of levying war), *with* Part III.B. (discussing the elements of terrorism, including the actus reus of force).

¹⁴² HURST, *supra* note 27, at 200.

¹⁴³ *Id.* at 199; *see also In re Charge to the Grand Jury – Treason*, 30 F. Cas. at 1047 (Story, Circuit Justice, C.C. D.R.I. 1842); *United States v. Hanway*, 26 F. Cas. 105, 115 (C.C. E.D. Pa. 1851).

influence or to coerce the policy of government by force.¹⁴⁴ The “Federal crime” definition of terrorism requires that the act “is calculated to influence or affect the conduct of government by intimidation or coercion”¹⁴⁵ The FISA definition’s failure to specify the U.S. government is of no consequence as applied to citizen-terrorists—in this case persons conducting jihad against the United States in the ongoing War on Terror. Thus, in the context at issue, there is no material difference between the mens rea requirements of treason and terrorism.

There is no basis for distinction between the two crimes with respect to the elements, or lack of elements, regarding geography, assemblage, and allegiance. First, the geographical limitation in the FISA definition does not, by itself, make that offense materially different from treason because treason may be committed anywhere. Therefore, the potential geographic range of the two crimes overlap such that all FISA terrorism is treason but not all treason is FISA terrorism.¹⁴⁶ Further, the argument that geographic limitations by themselves create substantively different offenses leads to absurd conclusions.¹⁴⁷

Imagine if Congress were to create two crimes, *A* and *B*, which, with the exception of adding geographic limits, mirror the crime of treason by levying war. Crime *A* only punishes acts performed within the boundaries of the United States; crime *B* only punishes acts performed outside of the boundaries of the United States. The Government would never need to indict any citizen for treason to punish treasonous acts, because in all cases it could achieve the same result by prosecuting the citizen under either crime *A* or *B*. Therefore, the government would not be constrained by the administratively cumbersome evidentiary and substantive protections afforded to the accused at a treason trial because any instance of treason could be punished under either *A* or *B*. That is to say, by dividing the world into whatever arbitrary components it found desirable, Congress could dodge the restrictive definitions of the Treason Clause. This is precisely the result that the Framers sought to avoid in drafting the Treason Clause; the Constitution will not allow the introduction of a geographical

¹⁴⁴ § 1801(c)(2)(B).

¹⁴⁵ § 2332b(g)(5)(A).

¹⁴⁶ *Kawakita v. United States*, 343 U.S. 717, 734-35 (1952). In *Kawakita*, the Court held that an American-Japanese dual citizen owed allegiance to the United States even while domiciled in Japan during World War II and thus, his acts in Japan were treason. *Id.*; see also *Carlisle v. United States (The Carlisle Case)*, 83 U.S. (16 Wall.) 147, 154-55 (1873).

¹⁴⁷ See *infra* note 183 and accompanying text.

limitation to create a crime distinct from treason. When a citizen commits an act of terrorism, geographical limitations in the definition of terrorism cannot form a basis for differentiating it from treason when they are substantively the same in all other material aspects.

Second, although the traditional notion of treason requires an assemblage, there are three reasons why this unique facet does not intrinsically distinguish treason from terrorism in the context of al-Aulaqi. First, although one person may commit terrorism and only an assemblage may levy war, as applied to a citizen-terrorist conducting jihad against the United States in tandem with a terrorist organization, that terrorist has clearly assembled in force. The same reasoning would apply to any such citizen-terrorist, so the express requirement in treason of multiple persons would be a distinction without a difference. For example, in making the decision to issue a kill order against al-Aulaqi, the President took specific note of al-Aulaqi's operational role in AQAP, a group that is easily described as an enemy assemblage of persons levying war against the United States.¹⁴⁸ This fact permits the inference that al-Aulaqi's association with an assemblage of men levying war against the United States informed the decision to target him for death. Second, the assemblage element is outdated and outmoded, reflecting a court determination that one man levying war is a factual impossibility—modern terrorists have shown that is no longer an impossibility.¹⁴⁹ Therefore, the assemblage element creates no distinction in War on Terror cases such as al-Aulaqi's, and the common-law inclusion of the element could not survive review on its merits.

Third, although treason requires a betrayal of a pre-existing allegiance to the United States, this distinction from terrorism is similarly immaterial within the context of *al-Aulaqi*. By definition, a citizen owes allegiance to his or her

¹⁴⁸ Mazzetti et al., *supra* note 3 (quoting President Barack Obama) (“The death of Awlaki is a major blow to Al Qaeda’s most active operational affiliate . . . [al-Aulaqi took] the lead role in planning and directing the efforts to murder innocent Americans.”).

¹⁴⁹ See Intelligence Reform and Terrorism Prevention Act of 2004, Pub. L. 108-458, 118 Stat. 3637 (2004) (codified at 50 U.S.C. § 1801(b)(1)) (the FISA “lone wolf” terrorist provision); Larson, *supra* note 24, at 913-14 (“[S]uch a person can be said to levy war against the United States; it would strain all credulity to assert, for example, that there must be at least two people in the cockpit of the plane in order for war to be levied.”); see also *supra* note 73 and accompanying text (discussing Larson and assemblage); *infra* note 182 and accompanying text (discussing Larson and assemblage).

country.¹⁵⁰ Owing an allegiance to the United States is a factual precondition for the commission of treason.¹⁵¹ Further, as a matter of construction, the omission of an express allegiance requirement does not in any degree affect the analysis of a court construing a statute for similarity to treason.¹⁵² For example, a person owing allegiance only to Russia could not be charged with treason against the United States even if the U.S. treason statute at issue lacked an allegiance element. While comparing the treason and misprision of treason statutes, Chief Justice Marshall observed in *United States v. Wiltberger*:

The 1st section defines the crime of treason, and declares, that if any person or persons owing allegiance to the United States of America shall levy war," & c. "such person or persons shall be adjudged guilty of treason," & c. The second section defines misprision of treason; and in the description of the persons who may commit it, omits the words "owing allegiance to the United States," and uses without limitation, the general terms "any person or persons." Yet, it has been said, these general terms were obviously intended to be limited, and must be limited, by the words "owing allegiance to the United States," which are used in the preceding section.

It is admitted, that the general terms of the 2d section must be so limited; but it is not admitted, that the inference drawn from this circumstance, in favour of incorporating the words of one section of this act into another, is a fair one. Treason is a breach of allegiance, and can be committed by him only who owes allegiance either perpetual or temporary. *The words . . . "owing allegiance to the United States," in the first section, are entirely surplus words, which do not, in the slightest degree, affect its sense. The construction would be precisely the same were they omitted. When, therefore, we give the same construction to the second section, we do not carry those words into it, but construe it as it would be construed independent of the first.* There is, too, in a penal statute, a difference between restraining general words, and enlarging particular words.¹⁵³

Thus, in light of *Wiltberger*, the omission of an allegiance requirement from the terrorism definitions is a distinction from treason without a difference.

By definition, as a citizen, al-Aulaqi owed allegiance to the United States. His operational involvement in a professed holy war against the United States while maintaining

¹⁵⁰ *Kawakita*, 343 U.S. at 721-23 (holding that citizens owe allegiance regardless of where they are domiciled). This allegiance is owed even if the individual holds a dual citizenship. *Id.*

¹⁵¹ *United States v. Wiltberger*, 18 U.S. (5 Wheat.) 76, 96-97 (1820).

¹⁵² *Id.*

¹⁵³ *Id.* (interpreting the treason statute, which is now codified at 18 U.S.C. § 2381).

citizenship permits the inference that he intended to betray that allegiance by acts tantamount to levying war. Al-Aulaqi's conduct that led to his killing involved citizens operating with terrorist organizations: he influenced and encouraged others, which is action taken in tandem with an assembly. Further, terrorist acts analogous to those in which al-Aulaqi was engaged¹⁵⁴ have been described as "ample evidence . . . [of] levy[ing] war" by the Second Circuit and similarly by its sister Circuits.¹⁵⁵ Therefore, al-Aulaqi was both a traitor and a terrorist.

IV. THE FIRST PERIL: THE TREASON CLAUSE

The Supreme Court has held for over 150 years that creating merely artificial distinctions between treason and another crime may not circumvent the Treason Clause's specific protections.¹⁵⁶ Because the crimes of treason and terrorism (when committed by a citizen) are essentially indistinguishable, either the punishment of citizens for terrorism or the adjudication of them as a terrorist should invoke Treason Clause protections¹⁵⁷ by virtue of the rule against constructive treasons. This part discusses applications of the rule against constructive treasons and how it applies to al-Aulaqi's case. This section concludes that the rule against constructive treasons is violated in the case where the defendant is a citizen-terrorist charged with terrorism offenses.

¹⁵⁴ See *supra* Part II (calling for jihad against the United States, encouraging terrorism, and planning and assisting in the operations of a terrorist organization that has claimed responsibility for attacking the United States); see also Dreyfuss, *supra* note 24, at 269-70 (stating that al-Aulaqi had levied war).

¹⁵⁵ *United States v. Rahman*, 189 F.3d 88, 149-61 (2d Cir. 1999) (per curiam) (affirming that facts such as calling for jihad and participating in the 1993 World Trade Center bombing were sufficient evidence for sustaining a conviction of seditious conspiracy to levy war and that the sentencing guidelines for treason by levying war were the "most analogous."), *cert. denied*, 528 U.S. 1094 (2000); accord *United States v. Augustin*, 661 F.3d 1105 (11th Cir. 2011), *cert. denied*, 132 S. Ct. 2444 (2012); *United States v. Rodriguez*, 803 F.2d 318 (7th Cir. 1986), *cert. denied*, 480 U.S. 908 (1987); see also *supra* note 120.

¹⁵⁶ See *supra* note 63.

¹⁵⁷ These exceptions include, e.g., the two-witness evidentiary requirement and the prohibition on corruptions of blood, U.S. CONST. art. III, § 3, all due criminal procedural rights, and the right to trial by jury. See *Baldwin v. New York*, 399 U.S. 117, 119-20 (1970). The *Bollman* opinion also notes that the bench-warrant issued against Aaron Burr was illegal because a grand jury had not been presented with the matter, and the offense was not committed in the presence of the court. 8 U.S. (4 Cranch) 75, 113-14 (1807). For a discussion of the right to a jury trial in treason cases, see *infra* Part V.A.2.a.

A. *The Rule Against Constructive Treasons Revisited*

The rule against constructive treasons must be applied to al-Aulaqi's case, as terrorism and treason are essentially the same offense.¹⁵⁸ Unfortunately, the lack of treason cases¹⁵⁹ leaves very few applications of the rule against constructive treasons. The resulting doctrinal underdevelopment and courts' use of loose and amorphous terms, such as "vary[]"¹⁶⁰ to describe alterations to treason has created interpretive problems. This looseness in language has led to at least one drastic misapplication of the rule in Supreme Court precedent and several questionable Circuit decisions.¹⁶¹ The resulting doctrinal ambiguity has eviscerated the constructive treason defense, the assertion by defendants that their prosecution under a particular crime is a prohibited constructive treason prosecution. This section discusses the contours of the rule, its misapplication by the Supreme Court and Circuit Courts, and provides a reading that harmonizes Supreme Court precedent, while providing a solid precedential basis for reversing the Circuits and restoring the defense against constructive treason.

1. Three Formulations of the Rule

Upon close reading and as identified in this note for the first time, Supreme Court precedent reveals that three particular methods of manipulating the treason definition are prohibited under the rule against constructive treasons. Taken in tandem, these forms of the rule provide a cohesive framework for analyzing any variance from or manipulation of the definition of treason. The rule against constructive treasons may thus be formulated in three different ways, termed mirroring, additive, and subtractive.

The mirroring formulation of the rule prohibits Congress from creating a constructive treason by mirroring the elements of treason and merely changing the name of the crime. Under the Constitution, treason by any other name remains

¹⁵⁸ See *supra* Part III.C.

¹⁵⁹ HURST, *supra* note 27, at 187 ("There have been less than two score treason prosecutions pressed to trial by the Federal government.").

¹⁶⁰ *Id.* at 239.

¹⁶¹ See *infra* Part IV.A.3.

treason, subject to Article III restrictions and protections.¹⁶² The Court expressly adopted this formulation in *Cramer*.¹⁶³

Under the additive formulation of the rule, Congress may not create a constructive treason by inventing a new crime that would otherwise be treason but for the addition of immaterial elements. For example, Congress could not pass a statute that mirrors treason but for an additional element that the overt act must be done while wearing a red hat. That law would only alter treason by an immaterial element.¹⁶⁴ Adding immaterial requirements to treason and thus merely relabeling it creates a constructive treason. In *Bollman*, the Court held that the addition of a conspiracy element creates a crime materially distinct from treason itself, and thus, because the addition makes the crime substantively distinguishable, conspiracy to commit treason by levying war does not carry Article III protection.¹⁶⁵ The *Bollman* opinion thus shows that the addition of a materially different element—the actus reus of agreement rather than a violent act—creates a separate crime from treason.¹⁶⁶

The subtractive formulation of the rule is somewhat more nuanced than the others. Congress may not codify an offense that provides for harsher punishment than that permitted by Article III, but in its description merely subtracts an element of treason and, as applied to a particular defendant,

¹⁶² *Cramer v. United States*, 325 U.S. 1, 45 (1945) (“[The Court does not] . . . intimate that Congress could dispense with the two-witness rule merely by giving the same offense [treason] another name.”).

¹⁶³ See *Cramer*, 325 U.S. at 45.

¹⁶⁴ For an example of a statute that is materially different enough from treason by *levying war* to avoid this rule, see the Espionage Act of 1917, 40 Stat. 217 (1917).

¹⁶⁵ See *Ex parte Bollman*, 8 U.S. (4 Cranch) 75, 126-28 (1807) (“To conspire to levy war, and actually to levy war, are distinct offences . . . it has been determined that the actual enlistment of men to serve against the government does not amount to levying war . . . [T]he crime of treason should not be extended by construction to doubtful cases; and that crimes not clearly within the constitutional definition, should receive such punishment as the legislature in its wisdom may provide . . . a combination or conspiracy to levy war against the United States is not treason, unless combined with an attempt to carry such combination or conspiracy into execution; some actual force or violence must be used in pursuance of such design to levy war . . .”); cf. *Ex parte Quirin*, 317 U.S. 1 (1942). While the reasoning is discussed *infra*, Part IV.A.3, *Quirin* actually is an example of the Court applying this sort of reasoning.

¹⁶⁶ This reading of *Bollman* is subject to the alternative reading that there is both an addition and a subtraction to the crime of conspiracy to levy war crime: the addition of an overt act of agreement and the subtraction of force requirement. However, this is a nominal distinction. If the subtraction itself were the material difference, the crime would have been subject to the subtractive formulation below, yielding a different result. The addition of the different actus reus created a separately cognizable offense in all cases. The formulations may operate in conjunction and the aim is to find *material* distinction.

would be treason.¹⁶⁷ As the Supreme Court held in *Wiltberger*, a citizen may not constitutionally be punished under a congressionally created statute that mirrors treason but omits the allegiance requirement and provides for process inconsistent with Article III protections.¹⁶⁸ Because, by default, a citizen owes an allegiance to the country, the actions for which that citizen is to be punished would be indistinguishable from treason. To permit such a manipulation would eviscerate the Treason Clause of any meaning. This formulation is more limited than the other two. The subtractive formulation only invalidates a statute as applied to circumstances where all the elements of treason are satisfied—it can never render a statute facially invalid. Although the hypothetical statute is perfectly valid as applied to those who do not owe allegiance, it would constitute a constructive treason if applied to a citizen. This formulation is more of a canon of construction, where, as applied, a statute must be construed to avoid creating a constructive treason.

In light of these formulations, the rule against constructive treasons may seem expansive at first impression. But there is a limiting principle: the gravamen of the offense must be materially the same as that of treason, and the conviction must not have been in accord with Treason Clause protections.¹⁶⁹ Thus, the crime alleged to be a constructive treason must punish “a direct effort to overthrow the government [by one owing allegiance], or wholly to supplant its authority in some part or all of its territory”¹⁷⁰ for a non-private motive.¹⁷¹ For example, an offence criminalizing a direct effort to overthrow the Government or to supplant its authority for solely private motives is not a constructive treason, but more properly construed as espionage because of the lack of a public motivation.¹⁷²

Although the rule against constructive treasons prohibits the use of a law that immaterially varies from treason to punish a citizen, a citizen may be punished under a statute that, although overlapping in elements, materially differs from

¹⁶⁷ See *supra* note 153 and accompanying text; see also *Cramer*, 325 U.S. at 45.

¹⁶⁸ *United States v. Wiltberger*, 18 U.S. (5 Wheat.) 76, 96-97 (1820) (Marshall, C.J.); see *supra* note 153 and accompanying text.

¹⁶⁹ See *Ex parte Bollman*, 8 U.S. (4 Cranch) 75, 127 (1807) (“[T]he crime of treason should not be extended by construction . . . [C]rimes not clearly within the constitutional definition, should receive such punishment as the legislature . . . may provide.”); see also *supra* note 63.

¹⁷⁰ HURST, *supra* note 27, at 186, 199.

¹⁷¹ *Charge to the Grand Jury – Treason*, 30 F. Cas. at 1047.

¹⁷² See HURST, *supra* note 27, at 239-40 (discussing the *Rosenberg* case that was before the Second Circuit. 195 F.2d 583, 610-11 (2d Cir. 1952)).

treason.¹⁷³ If any single difference is material, then the crime is substantively distinguishable from treason, and the offense is not subject to the restrictions of the Treason Clause.¹⁷⁴

2. The Three Formulations Applied

An application of the three formulations of the rule against constructive treasons reveals that neither the FISA nor the Federal crime definition of terrorism may be constitutionally applied to citizens. Both the FISA and Federal crime definitions of terrorism punish the same actus reus and mens rea as treason.¹⁷⁵ Because both definitions of terrorism omit treason's allegiance requirement and the FISA definition imports a geographical limitation,¹⁷⁶ the mirroring formulation of the rule against constructive treasons is not implicated.¹⁷⁷ However, the omission of the allegiance and assemblage requirements from both definitions implicates the subtractive formulation of the rule, and the geographic limitation within the FISA definition implicates the additive formulation.

As discussed above in Part IV.A.1, the omission of an allegiance element is immaterial because, when applied to a citizen, there is no material difference between acts that could be prosecuted as treason, and those that could be prosecuted as terrorism.¹⁷⁸ Further, in *Wiltberger*, the Supreme Court expressly stated that the omission of an allegiance element does not affect the construction of treason when comparing the requirements of the treason statute to the requirements of other laws.¹⁷⁹

The omission of an assemblage element is likewise immaterial when the terrorism definitions are applied to al-Aulaqi's conduct. First, in al-Aulaqi's case, his role as "leader of external operations" in AQAP¹⁸⁰ requires an assemblage. Second, as applied to any citizen who is conducting jihad against America in connection with a terrorist organization, the shared jihad of the movement constitutes an "assemblage

¹⁷³ See *Bollman*, 8 U.S. (4 Cranch) at 126-27.

¹⁷⁴ See *id.* at 127.

¹⁷⁵ See *supra* Part III.C.

¹⁷⁶ See *supra* Part III.C.

¹⁷⁷ See *supra* Part I.

¹⁷⁸ See *supra* Part IV.A.1.

¹⁷⁹ *United States v. Wiltberger*, 18 U.S. (5 Wheat.) 76, 96-97 (1820) (Marshall, C.J.).

¹⁸⁰ *Mazzetti et al.*, *supra* note 3 ("The death of Awlaki is a major blow to Al Qaeda's most active operational affiliate . . . [al-Aulaqi took] the lead role in planning and directing the efforts to murder innocent Americans.").

in force.”¹⁸¹ Third, the circumstances that underpinned Marshall reading an assemblage requirement into the definition of treason have unraveled in the wake of advances in modern weapons technology.¹⁸²

The imposition of a geographical limitation on the act of terrorism cannot, under the additive formulation, create a crime distinct from treason. If the acts are committed by a citizen, as discussed above, such a holding leads to absurd conclusions. The Court may not permit the arbitrary geographic petitioning of treason to create a distinction from terrorism where none exists.¹⁸³ It would be absurd to claim, for example, that Benedict Arnold would be an international terrorist under the FISA definition and not a traitor if all of his treacherous acts took place in Britain, rather than West Point.¹⁸⁴ Or, more narrowly, that he might not be afforded Treason Clause protections under the Constitution because of the geographical distinction.

So what is the effect of this analysis in al-Aulaqi’s case? The rule against constructive treasons would apply to all state

¹⁸¹ Opinion on The Motion To Introduce Certain Evidence in the Trial of Aaron Burr, For Treason, United States v. Burr, 8 U.S. (4 Cranch) 455, 487 (1807) (Marshall, Circuit Justice) (Fed. Cas. Number 14692a); see also *supra* note 121.

¹⁸² The Supreme Court has recognized before that a change in technology or other circumstance may render irrelevant a previous understanding of a constitutional provision. For example, in *Planned Parenthood v. Casey*, the Court noted:

West Coast Hotel and *Brown* each rested on facts, or an understanding of facts, changed from those which furnished the claimed justifications for the earlier constitutional resolutions. Each case was comprehensible as the Court’s response to facts that the country could understand, or had come to understand already, but which the Court of an earlier day, as its own declarations disclosed, had not been able to perceive . . . In constitutional adjudication as elsewhere in life, changed circumstances may impose new obligations, and the thoughtful part of the Nation could accept each decision to overrule a prior case as a response to the Court’s constitutional duty.

505 U.S. 833, 863-64 (1992). In the context of treason, Larson’s argument that the advances in weaponry since the Marshall Court have altered the military landscape, see *supra* notes 123, 149 and accompanying text, make a compelling case for a similar change in the law of treason with respect to the necessity of an assemblage.

¹⁸³ This point was previously made through a *reductio ad absurdum* form of argument, see *supra* Part III.C (giving a longer and logically precise *reductio ad absurdum* form of argument on this point). To briefly illustrate the point by way of literary example: in *Green Eggs and Ham*, Dr. Seuss, through the protagonist, attempts to make an exhaustive list of the places in which the protagonist refused to breakfast: “I would not eat them here or there. I would not eat them anywhere.” DR. SEUSS, *GREEN EGGS AND HAM* 24 (1960). However, his refusal to eat them either here or there is clearly subsumed within his refusal to eat them anywhere. Similarly, an act of terrorism committed by a citizen, either here or there, is clearly subsumed by the definition of an act of treason committed anywhere. See *Kawakita v. United States*, 343 U.S. 717 (1952) (holding that treason may be committed anywhere).

¹⁸⁴ See *Kawakita v. United States*, 343 U.S. 717, 734-35 (1952) (holding that a treasonous act may be committed by a citizen extraterritorially).

actions,¹⁸⁵ including those of the CIA—an agency within the executive branch—and the Executive. Thus, although the determination to place al-Aulaqi on a kill list was made by the CIA and not the Judiciary, the same rule against constructive treasons constrains the CIA’s ability to draw immaterial distinctions between treason and another crime in deciding to kill al-Aulaqi without Article III process.

3. The Problematic Case of *Ex parte Quirin*

The rule against constructive treasons has been called into question by commentators¹⁸⁶ based on dicta in a controversial 1942 Supreme Court case, *Ex parte Quirin*.¹⁸⁷ However, these commentators fundamentally misread the dicta from that case.

a. *The Quirin Problem: Herbert Haupt, Nazi Saboteur and U.S. Citizen*

U.S. citizen Herbert Haupt and six other Nazis sought a writ of habeas corpus to avoid trial under military jurisdiction.¹⁸⁸ Haupt and his crew were caught by the FBI after they landed by submarine in Florida and arrived in New York City dressed as civilians.¹⁸⁹ The *Quirin* Court addressed whether a U.S. citizen acting as a Nazi saboteur could lawfully be tried for unlawful belligerency—a crime under the “Hague Convention and the law of war” incorporated by an Act of Congress—rather than treason.¹⁹⁰ The Court held that an additional requirement—

¹⁸⁵ HURST, *supra* note 27, at 165 (“[T]he treason clause[] [is] clearly [a] limitation[] upon all the agencies of government, instead of . . . the legislative branch only.”).

¹⁸⁶ Larson, *supra* note 24, at 894-900; James Willard Hurst, *Treason in the United States*, 58 HARV. L. REV. 395, 421 (1945) (“On the other hand, where the defendant is charged with conduct involving all the elements of treason within the constitutional definition, and the gravamen of the accusation against him is an effort to subvert the government, or aid its enemies, it would seem in disregard of the policy of the Constitution to permit him to be tried under another charge than ‘treason.’ However, the decision in *Ex parte Quirin* casts considerable doubt on the validity of this analysis.”), *rept’d in* HURST, *supra* note 27 at 147; *see also Ex parte Quirin*, 317 U.S. 1 (1942).

¹⁸⁷ *Quirin*, 317 U.S. at 18-19, *aff’g* 47 F. Supp. 431 (D.C. Cir. 1942) (finding that a writ of habeas corpus may not issue for *Quirin* and six others), *aff’d on other grounds*, *Hamdi v. Rumsfeld*, 542 U.S. 507, 516, 548-49 (2004) (citations omitted) (emphasis added) (affirming the general ability of the Government to treat enemy belligerents as such in a “foreign theater of war”; however, not affirming the interpretation that *Quirin* allows for no limitation on the Government power based on citizenship: “*Ex parte Quirin* . . . may perhaps be claimed for the proposition that the American citizenship of such a captive does not as such limit the Government’s power to deal with him under the usages of war.”).

¹⁸⁸ *Quirin*, 317 U.S. at 1.

¹⁸⁹ *Id.* at 18-19.

¹⁹⁰ *Id.* at 37-8.

that the actor not be wearing a military uniform—differentiated unlawful belligerency from treason. This distinction arguably called into question the rule against constructive treasons.¹⁹¹ No doubt because of the seemingly obvious immateriality of the addition of the no-uniform requirement to what would otherwise be treason.¹⁹²

Commentators have asserted that *Quirin* is contrary to the rule against constructive treasons.¹⁹³ Because *Quirin* permitted Congress to enact a crime that added presumably immaterial elements to the crime of treason, it does appear to be a departure from the Court’s longstanding adherence to the rule against constructive treasons. However, instead of casting doubt on the rule itself, *Quirin* merely represents a questionable application of the rule, to which commentators have ascribed too much weight. This is especially true in light of its narrow applicability¹⁹⁴ and the availability of a reading of *Quirin* that does not negate the rule.

There are five convincing reasons why *Quirin* should not be construed as contrary to the rule against constructive treasons and why, instead, it should be limited to its facts. First, *Quirin*’s language regarding treason is merely “dict[a]”¹⁹⁵ as no treason charge was before the Court. It is well-settled that the Court “will not bind [itself] unnecessarily to passing dict[a].”¹⁹⁶ Second, *Quirin* is a wartime case. As Court precedent from this era, a “time of war and of grave public danger,”¹⁹⁷ shows, wartime cases often make bad law.¹⁹⁸ The Court at that time was known for giving significant latitude to the Government during war that may not be acceptable boundaries of conduct today.¹⁹⁹ Third, the *Quirin* dicta has received decidedly

¹⁹¹ *Id.* at 38.

¹⁹² *Id.* (addition of a uniform is “irrelevant” to treason).

¹⁹³ *United States v. Rahman*, 189 F.3d 88, 113 (per curiam) (1999) (stating that the *Quirin* “dictum” suggests that “citizens could be tried for an offense against the law of war that included all the elements of treason.”); HURST, *supra* note 27, at 147; Larson, *supra* note 24, at 894-900 (stating that *Hamdi* repeats the error of *Ex parte Quirin* in eviscerating the Treason Clause of meaning).

¹⁹⁴ Besides the analysis that follows, there is some jurisprudential basis for reading *Quirin* as narrowly holding that the Government has a right to exercise military jurisdiction over a U.S. citizen in certain circumstances. See *N.Y. Times Co. v. U.S. Dep’t of Justice*, 915 F. Supp. 2d 508, 526 n.13 (S.D.N.Y. 2013); *cf.* *Hamdi v. Rumsfeld*, 542 U.S. 507, 569-72 & n.4 (2004) (Scalia, J., dissenting).

¹⁹⁵ *Rahman*, 189 F.3d at 113 (comparing *Ex parte Quirin* with *Cramer*).

¹⁹⁶ See, e.g., *S.E.C. v. W.J. Howey Co.*, 328 U.S. 293, 299 (1946).

¹⁹⁷ *Ex parte Quirin*, 317 U.S. 1, 25 (1942).

¹⁹⁸ E.g., *Korematsu v. United States*, 323 U.S. 214 (1944). See generally Eugene Rostow, *The Japanese American Cases—A Disaster*, 54 *YALE L. J.* 489 (1945).

¹⁹⁹ See, e.g., ERWIN CHERMERINSKY, *CONSTITUTIONAL LAW: PRINCIPLES AND POLICIES* 715 & n.45 and accompanying text (4th ed. 2011) (citing Rostow, *supra* note

negative reviews from both well-regarded commentators²⁰⁰ and Supreme Court Justices.²⁰¹ Fourth, Herbert Haupt's "mission was to act as a secret agent, spy[,] and saboteur for the German Reich." These sorts of overt acts are relegated to the realm of adhering to the enemy by giving aid and comfort, not the levying of war.²⁰² Fifth, *Quirin's* reliance on the powers of the President under the usages of war was severely limited by the 1957 decision, *Reid v. Covert*. *Covert* causes a crime under the "Hague Convention and the law of war" and incorporated by an Act of Congress to subordinate to the requirements of the Constitution generally, and thus, of import to this note, the Treason Clause.²⁰³

Even assuming the *Quirin* dicta stood as good law, a close reading does support a negation of the rule against constructive treasons. The language at issue in *Quirin* is a very terse treatment of the issue of treason versus unlawful belligerency:

Citizenship in the United States of an enemy belligerent does not relieve him from the consequences of a belligerency which is unlawful because in violation of the law of war. Citizens who associate themselves with the military arm of the enemy government, and with its aid, guidance and direction enter this country bent on hostile acts are enemy belligerents within the meaning of the Hague Convention and the law of war. It is as an enemy belligerent that petitioner Haupt is charged with entering the United States, and unlawful belligerency is the gravamen of the offense of which he is accused.

The argument leaves out of account the nature of the offense which the Government charges and which the Act of Congress, by incorporating the law of war, punishes. It is that each petitioner, in circumstances which gave him the status of an enemy belligerent, passed our military and naval lines and defenses or went behind those lines, in civilian dress and with hostile purpose. The offense was complete when with that purpose they entered-or, having so entered, they remained upon-our territory in time of war without

198); Rostow, *supra* note 198 ("Korematsu is objectionable because the government used race alone as the basis for predicting who was a threat to national security and who would remain free.").

²⁰⁰ *E.g.*, HURST, *supra* note 27, at 147-48; Larson, *supra* note 24, at 894-900.

²⁰¹ Hamdi v. Rumsfeld, 542 U.S. 507, 569 (2004) (Scalia, J., dissenting) (internal citations omitted) ("The case was not this Court's finest hour. The Court upheld the commission and denied relief in a brief *per curiam* issued the day after oral argument concluded . . . a week later the Government carried out the commission's death sentence upon six saboteurs, including Haupt. The Court eventually explained its reasoning in a written opinion issued several months later.").

²⁰² *Cf.* Haupt v. United States, 330 U.S. 631, 644 (1947) (upholding the conviction a civilian co-conspirator to the conspiracy in *Ex parte Quirin* for treason by giving aid and comfort rather than levying war).

²⁰³ Reid v. Covert, 354 U.S. 1 (1957) (plurality) (Black, J.).

uniform or other appropriate means of identification. For that reason, even when committed by a citizen, the offense is distinct from the crime of treason defined in Article III, § 3 of the Constitution, since the absence of uniform essential to one is irrelevant to the other.²⁰⁴

Upon close reading, the Court is applying the rule against constructive treasons to two variations of “the crime of treason defined in Article III, § 3 of the Constitution”²⁰⁵: the addition of the “absence of uniform”²⁰⁶ requirement and the subtraction of a citizenship or allegiance requirement. The Court found that the addition of a no-uniform requirement was an essential element and, “[f]or that reason, even when committed by a citizen, the offense is distinct from the crime of treason.”²⁰⁷ In fact, the assertion that the offense is not distinct from treason “leaves out of account the nature of the offense [of unlawful belligerency].”²⁰⁸ In applying the rule, the Court should have focused on the irrelevancy of a uniform element to treason rather than the relevancy of it to unlawful belligerency, as elements are *added to treason* in this formulation²⁰⁹: “since the absence of uniform essential to [unlawful belligerency] is irrelevant to [treason].”²¹⁰ In essence, therefore, the Court employed the additive formulation of the rule against constructive treasons and merely misapplied it, rather than contradicting the rule.²¹¹

In 1945, the Supreme Court reaffirmed its commitment to the rule against constructive treasons in *Cramer v. United States*, further making clear that the Supreme Court did not intend to upend the rule against constructive treasons.²¹² *Cramer* was an appeal from the treason trial of one of Haupt’s co-conspirators. Based on the same set of facts and less than three years later, the Court again affirmed its commitment to the rule against constructive treasons in a significantly deeper treatment of the topic than in *Quirin*.²¹³ It clarified that it did

²⁰⁴ *Ex parte Quirin*, 317 U.S. 1, 37-8 (1942) (citations omitted) (emphasis added).

²⁰⁵ *Id.* at 38.

²⁰⁶ *Id.*

²⁰⁷ *Id.*

²⁰⁸ *Id.*

²⁰⁹ *Cf. Ex parte Bollman*, 8 U.S. (4 Cranch) 75, 125-26 (1807).

²¹⁰ *Rosenberg v. United States*, 195 F.2d 583, 610-11 (1952).

²¹¹ *See United States v. Rosenberg*, 195 F.2d 583, 610-11 (2d Cir. 1952) (“[T]he absence of uniform [in *Quirin*] was an *additional* element[.]”).

²¹² *Cramer v. United States*, 325 U.S. 1, 45 (1945).

²¹³ *Id.*; *see also Haupt v. United States*, 330 U.S. 631 (1947) (holding that Haupt’s father, who never donned a Nazi uniform, was guilty of treason by giving aid and comfort).

not “intimate that Congress could dispense with . . . [Article III protections] by giving the same offense another name.”²¹⁴

Additionally, and more directly toward the facts of *Quirin*, there is another, later Supreme Court case about the trial of Haupt’s father, Hans, a co-conspirator to the same plot, which supports this reading and for the limiting *Quirin* when the exigencies of war disappeared. Hans was convicted at trial of treason and appealed.²¹⁵ The Court’s 1947 case regarding that appeal, *Haupt v. United States*,²¹⁶ confirms this reading of *Quirin* as a materiality-of-individual-elements analysis utilizing the additive formulation. *Haupt* was an appeal from the treason trial of Haupt’s father, Hans, another co-conspirator. While both father and son were part of the same Nazi conspiracy, the father never donned a Nazi uniform—the uniform that made the difference between unlawful belligerency and treason in *Quirin*.

Application of a rule—even with questionable analysis—cannot be said to signify abandonment of the rule itself.²¹⁷ Therefore, the problem with *Quirin* is not that the Court has abandoned the rule against constructive treasons, but instead that the *Quirin* framework is inapt; similar to how *Korematsu*—if still cited today—would be an unsuitable framework for the application of strict scrutiny to facial racial classifications. Thus, *Quirin* properly rests within treason law as a *Korematsu*-like wartime aberration.²¹⁸ Albeit *Quirin* is lesser in magnitude, is still similarly is not a contradiction of the rule against constructive treasons.²¹⁹ The Court did not reject the restrictive rule; it merely applied it incorrectly.²²⁰

The *Quirin* Court did not need to reach the issue of whether the subtraction of either the citizenship or allegiance requirement would create a material difference because any single material variation makes an offense distinct from

²¹⁴ *Cramer*, 325 U.S. at 45.

²¹⁵ *Haupt*, 330 U.S. at 631.

²¹⁶ *Id.* at 631.

²¹⁷ *E.g.*, *Korematsu v. United States*, 323 U.S. 214 (1944) (applying questionable-at-best strict scrutiny to facial racial classifications while not invalidating strict scrutiny for facial racial classifications).

²¹⁸ *See Hamdi v. Rumsfeld*, 542 U.S. 507, 569 (2004) (Scalia, J., dissenting) (“[*Quirin*] was not this Court’s finest hour.” (internal citations omitted)); *Stenberg v. Carhart*, 530 U.S. 914, 953 (2000) (Scalia, J., dissenting) (describing *Korematsu* as one of the worst Supreme Court decisions in history).

²¹⁹ *Contra Larson*, *supra* note 24, at 894-900; *but see Hurst*, *supra* note 186, at 421.

²²⁰ The questionable application is similar—albeit lesser in magnitude—to the application of strict scrutiny for facial racial classifications in *Korematsu*. *See generally Rostow*, *supra* note 198.

treason. Rather, the Court seems to assume such a variation would create a constructive treason²²¹: the Court's precedent in *Wiltberger* expressly shows that the recitation of an allegiance requirement does not affect the construction of treason.²²²

b. The Quirin Problem in the Circuits

The Second, Seventh, and Eleventh Circuits have had the occasion to weigh in on the link between terrorism and treason by levying war. To date, each court has fallen into the first peril. As a result of the *Quirin* problem, the courts have drawn an immaterial distinction between treason and would-be constructive treasons.

In 1952, in *United States v. Rosenberg*, the Second Circuit became the first court to recognize the potential for incongruous "inferior court[]" results from and the severe criticism of the *Quirin* decision:

This ruling has been criticized. But this ruling binds inferior courts such as ours. In the *Quirin* case, the absence of uniform was an additional element, essential to [unlawful belligerency] although irrelevant to . . . treason; in the Rosenbergs' case, an essential element of treason, giving aid to an 'enemy,' is irrelevant to the espionage offense.

. . . .

. . . [T]he *Quirin* case had the unavoidable consequence of permitting death sentences to be imposed upon the citizen-saboteurs for crimes other than treason.²²³

The *Rosenberg* case dealt with the appeal from the conviction for the espionage-related offenses of the most infamous Soviet atomic spies.²²⁴ The Rosenbergs asserted that espionage offenses are a constructive treason under the giving aid and comfort definition of treason.²²⁵ The *Rosenberg* court's denial of the defense and reasoning would prove to be prescient.

²²¹ *Ex parte Quirin*, 317 U.S. 1, 38 (1942) ("For that reason, *even when committed by a citizen*, the offense is distinct from the crime of treason defined in Article III, § 3 of the Constitution, since the absence of uniform essential to one is irrelevant to the other." (emphasis added)).

²²² *United States v. Wiltberger*, 18 U.S. (5 Wheat.) 76, 96-97 (1820).

²²³ *United States v. Rosenberg*, 195 F.2d 583, 610-11 (2d Cir. 1952) (internal citations omitted); *see id.* at nn. 44-45; *see also* *United States v. Drummond*, 354 F.2d 132, 152-53 (2d Cir. 1965).

²²⁴ *Rosenberg*, 195 F.2d at 588-90, 611; *see also* *Drummond*, 354 F.2d at 152-53.

²²⁵ *Rosenberg*, 195 F.2d at 588-90, 610; *see also* *Drummond*, 354 F.2d at 152-53.

In 1986, in *United States v. Rodriguez*, the Seventh Circuit decided the appeal brought by a convicted member of Fuerzas Armadas de Liberación Nacional Puertorriqueña (FALN), “an armed clandestine terrorist organization seeking independence for Puerto Rico.”²²⁶ Rodriguez was convicted of seditious conspiracy to levy war for his role in the attempted bombing of U.S. military facilities in Chicago.²²⁷ The appellant challenged the seditious conspiracy statute on the grounds “that [it] [was] merely a ‘constructive treason’ statute that dispense[d] with the constitutional requirement[s].”²²⁸ Comparing seditious conspiracy to treason, the court engaged in analysis of what “requirements” differed between treason and seditious conspiracy, and of the different interests in criminalizing the conduct.²²⁹ The court held “that [seditious conspiracy] does not conflict with the [T]reason [C]ause. [Seditious conspiracy] protects a different governmental interest and proscribes a different crime.”²³⁰ Among other things, the *Rodriguez* court contended that seditious conspiracy lacked an allegiance element.²³¹ The court did not clearly decide whether the absence of an allegiance element, by itself, would make a material difference because it focused on the cumulative differences between the elements of treason and seditious conspiracy.²³²

In 1999, in *United States v. Rahman*, the Second Circuit affirmed the use of “analogous” sentencing guidelines for treason by levying of war when deciding the punishment for the participants in the 1993 World Trade Center bombing.²³³ The defendants were convicted of conspiracy to commit sedition by levying war.²³⁴ The court held that, with respect to the constructive treason defense raised,²³⁵ “[The] Treason Clause does not apply to the prosecution. The [Treason Clause] appl[ies] to prosecutions for ‘treason.’” Further, “[The defendants]

²²⁶ *United States v. Rodriguez*, 803 F.2d 318, 319 (7th Cir. 1986).

²²⁷ *Id.*

²²⁸ *Id.* at 320.

²²⁹ *Id.*

²³⁰ *Id.*

²³¹ *Id.*

²³² *Id.*

²³³ *United States v. Rahman*, 189 F.3d 88, 103 (2d Cir. 1999) (per curiam), cert. denied, 528 U.S. 1094 (2000).

²³⁴ *Id.* at 103.

²³⁵ *Id.* at 113 (“Nosair suggests that allegiance to the United States is not an element of treason within the contemplation of the Constitution. He concludes that, for constitutional purposes, the elements constituting seditious conspiracy by levying war and treason by levying war are identical, and consequently that prosecutions for seditious conspiracy by levying war must conform to the requirements of the Treason Clause.”).

were not charged with treason. Their offense . . . seditious conspiracy . . . differs from treason not only in name and associated stigma, but also *in its essential elements* and punishment.”²³⁶ The *Rahman* court reasoned that seditious conspiracy is distinct from treason for two primary reasons.²³⁷ First, the seditious conspiracy statute subtracts an allegiance element; and second, a seditious alien is less stigmatized in his home country than a treasonous citizen.²³⁸ The *Rahman* court, however, citing *Quirin*, noted that “the question [of] whether the [Treason] [C]lause applies to offenses that include all the elements of treason but are not branded as such” remains open.²³⁹

In 2011, in *United States v. Augustin*, the Eleventh Circuit cited the Second Circuit’s *Rahman* decision and the Seventh Circuit’s *Rodriguez* decision in denying the appeal of Augustine (not Augustin), an al-Qaeda operative.²⁴⁰ Augustine asserted a constructive treason defense during his trial where he was charged with providing material support to a terrorist organization.²⁴¹ The Eleventh Circuit noted that “neither . . . statutes under which Augustine was convicted—include allegiance to the United States as an element of the offense.” Therefore, it had “no trouble concluding that these offenses, as defined by Congress, do not fall within the ambit of the Treason Clause.”²⁴²

Although the *Rodriguez*, *Rahman*, and *Augustin* courts all reached the right result regarding seditious conspiracy, they did so by basing their decisions on the wrong premise. While they impermissibly focused upon the presence or absence of an allegiance requirement—especially because *Wiltberger* expressly proscribes that construction—they ignored the existence of a unique, and materially different, element in seditious conspiracy: the conspiracy. As explained by the Supreme Court in *Bollman*, conspiracy to levy war is a separate and distinct

²³⁶ *Id.* at 112 (emphasis added).

²³⁷ *Id.* at 112-13.

²³⁸ *Id.* at 112-13, n.9 (noting that seditious conspiracy is a “lesser offense,” thus, “[w]hether any of the defendants in fact owed allegiance to the United States and thus could have been prosecuted for treason if the other requirements to make such a prosecution were satisfied is immaterial”). Whether the necessary and sufficient nature of the treason definition affects the merging of offenses under the Doctrine of Lesser Included Offenses has not been addressed.

²³⁹ *Id.* at 113 (citing *Quirin*, 317 U.S. at 37-38).

²⁴⁰ *United States v. Augustin*, 661 F.3d 1105, 1117 (11th Cir. 2011) (citing *United States v. Rahman*, 189 F.3d 88, 113 (2d Cir. 1999) (per curiam); *United States v. Rodriguez*, 803 F.2d 318, 320 (7th Cir.1986), *cert. denied*, 132 S. Ct. 2444 (2012).

²⁴¹ *Augustin*, 661 F.3d at 1117 (citing *Rahman*, 189 F.3d at 113; *Rodriguez*, 803 F.2d at 320)

²⁴² *Id.*

offense from treason because it adds a unique material element: conspiracy itself.²⁴³ Treason by levying war requires overt acts tantamount to levying war, not merely overt acts in furtherance of the conspiracy.²⁴⁴ Applying the *Bollman* reasoning to seditious conspiracy produces the same result reached by the Circuits, but it does so without the need for an elemental inquiry that was performed over 200 years ago.²⁴⁵

Additionally, the Circuits have fundamentally misapplied *Wiltberger*'s holding regarding the allegiance or citizenship requirement of treason. In *Wiltberger*, Chief Justice Marshall compared the treason statute with the misprision (failing to report actual knowledge of) of treason statute.²⁴⁶ As Marshall noted, "The words . . . 'owing allegiance to the United States' [in the treason statute] . . . are entirely surplus words, which do not, in the slightest degree, affect its sense."²⁴⁷ The Circuits certainly understood the material necessity of allegiance, as discussed in *Wiltberger*,²⁴⁸ but they failed to recognize that a recitation of allegiance is neither material nor necessary. *Wiltberger* held that, when comparing the treason statute to another statute, the express inclusion of an allegiance element in the treason statute has no effect.²⁴⁹ If the allegiance element were omitted from the treason statute—such that the language of the statute precisely mirrored the constitutional clause—then the flaws in the elemental analysis performed by the Second, Seventh, and Eleventh Circuits are clear. Therefore, to give effect to *Wiltberger*, courts must construe the treason statute as if allegiance were not an element, but rather a mere factual precondition necessary for the mens rea.²⁵⁰ The principal idea is that a person must owe an allegiance to commit treason, so when someone owing an allegiance does what is substantively treason, his or her act is treason and not some other crime.

²⁴³ *Ex parte Bollman*, 8 U.S. (4 Cranch) 75, 125-26 (1807).

²⁴⁴ *Id.*

²⁴⁵ *See id.* at 127. *Compare* 18 U.S.C § 2384 (2012) (seditious conspiracy), *with* 18 U.S.C § 2381 (treason).

²⁴⁶ *United States v. Wiltberger*, 18 U.S. (5 Wheat.) 76, 96-9 (1820). The Court reprinted the statutes in question at footnote "a." *Id.* at 80 n.a. The language of the treason statute is substantially the same except for the possibility of lesser punishment. *Compare id.* (defining the crime of treason in 1820), *with* 18 U.S.C § 2381 (modern treason statute).

²⁴⁷ *Wiltberger*, 18 U.S. (5 Wheat.) at 97 (interpreting the treason statute, which is now codified at 18 U.S.C § 2381).

²⁴⁸ *E.g.*, *United States v. Rahman*, 189 F.3d 88, 113 (2d Cir.1999) (quoting *Wiltberger*, 18 U.S. (5 Wheat.) at 97) ("[T]reason is a breach of allegiance, and can be committed by him only who owes allegiance.").

²⁴⁹ *Wiltberger*, 18 U.S. (5 Wheat.) at 96-97.

²⁵⁰ *See supra* notes 153-55 and accompanying text.

Notwithstanding flaws in their reasoning, each of these Circuits—and even the Supreme Court in *Quirin*—has indicated an inclination to engage in the mirroring, additive, and subtractive analysis for detecting substantive differences between treason and the statute in question. In addition to expressly affirming the mirroring formulation in *Cramer*, the Supreme Court used the subtractive formulation in *Wiltberger*, the additive formulation in *Bollman*, and—questionable result aside—in *Quirin*.²⁵¹ But without guidance from the Supreme Court on how to conduct such analysis, the constructive treason defense is doomed because of the *Quirin* problem. The Seventh Circuit analyzed whether the elements of the crime differed from that of treason by listing each and every semantic distinction that occurred to them, but it failed to consider the materiality of those distinctions.²⁵² The Second Circuit began to consider the materiality of the differing elements, but, in contradicting *Wiltberger*, it concluded that the lack of an allegiance element in the seditious conspiracy statute was an essential distinction from treason.²⁵³ The Eleventh Circuit compared the elements, but stopped its inquiry after noting that seditious conspiracy lacked an allegiance requirement, and relied on its sister circuits' decisions on point rather than applying *Wiltberger*.²⁵⁴ Thus, the Supreme Court would merely need to synthesize its previous rulings into these three coherent formulations to resolve the analytical portion of the *Quirin* problem.

c. The Solution: “Korematsu” Quirin

If *Korematsu*—the first Supreme Court case expressly to apply strict scrutiny to facial classifications on the basis of race—were considered to be the framework for applying strict scrutiny today, a cogent Equal Protection Clause jurisprudence would not exist. The similarly aberrant, wartime application of the even more well-established rule against constructive treasons should not constitute the framework for modern application. Giving effect to *Wiltberger*, *Bollman*, *Cramer*, and the above formulations of the rule against constructive treason would fix the analytical problems faced by the Circuits in applying the rule against constructive treasons post-*Quirin*. But

²⁵¹ See *supra* Part IV.A.1 & note 165.

²⁵² *United States v. Rodriguez*, 803 F.2d 318, 320 (7th Cir. 1986).

²⁵³ *United States v. Rahman*, 189 F.3d 88, 111-13 (2d Cir. 1999) (per curiam).

²⁵⁴ *United States v. Augustin*, 661 F.3d 1105, 1117 (11th Cir. 2011), *cert. denied*, 132 S. Ct. 2444 (2012).

the uniform issue remains. How may terrorists, like al-Aulaqi, who presumably never wear military uniforms, avoid the specific holding of *Quirin*? And are certain acts committed by a citizen treasonous only if committed while wearing a uniform?²⁵⁵

There is one very simple and commonsense way to avoid the confusion created by *Quirin*, at least in the context of targeted killing: limit *Quirin* to its facts. As Judge McMahon noted in granting summary judgment for the Government in *New York Times Co. v. U.S. Department of Justice*:

Both *Quirin* and *Hamdi* involved individuals who were in United States custody. *Quirin* remains the lone case upholding the right to try a United States citizen before a military commission; it said nothing at all about killing a United States citizen without any sort of trial. *Hamdi* addressed the right of a United States citizen detained in the United States as an enemy combatant to challenge his confinement via habeas corpus. Again, there was no suggestion that Mr. Hamdi was to be executed without some kind of trial.²⁵⁶

Justice Scalia's *Hamdi* dissent provides additional jurisprudential support for reading *Quirin* as narrowly holding that the Government has a right to exercise military jurisdiction over a U.S. citizen in certain, extreme circumstances.²⁵⁷

Moreover, according to the *Quirin* court, and on the facts before it, a uniform was an "appropriate means of identification."²⁵⁸ Today, however, the Government could not claim, with any validity, that the absence of a uniform affects its ability to identify al-Aulaqi. The cases of Herbert Haupt and Anwar al-Aulaqi arose in very different contexts. Haupt took up a uniform in serving Nazi Germany,²⁵⁹ a well-organized enemy with a central government, and was captured on U.S. soil.²⁶⁰ Al-Aulaqi never wore a uniform, did not work for an enemy that could be described as an effectively organized central government, and was stalked by a predator drone in

²⁵⁵ See *Ex parte Quirin*, 317 U.S. 1, 37-38 (1942). The Supreme Court's opinion in *Hamdi* may be read as signaling that it is uncomfortable with the result in *Quirin*. *Hamdi v. Rumsfeld*, 542 U.S. 507, 548-49 (2004) (plurality opinion) (O'Connor, J.) ("*Ex parte Quirin* may perhaps be claimed for the proposition that the American citizenship of such a captive does not as such limit the Government's power to deal with him under the usages of war." (citations omitted) (emphasis added)); see also *id.* at 569-72 & n.4 (Scalia, J., dissenting).

²⁵⁶ *N.Y. Times Co. v. U.S. Dep't of Justice*, 915 F. Supp. 2d 508, 526 n.13 (S.D.N.Y. 2013).

²⁵⁷ *Id.* at 523 (citing *Hamdi*, 542 U.S. at 554 (2004) (Scalia, J., dissenting)); see also *Hamdi*, 542 U.S. at 569-72 & n.4 (Scalia, J., dissenting).

²⁵⁸ *Quirin*, 317 U.S. at 38.

²⁵⁹ *Id.* at 21.

²⁶⁰ *Id.* at 21-22.

Yemen.²⁶¹ In Haupt's case, a Nazi uniform would have helped the U.S. government to identify its enemy as he walked along the beaches of Long Island and the streets of New York City (and in fact an abandoned one did). In al-Aulaqi's case, by way of contrast, the targeted nature of the drone strike²⁶² permits the inference that the Government had no trouble identifying al-Aulaqi, even from the sky, well before striking. Although a uniform may assist in the identification of terrorists in some cases, in the circumstance of targeted killing, where the Government has already identified and located its target, it does not. Therefore, *Quirin*, as well as *Hamdi's* reliance on *Quirin*, is inapposite to cases of targeted killing. This line of reasoning is particularly damning to the Justice Department's legal position on the matter, as what has been revealed of the government's legal justification relies almost exclusively on *Hamdi*.²⁶³

B. A Corruption of Blood and Citizen-Terrorist Property Interests: Disparate Treatment

Prosecution under a differently named crime that affords the protections of the Treason Clause is a harmless constructive treason because the Treason Clause was complied with in all but name.²⁶⁴ That is to say, if a prosecution for terrorism was in fact a prosecution for constructive treason, but the defendant was afforded the processes due to a traitor, the error would be harmless.²⁶⁵ In al-Aulaqi's case, there are numerous obvious ways that his treatment did not comport with the Treason Clause. This section focuses on the one example of the disparate treatment between terrorists and traitors: the corruption of blood. Rather than being treated as a traitor's assets, al-Aulaqi's assets were treated as a non-citizen terrorist's assets.²⁶⁶ They were subject to total forfeiture and

²⁶¹ See *supra* Part II (discussing how al-Aulaqi worked for AQAP, a non-state terrorist organization notable for deceptive and nefarious tactics).

²⁶² See *supra* Part II (discussing the precision drone strike that killed al-Aulaqi).

²⁶³ See *infra* note 298.

²⁶⁴ *United States v. Drummond*, 354 F.2d 132, 152 (2d Cir. 1965) (“[I]t is also settled that an offense must incorporate all the elements of treason in order for the two-witness rule to apply.”); see *United States v. Rahman*, 189 F.3d 88, 111-13 (2d Cir. 1999) (per curiam) (“[The defendant’s] conviction was not supported by two witnesses to the same overt act. Accordingly the conviction must be overturned if the requirement of the Treason Clause applies to this prosecution.”); see also *United States v. Rosenberg*, 195 F.2d 583, 610-11 (2d Cir. 1952).

²⁶⁵ Cf. *Rahman*, 189 F.3d at 111-13.

²⁶⁶ 18 U.S.C. § 981(a)(1)(G) (2012); *Al-Aulaqi Designation*, *supra* note 101, at 43233-34.

seizure by order of the U.S. Department of the Treasury.²⁶⁷ In light of *Van Riswick*, and because al-Aulaqi is properly characterized as a traitor, those assets must divest completely from the Government and pass on to al-Aulaqi's successors in interest.²⁶⁸ If any assets seized pursuant to al-Aulaqi's designation as a Specially Designated Global Terrorist, or forfeited under 18 U.S.C. § 981(a)(1)(G),²⁶⁹ have not yet divested completely from the Government, then the bar against corruptions of blood is violated.

Incidentally, this particular form of asset protection provides relief for the standing issue that predicated the dismissal in *al-Aulaqi v. Obama*.²⁷⁰ By creating an injury in fact to al-Aulaqi's estate (unlawful seizure of Anwar's assets under Treasury Department terrorism procedures), the government thus confers third-party standing on the executor.²⁷¹ Further, the petitioners in *al-Aulaqi v. Panetta* employed executory interest as the basis for standing; the ACLU asserts standing for Nasser al-Aulaqi not as father, but as executor.²⁷² If Nasser al-Aulaqi is able to demonstrate his credentials as executor, then the case will likely address the merits of the case.²⁷³

C. *Remedy for Violations of a Citizen's Treason Clause Rights*

Courts have treated failure to abide by the Treason Clause as structural error, which demands automatic reversal on appeal without a showing of prejudice.²⁷⁴ However, there are

²⁶⁷ 18 U.S.C. § 981(a)(1)(G); *Al-Aulaqi* Designation, *supra* note 101, at 43233-01.

²⁶⁸ *Wallach v. Van Riswick*, 92 U.S. 202, 209 (1875).

²⁶⁹ § 981(a)(1)(G) (providing that all of a terrorist's assets, real or personal, foreign or domestic, are subject to forfeiture).

²⁷⁰ *Al-Aulaqi v. Obama*, 727 F. Supp. 2d 1, 28, 30 (D.D.C. 2010).

²⁷¹ Judge Bates hinted that the ACLU may be able to surmount the standing issue by asserting official executory interest. *See Al-Aulaqi*, 727 F. Supp. 2d at 25-26 (citing *Saunders v. Air Florida, Inc.*, 558 F. Supp. 1233, 1235 (D.D.C. 1983) ("The D.C. wrongful death statute does not provide a basis for plaintiff's alleged legally protected interest in preserving his relationship with his adult son, as it only protects persons who are 'officially appointed executors or administrators of the child's estate'. . . . There is no evidence in the record to suggest that plaintiff is the 'executor or administrator' of Anwar Al-Aulaqi's estate, and the Court is aware of no other possible statutory basis for plaintiff's alleged legally protected interest.")).

²⁷² *Panetta* Complaint, *supra* note 20, at ¶ 6.

²⁷³ Defs. Motion to Dismiss at 4-5, *Al-Aulaqi v. Panetta*, 1:12-cv-01192-RMC (D.C. Cir. 2012) (contesting standing on the narrow grounds that plaintiffs "failed to properly alleg[e]" that they are "decedents' personal [estate] representatives" because the plaintiffs must have previously "file[d] with the Register a copy of the appointment as personal representative.").

²⁷⁴ *See United States v. Marcus*, 130 S. Ct. 2159, 2165 (2010) (defining a structural error); *cf. United States v. Burr*, 25 F. Cas. 55, 181 (Marshall, Circuit Justice, C.C.D. Va., 1807) (No. 14692a) (dismissing a High Treason charge against

valid arguments for a different standard of review. The guarantees of the Treason Clause have never been subjected to a standard of review such as those employed in due process or equal protection cases. The Supreme Court has never addressed the question of whether all violations require immediate reversal or if there may be circumstances in which a state's interests outweigh the harm of the deprivation.

Supreme Court precedent indicates that automatic reversal results from the deprivation of any of the procedural protections afforded by the Treason Clause. In *United States v. Burr*, Justice Marshall dismissed the High Treason charge against Aaron Burr because, as an evidentiary matter, the Government had not provided two witnesses to the same overt treasonous act.²⁷⁵ Hundreds of years later, in *Rahman*, the Second Circuit stated that “[i]t is undisputed that [the defendant]’s conviction was not supported by two witnesses to the same overt act. Accordingly, the conviction must be overturned if the requirement of the Treason Clause applies to this prosecution for seditious conspiracy.”²⁷⁶

The Judiciary is responsible for ensuring that the Government does not abuse its power by declaring a person an enemy of the state in order to suppress that person’s political activities.²⁷⁷ The procedural protections in the Treason Clause do not exist simply to make prosecution more challenging. Rather, they exist to safeguard against improper accusations, which would be manifest miscarriages of justice were they brought to trial. A court can tell the difference between a treason prosecution for the purpose of suppressing minority political activity and one to address a security threat without

Aaron Burr as there were no two witnesses to the same overt act); *see also* *United States v. Rahman*, 189 F.3d 88, 112 (2d Cir. 1999) (per curiam).

²⁷⁵ *Burr*, 25 F. Cas. at 13 (Marshall, Circuit Justice, C.C.D. Va., 1807) (No. 14692a) (“[Treason] . . . must be proved by two witnesses Under the control of this constitutional regulation, I am to inquire whether the testimony laid before me furnishes probable cause in support of this charge.”); *see also* *United States v. Burr*, 25 F. Cas. 55, 180 (Marshall, Circuit Justice, C.C.D. Va., 1807) (No. 14693) (“This opinion does not comprehend the proof by two witnesses . . .”).

²⁷⁶ *Rahman*, 189 F.3d at 112.

²⁷⁷ The matter that concerned the Founding Fathers was really the use of treason convictions by political factions to “[wreak] alternate malignity on each other.” THE FEDERALIST NO. 43, *supra* note 29. For example, if al-Aulaqi were not in any way related to the operations of AQAP and publically spoke as a cleric against policies of the United States, then his actions wouldn’t be treason by levying war, but likely political speech covered by the First Amendment. *But cf.* *Brandenburg v. Ohio*, 395 U.S. 444, 449-50 (1969). Depending on the specific content of the speech, however, if it “incite[d] his listeners to imminent lawless action,” it would forfeit First Amendment protection. *Id.*

entering into deep and exhaustive inquiry. Where the government kills traitors without process to address a clear, imminent security threat, no such miscarriage exists, and procedural defects should be subject to less stringent review.

D. Treason Clause Externalities: A Brief Discussion of the Effect of Article III, Section iii on the Political Question Doctrine

A court scrutinizing the Government action in *al-Aulaqi v. Obama* would need to determine if al-Aulaqi was a military threat. This turns on the question of how a court could qualify a threat to determine the appropriateness of the responding force.²⁷⁸ As the judge in *al-Aulaqi v. Obama* held, such an inquiry is the traditional hallmark of a non-justiciable political question.²⁷⁹ But some commentators have argued that it is not.²⁸⁰ The application of the political question doctrine in *al-Aulaqi v. Obama* was mere dicta: the court had already held that the plaintiffs lacked standing and it did not need to reach the issue of political question nonjusticiability.²⁸¹ Nevertheless, with respect to a constructive treason defense, consideration of two of the six factors considered in political question jurisprudence—a textually demonstrable commitment to a coordinate branch of the Government, and the lack of a judicially manageable standard of determination—is informative as the analysis of these factors changes significantly when the Treason Clause comes into play.²⁸²

The Judiciary is not allowed to intrude upon issues where there is a textually demonstrable commitment to a

²⁷⁸ Ex ante determinations on the appropriateness of military decisions like this this traditionally have been relegated to the realm of non-justiciable political questions. See, e.g., *Al-Aulaqi v. Obama*, 727 F. Supp. 2d 1, 46-47 (D.D.C. 2010). The Court, however, has clearly signaled that it will entertain challenges to actions under the war power. See, e.g., *United States v. Robel*, 389 U.S. 258 (1967); *Korematsu v. United States*, 323 U.S. 214 (1944); *Hirabayashi v. United States*, 320 U.S. 81 (1943).

²⁷⁹ *Al-Aulaqi*, 727 F. Supp. 2d at 46-47.

²⁸⁰ E.g., Dehn & Heller, *supra* note 8.

²⁸¹ *Al-Aulaqi*, 727 F. Supp. 2d at 35 (standing); *id.* at 52 (justiciability).

²⁸² *Baker v. Carr*, 369 U.S. 186, 217 (1962) (plurality opinion) (“Prominent on the surface of any case held to involve a political question is found a textually demonstrable constitutional commitment of the issue to a coordinate political department; or a lack of judicially discoverable and manageable standards for resolving it; or the impossibility of deciding without an initial policy determination of a kind clearly for nonjudicial discretion; or the impossibility of a court’s undertaking independent resolution without expressing lack of the respect due coordinate branches of government; or an unusual need for unquestioning adherence to a political decision already made; or the potentiality of embarrassment from multifarious pronouncements by various departments on one question.”).

coordinate branch of government because “[t]he nonjusticiability of a political question is primarily a function of the separation of powers.”²⁸³ The fact that the Treason Clause appears in Article III, and not Article I or II, reveals no such textual commitment. Rather, it represents a textually demonstrable commitment to the Judiciary to administer treason law.²⁸⁴ Thus, the *al-Aulaqi* court’s reliance on the textual delegation of foreign affairs and war-making authority to the Executive and Congress²⁸⁵ would be inapposite in a Treason Clause challenge.

While such an interpretation may seem overly textual, the Government, in moving to dismiss the *al-Aulaqi v. Panetta* suit, used a parallel reading. The ACLU complaint alleged that “[the Government’s] actions constituted an unconstitutional act of attainder because [the Government] designated Anwar Al-Aulaqi for death without the protections of a judicial trial”²⁸⁶ Bills of attainder are always unconstitutional under Article I.²⁸⁷ The Government asserts that “the Bill of Attainder Clause applies to bills: legislative acts—not executive ones” because “[the] clause is found in Article I of the Constitution, the article addressing the powers of Congress.”²⁸⁸ The Government’s position is correct insofar as Supreme Court jurisprudence states, attainders are a “category of *Congressional* actions which the Constitution barred.”²⁸⁹ However, if the court accepts the Government’s textual argument that the prohibition on attainders does not apply to the Executive because of its placement in Article I, then it must analogously construe the Treason Clause’s judicial restrictions and responsibilities.

Further, the CIA Counterterrorism Center legal team has created a “judicially discoverable and manageable standard.”²⁹⁰ “These [counterterrorism] operations are conducted in strict accordance with American law and are governed by legal

²⁸³ *Baker*, 369 U.S. at 210.

²⁸⁴ See *supra* Part I.A.2 (discussing separation of powers); see also N.Y. Times Co. v. U.S. Dep’t of Justice, 915 F. Supp. 2d 508, 523 (S.D.N.Y. 2013) (discussing the separation of powers regarding treason law and the role of the judiciary).

²⁸⁵ *Al-Aulaqi*, 727 F. Supp. 2d at 47-48.

²⁸⁶ *Panetta* Complaint, *supra* note 20 at ¶ 43.

²⁸⁷ U.S. CONST. art. I, § 9 cl. 3. The Government’s motion to dismiss also asserts several cases to support its proposition.

²⁸⁸ Defs. Motion to Diss. at 44-45, *Al-Aulaqi v. Panetta*, 1:12-cv-01192-RMC (D.C. Cir. 2012).

²⁸⁹ *United States v. Lovett*, 328 U.S. 303, 315 (1946) (emphasis added); see also *Paradissiotis v. Rubin*, 171 F.3d 983, 988 (5th Cir. 1999); *Global Relief Found., Inc. v. O’Neill*, 315 F.3d 748, 755 (7th Cir. 2002); *Walmer v. U.S. Dep’t of Defense*, 52 F.3d 851, 855 (10th Cir. 1995).

²⁹⁰ *Baker v. Carr*, 369 U.S. 186, 217 (1962); see *supra* Part V.A.2.a (describing the trial-like adjudication by the CIA).

guidance provided by the Department of Justice.”²⁹¹ Thus, the basis for CIA adjudication and approval of citizen-terrorists for lethal operation is a “legalistic and carefully argued” analysis.²⁹²

In fact, in February 2013, the Department of Justice released a presumably redacted version of its “al-Aulaqi White Paper,”²⁹³ which provides the previously classified²⁹⁴ “legal framework for considering the circumstances in which the U.S. government could use lethal force in a foreign country outside the area of active hostilities . . . against a U.S. citizen who is a senior operational leader of . . . an associated force of al-Qa’ida.”²⁹⁵ The standard is a three-part inquiry, and asks whether:

- (1) an informed, high-level official of the U.S. government has determined that the targeted individual poses an imminent threat of violent attack against the United States;
- (2) capture is infeasible, and the United States continues to monitor whether capture becomes feasible;
- (3) the operation would be conducted in a manner consistent with the applicable law of war principles.²⁹⁶

²⁹¹ McKlevey, *supra* note 16.

²⁹² *Id.*

²⁹³ A.k.a., “the drone memo,” “the al-Qulaqi white papers,” etc. Many names have been used to refer to this DOJ unsigned white paper in the press and in scholarship. *See, e.g.*, Charlie Savage, *Secret U.S. Memo Made Legal Case to Kill a Citizen*, N.Y. TIMES (Oct. 8, 2011), <http://www.nytimes.com/2011/10/09/world/middleeast/secret-us-memo-made-legal-case-to-kill-a-citizen.html?pagewanted=all&r=0>.

²⁹⁴ Obviously, the white paper has been at least partially declassified. Judge McMahon’s finding in *N.Y. Times Co.* that the Government had not waived the classified status of the entire “al-Aulaqi White Paper” because, with respect to the public disclosures by Attorney General Holder that would have been the basis for such a waiver, *N.Y. Times Co. v. U.S. Dep’t of Justice*, 915 F. Supp.2d 508, 537 (S.D.N.Y. 2013) (citing Eric Holder, U.S. Att’y Gen., Speech at the Northwestern University School of Law (Mar. 5, 2012)), was based on such disclosure being “a far cry from a legal research memorandum.” *Id.* It is no longer the case that the Obama Administration’s disclosures on that topic are a far cry, but are in fact *exactly* such a memorandum, which purportedly “reveal[s] the *exact* legal reasoning behind the Government’s conclusion that its actions comply with domestic and international law.” *Id.* at 536-37 & n.29. *See generally* DEP’T OF JUSTICE, WHITE PAPER: LAWFULNESS OF A LETHAL OPERATION DIRECTED AGAINST A U.S. CITIZEN WHO IS A SENIOR OPERATIONAL LEADER OF AL-QA’IDA OR AN ASSOCIATED FORCE 1 (2013). Therefore, the rest of the White Paper, Savage, *supra* note 293 (describing the document as approximately fifty pages), might discuss the Government position on the Treason Clause and has been a change in circumstances which may demand a change in Judge McMahon’s findings and compel full publication. *Cf. N.Y. Times Co.*, 915 F. Supp.2d at 535-36 (citing *Halpern v. F.B.I.*, 181 F.3d 279, 294 (2d Cir. 1999)); *Public Citizen v. Dep’t of State*, 11 F.3d 198, 201 (D.C. Cir. 1993); *Dow Jones & Co., Inc. v. Dep’t of Justice*, 880 F. Supp. 145, 150-51 (S.D.N.Y. 1995). The D.C. Circuit Court of Appeals, however, held contrary to Judge McMahon. *See generally* *ACLU v. CIA*, No. 11–5320, 2013 WL 1003688 (D.C. Cir. Mar. 15, 2013) (Garland, C.J.).

²⁹⁵ AL-AULAQI WHITE PAPER, *supra* note 294, at 1.

²⁹⁶ *Id.* at 1, 6.

Hence, the *al-Aulaqi* holding that no such standard is intelligibly discernible²⁹⁷ is in error.²⁹⁸ It strains all credulity to believe that the CIA lawyers and the Department of Justice are more capable than a court in applying an “extremely robust”²⁹⁹ rule with “a solid legal foundation” to determine if a citizen should die³⁰⁰ for acts that may be constitutionally punished only if the Judiciary has discharged its Article III responsibility. It is particularly true that courts are more capable when the standard is “[b]ased on generations-old legal principles and Supreme Court decisions handed down since WWII, as well as during this current [War on Terror].”³⁰¹

Therefore, with respect to the essential inquiry of the political question doctrine—the textually demonstrable commitment that separates a power from coordinate branches of government—the assertion of a constructive treason defense in *al-Aulaqi*-type cases allocates the Government’s responsibility of administering treason law to the Judiciary, rather than either the

²⁹⁷ *Al-Aulaqi v. Obama*, 727 F. Supp. 2d 1, 47 (D.D.C. 2010).

²⁹⁸ See *N.Y. Times Co.*, 915 F. Supp. 2d at 525-26 & nn.13, 15 (describing the well-developed standard). However, there is an obvious flaw in the Government’s standard: the reliance on *Hamdi* alone as a jurisprudential basis for the framework. AL-AULAQI WHITE PAPER, *supra* note 294, at 6 (citing *Hamdi v. Rumsfeld*, 542 U.S. 507, 534-35 (2004) (plurality opinion)). As Judge McMahon in the Southern District of New York notes, the *Hamdi* and *al-Aulaqi* cases are readily distinguishable: “*Hamdi* addressed the right of a United States citizen . . . to challenge his confinement . . . there was no suggestion that Mr. Hamdi was to be executed without some kind of trial.” *N.Y. Times Co.*, 915 F. Supp.2d at 526 n.13. Or, as the government states in the *Panetta* legislation, “*Hamdi* involved the habeas claim of a U.S. citizen challenging his military detention in the United States, a context wholly distinct from the alleged use of lethal force abroad to target a leader of an armed enemy group.” Defs. Reply Brief at 6, *Al-Aulaqi v. Panetta*, 1:12-cv-01192-RMC (D.C. Cir. 2012) (citation omitted). Thus, the standard relies on a case decided in a significantly different context, where the right to life was not at issue in the *Mathews* balancing performed by the Court. *Hamdi*, 542 U.S. at 534-35. The larger issue is that this standard, while being touted as “extremely robust” and “[b]ased on generations-old legal principles and Supreme Court decisions handed down during WWII, as well as during this current conflict,” relies erroneously on *Hamdi* and *Quirin*. See *New York Times Co.*, 915 F. Supp.2d at 525 n.15. Either the standard is developed enough where some manageable legal standard exists for making for these sorts of determinations, or the determinations are arbitrary and capricious actions, which would fail even rational basis review, and which even more strongly demands judicial intervention to grant relief to citizens being deprived of their right to life by unconstitutional state action. See *supra* notes 256-57 and accompanying text (discussing this footnote).

²⁹⁹ *N.Y. Times Co.*, 915 F. Supp. 2d at 525 (quoting Harold Koh, State Department Legal Advisor, Address to the Annual Meeting of the American Society of International Law in Washington, DC. (Mar. 25, 2012), available at <http://www.cfr.org/international-law/legal-adviser-kohs-speech-obamaadministration-international-law-march-2010/p22300>).

³⁰⁰ McKlevey, *supra* note 16.

³⁰¹ *N.Y. Times Co.*, 508 F. Supp. 2d at 527 (quoting Eric Holder, U.S. Att’y Gen., Speech at the Northwestern University School of Law (Mar. 5, 2012)).

Executive or Congress. Further, there is a judicially manageable standard by which a court may do so.

V. THE SECOND PERIL: THE EQUAL PROTECTION CLAUSE

Even if a court reviewing an al-Aulaqi-like case avoids the first peril, it must ensure that its treatment of the defendant does not violate the Equal Protection Clause. Because there is no substantial difference between treason by levying war and terrorism when committed by a U.S. citizen; the two crimes are intrinsically the same offense within the meaning of *Skinner*.³⁰² Thus, the Government has made an “invidious . . . discrimination” that must pass strict scrutiny if it “lays an unequal hand” on the two classes of offenders.³⁰³

A. *Lays An Unequal Hand: Different Treatment of Citizen-Terrorists and Traitors with Respect to Legal Process and Access to the Judiciary*

A comparison of the legal protections afforded to terrorists and traitors reveals significant differences with respect to the legal process provided prior to a determination to end the individual’s life, and with respect to access to the Judiciary. One’s status as either a traitor or terrorist will shape the accused’s access to the courts and legal process.

1. The Right to Life

Many commentators have discussed the unprecedented nature of the al-Aulaqi killing with respect to his right to life, albeit not in an equal protection context.³⁰⁴ Yet the fact remains that no other criminal in the United States has ever been sentenced to death by drone without a trial.

Although the federal statute for treason prescribes a sentence of death,³⁰⁵ it also gives significant latitude to the sentencing judge. This latitude permits that the traitor “be imprisoned not less than five years and fined . . . not less than \$10,000.”³⁰⁶ By contrast, the terrorism statute mandates a sentence much less severe than capital punishment.³⁰⁷ Thus,

³⁰² *Skinner v. Oklahoma ex. rel. Williamson*, 316 U.S. 535, 541 (1942).

³⁰³ *Id.*

³⁰⁴ *See supra* note 24.

³⁰⁵ 18 U.S.C. § 2381 (2012).

³⁰⁶ *Id.*

³⁰⁷ *Id.* § 2332b(g)(5); 50 U.S.C. § 1801(c).

had al-Aulaqi been tried before an Article III court and found guilty of treason, he could have had a chance to plea for a lesser sentence than the one the CIA imposed. Additionally, and perversely, had al-Aulaqi been found guilty of treason, the court would have had a stronger constitutional basis for imposing a death sentence.

2. Access to the Judicial System

The availability of these alternative punishments, however, presupposes access to the courts. Accused traitors are given the full rights of any person accused of a capital offense in a federal prosecution,³⁰⁸ such as the right to a jury trial³⁰⁹ and the right to appeal.³¹⁰ Additionally, the accused would benefit from the special requirements of treason prosecutions: its evidentiary requirement and its prohibition on corruptions of blood.³¹¹ The Supreme Court has vigilantly protected these treason rights, so to speak, since the early founding of the Republic.³¹² When a terrorist target like al-Aulaqi is approved for a lethal operation, he or she likely will be executed. That is to say, terrorists may be killed without trial or appeal,³¹³ but traitors may not be killed without either.

a. Trial by the CIA Rather Than by Jury

In *Ex parte Bollman*, the Supreme Court determined that the question of whether an accused traitor has levied war is a matter of fact for a jury to decide.³¹⁴ In al-Aulaqi's case, the determination that he was a terrorist who deserved death came from a different source: the CIA.³¹⁵ In such circumstances, the

³⁰⁸ *E.g.*, U.S. CONST. amend. VI (granting, among other things, the right to confront witnesses); 18 U.S.C. § 3005 (providing for the right to counsel in federal capital cases).

³⁰⁹ U.S. CONST. art. III, § 2, amend. VI; *see also* *Baldwin v. New York*, 399 U.S. 117, 119-20 (1970) (“[T]he federal right to jury trial attaches where an offense is punishable by as much as six months imprisonment. I think this follows both from the breadth of the language of the Sixth Amendment, which provides for a jury in ‘all criminal prosecutions,’ and the evidence of historical practice.”). Treason, being punishable by a minimum of five years and a maximum of death, clearly has the right to a jury trial attached. 18 U.S.C. § 2381.

³¹⁰ 18 U.S.C. § 3732; Fed. R. App. P. 3(a)(1).

³¹¹ U.S. CONST. art III, § 3.

³¹² *See supra* note 63 and accompanying text.

³¹³ *See generally, e.g.*, *Al-Aulaqi v. Obama*, 727 F. Supp. 2d 1 (D.D.C. 2010).

³¹⁴ *Ex parte Bollman*, 8 U.S. (4 Cranch) 75, 118 (1807) (“[It] [i]s impossible to define what should in every case be deemed a levying of war. It is a question of fact to be decided by the jury from all the circumstances.”).

³¹⁵ *Miller, supra* note 110.

CIA is not making a routine administrative decision; it is conducting a trial-like adjudication.³¹⁶ Even where an agency, rather than a court, makes a determination, some due process rights attach. Where “a relatively small number of persons [is] concerned, who [are] exceptionally affected [by the agency action at issue], in each case upon individual grounds,” a hearing is required.³¹⁷

An individual must meet the CIA’s legal standard to be classified as a terrorist subject to targeted killing.³¹⁸ Pursuant to a secret 50-page Department of Justice white paper outlining the terrorist classification process,³¹⁹ approximately 10 CIA Counterterrorism Center attorneys receive a “two page document,” along with “an appendix with supporting information, if anybody want[s] to read all of it.”³²⁰ The attorneys then prepare a “cable” that “often run[s] up to five pages.”³²¹ Senior attorneys will review the cable for errors, such as if “the justification in approving a person for lethal operation] would be that the person was thought to be at a meeting [but was not].”³²² The cable is then sent to the CIA’s General Counsel for approval.³²³ At any given time, there are about 30 individuals approved for targeting.³²⁴

The CIA determined that al-Aulaqi was an appropriate target of a lethal operation because he was the “leader of external operations”³²⁵ in AQAP, and, accordingly, he was a terrorist and a military threat.³²⁶ It is undisputed that al-

³¹⁶ Dreyfuss, *supra* note 24 (“When an agency makes a binding decision on the rights of a particular party by reference to historical facts, it is conducting an adjudication.” (citations omitted)).

³¹⁷ *Bi-Metallic Inv. Co. v. State Bd. Equalization*, 239 U.S. 441, 446 (1915). Undoubtedly, a single person facing the prospect of death by Hellfire missile would be a sufficiently small number of persons: to say that he would be exceptionally affected by the adjudication is an understatement.

³¹⁸ McKlevey, *supra* note 16. For the purposes of this note, we will assume that al-Aulaqi was subject to these standards, albeit that the relevant action was the final determination by the Obama Administration. *Islamist cleric Anwar al-Awlaki killed in Yemen*, B.B.C. NEWS (Sept. 30, 2011), <http://www.bbc.co.uk/news/world-middle-east-15121879>.

³¹⁹ McKlevey, *supra* note 16.

³²⁰ *Id.* (quoting John A. Rizzo).

³²¹ *Id.*

³²² *Id.*

³²³ *Id.*

³²⁴ *Id.*

³²⁵ Mazzetti et al., *supra* note 3, at A1 (quoting President Obama).

³²⁶ According to Scott Shane, the Government’s legal basis for lethal operations approval is as follows:

First, he posed an imminent threat to the lives of Americans, having participated in plots to blow up a Detroit-bound airliner in 2009 and to bomb

Aulaqi levied war.³²⁷ His actions conformed to the definition of treason: he assembled with others to commit overt acts to usurp the Government's authority for non-private motives; and importantly, he was a citizen who owed allegiance to—and therefore betrayed—the United States.³²⁸ Thus, because he was a traitor, his guilt and punishment were questions for a jury, not for the President and his men.³²⁹

b. Equal Access to Appellate Courts

The right to appeal for indigent classes is protected by the Equal Protection Clause.³³⁰ In *Douglas v. California*, the Supreme Court held that a state cannot invidiously discriminate by providing different appellate processes to protected classes.³³¹ In *Douglas*, the discriminatory classification at issue was the more mundane classification of wealth.³³² In al-Aulaqi's case, the different treatment between citizen-terrorists and traitors is a product of invidious discrimination between two classes of alleged criminals who committed intrinsically the same

two cargo planes last year. Second, he was fighting alongside the enemy in the armed conflict with Al Qaeda. And finally, in the chaos of Yemen, there was no feasible way to arrest him.

Scott Shane, *Judging a Long, Deadly Reach*, N.Y. TIMES (Sept. 30, 2011), <http://www.nytimes.com/2011/10/01/world/american-strike-on-american-target-revives-contentious-constitutional-issue.html#>, reprinted in N.Y. TIMES, Oct. 1, 2011, at A1. The fact that al-Aulaqi was also targeted because of the infeasibility of arrest and immanency of the threat will be discussed later, this note assumes those fact to be true, but the merits of them are not relevant to this portion of the analysis. See *infra* Part V.B (applying strict scrutiny).

Further, the DOJ in *al-Aulaqi v. Obama* used the President's military and commander-in-chief powers as the basis for asserting that the case fell within the ambit of the political question doctrine. Opposition to Plaintiff's Motion for Preliminary Injunction and Memorandum in Support of Defendant's Motion to Dismiss at 19, *Al-Aulaqi v. Obama*, 727 F. Supp. 2d 1 (D.D.C. 2010) (No. 1:10-cv-01469).

³²⁷ See *supra* Part II (describing how al-Aulaqi called for jihad against the United States, encouraged and assisted in the operations of a terrorist organization that has claimed responsibility for attacking the United States); see also Dreyfuss, *supra* note 24, at 269-70 (stating that al-Aulaqi had levied war).

³²⁸ See *United States v. Wiltberger*, 18 U.S. (5 Wheat.) 76, 97 (1820) ("Treason is a breach of allegiance, and can be committed by him only who owes allegiance . . ."); cf. *Cramer v. United States*, 325 U.S. 1, 29 (1945) ("[I]f there is no intent to betray, there is no treason.").

³²⁹ The Treason Clause was meant to restrict the powers of the individual government branches with respect to the handling of traitors, not permit the executive to sit as judge, jury, and executioner. See, e.g., Alford, *supra* note 24, at 1205-06.

³³⁰ E.g., *Griffin v. Illinois*, 351 U.S. 12 (1956) (holding that indigent petitioners who are denied free trial transcripts are discriminated against on the basis of wealth in terms of their right to an appeal).

³³¹ 372 U.S. 353, 357-58 (1963); see also *Griffin*, 351 U.S. at 19.

³³² 372 U.S. at 357-58; see also *Griffin*, 351 U.S. at 19.

offense,³³³ resulting in different treatment with respect to appeals as a matter of right.

The President takes the position that he may order killings of citizen-terrorists, a stance that is not subject to judicial review under the political question and state secrets doctrines.³³⁴ In *al-Aulaqi v. Obama*,³³⁵ the presiding judge noted that it is constitutionally peculiar that executive decisions regarding wiretapping citizens abroad were subject to judicial review, but what were effectively kill warrants were not.³³⁶ The judge ultimately agreed that the issuance of kill warrants is an unreviewable political question.³³⁷

Additionally, the judge accepted the Government's claims that al-Aulaqi, or a person in a similar situation, could avail himself of the courts, for example, by peaceably surrendering at an embassy.³³⁸ This claim, however, presumes two things. First, it presumes that there is a matter over which to surrender. While al-Aulaqi was clearly a traitor, he was never charged with any "terrorism-related crimes"³³⁹ or treason. The Government's position here begs the question: why would al-Aulaqi surrender on non-existent charges in order to appear in court?³⁴⁰ The lack of a criminal indictment and the secret nature of the CIA kill list³⁴¹ negates any possibility that al-Aulaqi could have received notice of the specific crimes or terrorist attacks for which he was expected to surrender and stand trial.

Second, the Government's claim that al-Aulaqi could have accessed courts presumes that surrender presents itself as a realistic option. The Government's position, as accepted by the court, essentially would have required al-Aulaqi to travel to the U.S. embassy in Yemen. Likely possessing invaluable information about his associates' international criminal conspiracy of terror, al-Aulaqi would have had to betray and evade the murderous AQAP members, comrades that had kept

³³³ See *supra* Part III.C.

³³⁴ Opposition to Plaintiff's Motion for Preliminary Injunction and Memorandum in Support of Defendants' Motion to Dismiss at II, V, *Al-Aulaqi v. Obama*, 727 F. Supp. 2d 1 (D.D.C. 2010) (No. 1:10-cv-01469) (Dep't. of Justice).

³³⁵ *Al-Aulaqi v. Obama*, 727 F. Supp. 2d 1 (D.D.C. 2010).

³³⁶ *Id.* at 8.

³³⁷ *Id.* at 46.

³³⁸ *Id.* at 17-18.

³³⁹ *Al-Aulaqi* Complaint, *supra* note 13 at ¶ 24.

³⁴⁰ Which, the ACLU properly recognized. *Al-Aulaqi*, 727 F. Supp. 2d at 18 (citing Pl.'s Opp. at 9) (arguing that deciding that al-Aulaqi needs to avail himself of the judicial system decides the Government's contention that "[al-Aulaqi was at the time] a participant in an armed conflict against the United States.").

³⁴¹ Dreyfuss, *supra* note 24, at 273.

him and that information safe from the Yemeni authorities.³⁴² He would have needed to travel through Yemen when he was wanted for a crime for which he was sentenced *in absentia*.³⁴³ And, he would have needed to do all of this while evading the freely flying predator drone force of the U.S. government.³⁴⁴ Essentially, al-Aulaqi was facing the same choice of Ben Richards, the protagonist of *The Running Man*.³⁴⁵

Although some of these considerations are unique to al-Aulaqi's case, and will not apply to all citizen-terrorists, the first presumption stands as a legal point independently of the second. If the Government adopts some form of notice system, the second consideration must be at least examined when discussing the concept of surrender. Thus, with respect to Al-Aulaqi, the court erred in holding that "[a]ll U.S. citizens may avail themselves of the U.S. judicial system if they present themselves peacefully, and no U.S. citizen may simultaneously avail himself of the U.S. judicial system and evade U.S. law enforcement authorities."³⁴⁶

Further, and most importantly, the judge did not realize the full implication of his conclusions that the targeting of al-Aulaqi was a political question.³⁴⁷ As John C. Dehn notes, "[t]argeted individuals thus might turn themselves in only to find their status [as targeted for death] unreviewable as a political question."³⁴⁸ The surrender option thus guarantees no actual judicial relief to the *Running Man* conundrum under *al-Aulaqi v. Obama*.

³⁴² See, e.g., Savage, *supra* note 294. Al-Aulaqi evaded Yemeni commando authorities for some time with the assistance of his terrorist associates. *Id.*

³⁴³ See *supra* note 97.

³⁴⁴ The U.S. has permission from Yemen to patrol with drones. Savage, *supra* note 294.

³⁴⁵ See generally RICHARD BACHMAN, *THE RUNNING MAN* (1982). Ben Richards competes in a game show, *The Running Man*, ostensibly to make some money for his family. *Id.* The object of *The Running Man* is to survive: the participant is declared an enemy of the U.S. government and elite hit men are sent to kill him in a thirty-day worldwide excursion. *Id.* Richard Bachman is a pen name for Stephen King.

³⁴⁶ *Al-Aulaqi*, 727 F. Supp. 2d at 18.

³⁴⁷ *Id.* at 46.

³⁴⁸ Dehn & Heller, *supra* note 8, at 185; accord *Al-Aulaqi*, 727 F. Supp.2d at 46 ("Judicial resolution of the 'particular questions posed by plaintiff in this case would require this Court to decide: . . . whether there are 'means short of lethal force' that the United States could 'reasonably' employ to address *any* threat that Anwar Al-Aulaqi poses to U.S. national security interests . . . it becomes clear that plaintiff's claims pose precisely the types of complex policy questions that the D.C. Circuit has historically held non-justiciable under the political question doctrine." (emphasis added) (citation omitted)); see also *id.* at 52 (discussing the court's lack of capacity). Cognizing any real limitation on the Government's power to deal with "*any* threat," *id.*, posed by an individual infamous for devious and treacherous suicide bombing attempts seems to be an impossible task.

Consequently, although the Constitution guarantees traitors more than a full spectrum of rights, citizen-terrorists do not equally enjoy the right to a jury trial or an appeal of their capital sentence. Furthermore, and more troubling, in the sole case to consider questions about the rights of those determined to be CIA targets, the D.C. district court shielded this invidious discrimination³⁴⁹ behind the political question doctrine. Therefore, the Government has made, and a court has sanctioned “as an invidious a discrimination as if it had selected a particular race or nationality for oppressive treatment” and has “la[id] an unequal hand” upon al-Aulaqi.³⁵⁰

B. *Strict Scrutiny Applied*

As in any circumstance where an invidious discrimination is present, the Government’s differential treatment of two classes of criminals who have committed intrinsically the same offense must be “[narrowly] tailored to serve a compelling governmental interest.”³⁵¹

While the general rule in criminal law is that “what charge to file or bring before a grand jury are decisions that generally rest in the prosecutor’s discretion,” and that “a defendant has no constitutional right to elect which of two applicable federal statutes shall be the basis of his indictment and prosecution,”³⁵² that rule is inapposite in treason cases. The Drafters of the Constitution specifically wrote the Clause to circumscribe the state’s discretion in even *creating* crimes that encroach on the gravamen of the offense of treason. Thus, prosecutorial and legislative discretion is uniquely at constitutional ebb when the Treason Clause comes into play, as it is exactly the state’s almost unbridled discretion in criminal prosecution that the Founder’s feared.

1. The Compelling Governmental Interest: National Security

The Supreme Court has declared that the Government, and specifically the Executive, has a compelling interest in

³⁴⁹ See *supra* Part III.A.

³⁵⁰ *Skinner v. Oklahoma ex rel. Williamson*, 316 U.S. 535, 541 (1942).

³⁵¹ *Plyler v. Doe*, 457 U.S. 202, 217 (1982).

³⁵² *United States v. Batchelder*, 442 US 114, 115 (1979).

preventing acts tantamount to levying war against the United States.³⁵³ In *Korematsu v. United States*, the Court noted:

[H]ardships are part of war, and war is an aggregation of hardships. All citizens alike, both in and out of uniform, feel the impact of war in greater or lesser measure. Citizenship has its responsibilities as well as its privileges, and in time of war the burden is always heavier. Compulsory exclusion of large groups of citizens from their homes, except under circumstances of direst emergency and peril, is inconsistent with our basic governmental institutions. But when under conditions of modern warfare our shores are threatened by hostile forces, the power to protect must be commensurate with the threatened danger.³⁵⁴

While a court considering the facts of *Korematsu* would undoubtedly reach a different result today,³⁵⁵ the principle of the case stands: when the Government is claiming its war powers justify an action, even an action “inconsistent with our basic governmental institutions,”³⁵⁶ that action is constitutionally permissible under strict scrutiny so long as it is proportional to the threat.³⁵⁷

The *Skinner* equal protection analysis tends to allow the Government significant “play in its joints.”³⁵⁸ However, in *United States v. Robel*, the Supreme Court signaled that “the phrase ‘war power’ cannot be invoked as a talismanic incantation to support any exercise of . . . power which can be brought within its ambit. ‘[E]ven the war power does not remove constitutional limitations safeguarding essential liberties.’”³⁵⁹ Although the *Robel* Court was discussing congressional war powers and not executive war powers, it would be absurd to claim that even

³⁵³ *Korematsu v. United States*, 323 U.S. 214, 217-20 (1944) (citing Executive Order No. 9066, 7 Fed. Reg. 1407) (“[T]he successful prosecution of the war requires every possible protection against espionage and against sabotage to national-defense material, national-defense premises, and national-defense utilities.”); see also *Hirabayashi v. United States*, 320 U.S. 81, 99 (1943).

³⁵⁴ *Korematsu*, 323 U.S. at 217-20 (applying strict scrutiny to the question of whether, under its war powers, the Government, based on race alone, may inter the entire population of West Coast Japanese-Americans during WWII).

³⁵⁵ See CHEMERINSKY, *supra* note 199 at 715 n.45 and accompanying text (citing Rostow, *supra* note 198) (“*Korematsu* is objectionable because the government used race alone as the basis for predicting who was a threat to national security and who would remain free.”).

³⁵⁶ *Korematsu*, 323 U.S. at 220.

³⁵⁷ *United States v. O’Brien*, 391 U.S. 367, 376-77 (1968) (permitting infringements on free expression under Congress’ war power, but “no greater than is essential to the furtherance of that interest”).

³⁵⁸ *Skinner*, 316 U.S. at 540 (quoting *Bain Peanut Co. v. Pinson*, 282 U.S. 499, 501 (1931) (Holmes, J.)).

³⁵⁹ *United States v. Robel*, 389 U.S. 258, 264 (1967) (internal citations omitted) (alteration in original) (citing *Home Bldg. & Loan Assn. v. Blaisdell*, 290 U.S. 398, 426 (1934)).

though Congress' war powers are limited, the Executive may use its powers as a talismanic incantation to eviscerate the Constitution of all legal protections. Thus, the fact that the Government invoked the Executive's war powers under the AUMF and the President's Commander-in-Chief powers in *al-Aulaqi v. Obama*³⁶⁰ does not foreclose the consideration of whether a compelling government interest exists to justify the killing of al-Aulaqi.

Al-Aulaqi constituted a perpetual terrorist threat between the time he became a leader in AQAP in 2007, and his execution in 2011. During the period where al-Aulaqi was "leader of external operations [for AQAP],"³⁶¹ he was linked to over a dozen terrorist plots or treasonable designs and their overt acts—such as the Fort Hood Massacre, the Times Square Bomber, and the 2009 Christmas Day Bomber.³⁶² He was especially dangerous because of his intimate knowledge of U.S. culture and his ability to reach a widespread, English-speaking audience.³⁶³ Therefore, under a deferential standard of review and assuming facts favorable to the government, al-Aulaqi could be considered a continuing threat to the security of the United States that created a compelling government interest in his elimination. A drone is not much different than a bomb in terms of its effect and, thus, its proportionality.

³⁶⁰ Opposition to Plaintiff's Motion for Preliminary Injunction and Memorandum in Support of Defendants' Motion to Dismiss at 4-5, V, *Al-Aulaqi v. Obama*, 727 F. Supp. 2d 1 (D.D.C. 2010) (No. 1:10-cv-01469) ("More broadly, the Complaint seeks judicial oversight of the President's power to use force overseas to protect the Nation from the threat of attacks by an organization against which the political branches have authorized the use of all necessary and appropriate force, in compliance with applicable domestic and international legal requirements, including the laws of war. See Authorization for Use of Military Force (AUMF), Pub. L. No. 107 40, 115 Stat. 224 (2001) (Joint Resolution of Congress signed by the President). In addition to the AUMF, there are other legal bases under U.S. and international law for the President to authorize the use of force against al-Qaeda and AQAP, including the inherent right to national self-defense recognized in international law (see, e.g., United Nations Charter Article 51). Plaintiff asks the Court to issue *ex ante* commands to the President and his military and intelligence advisors about how to exercise this authority [as commander-in-chief] . . .").

³⁶¹ Mazzetti et al., *supra* note 3, at A1 (quoting President Obama), available at <http://www.nytimes.com/2011/10/01/world/middleeast/anwar-al-awlaki-is-killed-in-yemen.html?pagewanted=all>.

³⁶² See *supra* notes 101-05 and accompanying text (detailing al-Aulaqi's terrorist career).

³⁶³ Kannof, *supra* note 24, at 1381 (2011).

2. Narrowly Tailored

As commentators have observed, al-Aulaqi was targeted because “there was no feasible way to arrest him” and because “he posed an imminent threat to the lives of Americans.”³⁶⁴ Therefore, and in light of the increased deference shown by the courts to the Executive in times of war,³⁶⁵ issuing a kill order would likely be found a narrowly tailored action. Additionally, the manner in which the kill order was executed was appropriately narrowly tailored; there is hardly a more precise and exact killing machine than a predator drone.³⁶⁶ Because the asserted government interest was elimination of a security threat,³⁶⁷ the Government initiated a specific military response to completely eliminate the threat.³⁶⁸

CONCLUSION

The Constitution discriminates between citizens and non-citizens who levy war against the United States by giving a restrictive yet exhaustive definition of treason. The defined crime may only be committed by citizens and entitles only citizens to specific due process protections.³⁶⁹ The Constitution strips from Congress and the Executive the power to define the crime of treason or to alter its scope, and enshrines this in Article III, for the Judiciary to guard against encroachment of the protections provided for in the Treason Clause.

Two centuries later, by combination of executive action, secret agency adjudication, and congressional authorization, a citizen may be executed for levying war against the United States with none of the constitutional protections afforded by the Treason Clause. The Judiciary has shielded challenges to this process as a nonjusticiable political question when the text of Article III demonstrably commits treason administration to

³⁶⁴ Shane, *supra* note 326.

³⁶⁵ *Rostker v. Goldberg*, 453 U.S. 57, 58 (1981); *United States v. O'Brien*, 391 U.S. 367, 376-77 (1968).

³⁶⁶ For a thorough discussion of targeted killing processes, see Geoffrey S. Corn, *Targeting, Command Judgment, And a Proposed Quantum of Information Component: A Fourth Amendment Lesson in Contextual Reasonableness*, 77 BROOK. L. REV. 437 (2012).

³⁶⁷ See *supra* note 326 (detailing the security threat of al-Aulaqi).

³⁶⁸ Vlasic, *supra* note 14, at 330 (citing Mazzetti et al., *supra* note 3); see *supra* note 14 and accompanying text.

³⁶⁹ It is a settled matter of constitutional law that only persons owing allegiance, like citizens, are covered by the Treason Clause. See *supra* note 125. Rhetorical point aside, it would also apply to persons such as legal resident aliens.

the Judiciary. Further, the Supreme Court has not corrected its *Quirin* problem, which has resulted in questionable conclusions by the Circuits. For example, some Circuit courts have interpreted allegiance as essential to treason by levying war, but permitted those owing allegiance to be processed without Treason Clause protections. They have done so because the crimes charged, while substantively the same as treason by levying war, were indiscriminate with respect to allegiance. It seems as though courts have eschewed the reasoning that predicated the inclusion of the Treason Clause in the Constitution and ignored the maxim, “[w]hen anything is prohibited directly, it is also prohibited indirectly.”³⁷⁰

As a policy matter, al-Aulaqi was driving in a car on a deserted highway at the time that he was executed. Not every U.S. citizen that preaches jihad is a military threat to the United States. Looking forward, how does one resolve this issue of whom the government may kill via a drone strike?

The coordinate branches of government may resolve these issues by adopting the following suggestions. The Court may solve the *Quirin* problem in the Circuits by adopting the readings of *Bollman*, *Wiltberger*, *Quirin*, and *Cramer* proposed in this note. As to the policy question, this note supports the proposal that the CIA is allowed to carry out its macabre task, but not unilaterally. The issue is not with these operations being carried out, but with who orders them to be carried out. Some court must approve petitions for kill warrants of U.S. citizens. The Judiciary must satisfy its Article III obligations, such as the requirement of two witnesses to the same overt act, instead of delegating them to another branch’s agencies. Exercising its Article III power over the jurisdiction of the federal courts, Congress may pass a statute that creates a judicial process where secret, *ex parte* review is given to wartime kill order cases like that of al-Aulaqui. Thus, the Government may be able to maintain secrecy where necessary and the Judiciary may discharge its Article III obligations before action is taken against a citizen.

If nothing else, the Treason Clause—and its specific allocation of the responsibility for resolving treason cases to every branch *other* than the Executive—means that the President, and those who serve at his pleasure, should not act as prosecutor, defense counsel, judge, jury, and executioner,

³⁷⁰ BLACK’S LAW DICTIONARY 1863 (9th ed. 2009) (“[Q]uando aliquid prohibetur ex directo, prohibetur et per obliquum.”).

especially in secret. There needs to be some action to curtail the incipient erosion of Treason Clause protections, lest the United States revert to the state of treason law in England before the Statute of Edward III: the assignment of unreviewable death sentences by unilateral executive whim.

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