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American Terrorists as Perpetrators of Communitarian Assaults

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AMERICAN TERRORISTS AS PERPETRATORS OF COMMUNITARIAN ASSAULTS

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I. INTRODUCTION

This article argues that there are strong normative reasons to treat American terrorists, abroad and within the United States, as individuals who have committed treason. For the purposes of this article, "American terrorists" refers to persons recognized as American citizens under the Constitution of the United States who commit acts defined under one of the following statutes: 18 U.S.C. § 2331(1),[1] 18 U.S.C. § 2232b,[2] 18 U.S.C. § 2339A,[3] or 18 U.S.C. §

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1. 18 U.S.C. § 2331(1) (2012) (defining "international terrorism" as activities that "a) involve violent acts or acts dangerous to human life that are a violation of

2339B.[4] It is important to note that these statutes are not the only statutes available to prosecute terrorism related offences in the United States. In fact, often perpetrators recognized by the American public as "terrorists" are actually prosecuted for various non-terrorism related offenses.[5] Americans who commit or materially

criminal laws . . . b) appear to be intended (i) to intimidate or coerce a civilian population; (ii) to influence the policy of a government by intimidation or coercion; or (iii) to affect the conduct of a government by mass destruction, assassination, or kidnapping; and c) occur primarily outside the territorial jurisdiction of the United States . . . .")

2. 18 U.S.C. § 2232b (2008) (defining "acts of terrorism transcending national boundaries" as "(1) Whoever, involving conduct transcending national boundaries and in a circumstance described in subsection (b)– (A) kills, kidnaps, maims, commits an assault resulting in serious bodily injury, or assaults with a dangerous weapon any person within the Unites States; or (B) creates a substantial risk of serious bodily injury to any other person by destroying or damaging structure, conveyance, or other real or personal property within the United States or by attempting or conspiring to destroy or damage any structure, conveyance, or other real or personal property within the United States; in violation of the laws of any State, or in the United States, shall be punished as prescribed in subsection (c) . . . (g)–As used in this section– . . . (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 . . .).

3. 18 U.S.C. § 2339A (2009) (defining providing material support to terrorists as "[w]hoever provides material support or resources or conceals or disguises the nature, location, source, or ownership of material support or resources, knowing or intending that they are to be used in preparation for, or in carrying out, a violation of [a number of listed sections] or in preparation for, or in carrying out the concealment of an escape from the commission of any such violation, or attempts or conspires to do such an act, shall be fined under this title, imprisoned not more than 15 years, or both, and , if the death of any person results, shall be imprisoned for any term of years or for life . . . .").

4. 18 U.S.C. § 2339B (2009) (defining providing material support or resources to designated foreign terrorist organizations as "[w]hoever knowingly provides material support or resources to a foreign terrorist organization, or attempts or conspires to do so, shall be fined under this title or imprisoned not more than 15 years, or both, and if the death of any person results, shall be imprisoned for any term of years or for life. To violate this paragraph a person must have knowledge that the organization is a designated terrorist organization (as defined in subsection (g)(6)), that the organization has engaged or engages in terrorist activity (as defined in section 212(a)(3)(B) of the Immigration and Nationality Act), or that the organization has engaged or engages in terrorism (as defined in section 140(d) (2) of the Foreign Relations Authorization Act, Fiscal Years 1998 and 1989)).

5. *See* RICHARD B. ZABEL & JAMES J. BENJAMIN, JR., IN PURSUIT OF JUSTICE: PROSECUTING TERRORISM CASES IN THE FEDERAL COURTS 1 (July 2009), *available at* http://www.humanrightsfirst.org/wp-content/uploads/pdf/090723-LS-in-pursuit-

support terrorist acts are widely held as commanding rights above and beyond those to which other so called terrorists are entitled; however, Americans commit a serious offense when they raise their arms against their nation, a crime that other terrorists are incapable of committing. To put it differently, when Americans attack the United States, they often commit two offenses: acts of terrorism and the undermining of trust that Americans invest in each other—trust that serves as a basis for a robust civil society. Whether or not a particular suspect committed treason—the only crime treated thoroughly in this article—should be determined through two distinct sets of processes that the U.S. Constitution explicitly lays out: "on the Testimony of two Witnesses to the same overt Act, or on Confession in open Court."[6] The forum in which these witnesses present their evidence depends on whether these terrorists can be captured and brought before a tribunal without subjecting U.S. troops to undue risk.

The terms "treason" and "traitor" raise the hackles of many people because such terms remind them of accusations all too quickly hurled by demagogues. At the same time, one cannot ignore that members of a community can and do betray the trust of their fellow community members. It might help readers to think about the acts of treason considered here as referencing assaults on the community and actual terrorist attacks, rather than trumped-up charges of disloyalty. Unfortunately, the word "treason" cannot be avoided in what follows, since it is the term that the Constitution employs.

A. FOCUS ON AMERICAN TERRORISTS

Often when the issue of American terrorists is debated, the objections raised concern the targeted killing or the non-civilian persecution of any terrorist, U.S. citizen or not. These objections include questions about the legitimacy of killing terrorists either outside of a declared zone of war, without a declaration of war, or without a trial in a civil court.[7] However, the question about

justice-09-update.pdf (explaining that many "alternative" prosecutions based on non-terrorism charges such as immigration fraud, financial fraud, and false statements have been preemptive prosecutions that focused on preventing and disrupting terrorist activities); *see also id.* Figure 12 at 12 (demonstrating the various U.S. Statutes used to prosecute terrorism).

6. U.S. CONST. art. III, § 3.

7. *See* Kenneth Anderson, *Targeted Killing and Drone Warfare: How We*

American citizens arises only if one agrees that the killing of terrorists is legal in general, when the targeted individual is not a U.S. citizen. If no terrorist may be killed in such a way, then logically the same would hold true for Americans. This article takes for granted that killing terrorists, if they cannot be captured without undue risk to U.S. troops, is legal and legitimate, on the grounds of self-defense;[8] that membership in a declared terrorist organization suffices to qualify an individual as a terrorist; and that Congress' Authorization for Use of Military Force ("AUMF")[9] authorizes the use of lethal force by the President and those he commands against those whom the President determines planned, authorized, committed or aided in the terrorist attack that occurred on September 11, 2001.[10] One may disagree about any or all of these points; however, they are not relevant to the question of whether American terrorists should be treated differently from foreign terrorists.

If one accepts, even merely for sake of argument, the preceding point, one should then note that the 2012 Justice Department White Paper, which purports to explain when the government can "use lethal force in a foreign country outside the area of active hostile activities against a U.S. citizen," fails to achieve its goal.[11] The three

Came to Debate Whether There Is a 'Legal Geography of War', *in* FUTURE CHALLENGES IN NATIONAL SECURITY AND LAW 1, 3–4 (Peter Berkowitz ed., 2011); Beau Barnes, *Reauthorizing the 'War on Terror': The Legal and Policy Implications of the AUMF's Coming Obsolescence*, 211 MIL. L. REV. 57, 75–76 (2012); Richard Murphy & Afsheen John Radsan, *Due Process and Targeted Killing of Terrorists*, 31 CARDOZO L. REV. 405, 408–09 (2009).

8. Jordan J. Paust, *Self-Defense Targetings of Non-State Actors and Permissibility of U.S. Use of Drones in Pakistan*, 19 J. TRANSNAT'L L. & POL'Y 237, 238–41 (2010) (recognizing that international law, along with patterns of practice and legal expectations, allow for a state's right of self-defense against a target outside its own borders).

9. Authorization for the Use of Military Force Pub. L. No. 107–40, 115 Stat. 224 (2001) ("That the President is authorized to use all necessary and appropriate force against those nations, organizations, or persons he determines planned, authorized, committed, or aided the terrorist attacks that occurred on September 11, 2001, or harbored such organizations or persons, in order to prevent any future acts of international terrorism against the United States by such nations, organizations or persons.").

10. David Glazier, *Playing by the Rules: Combating Al Qaeda Within the Law of War*, 51 WM. & MARY L. REV. 957, 960 (2010) (stating that the AUMF is logically sourced in the law of war governing international armed conflicts).

11. U.S. DEP'T OF JUSTICE, LAWFULNESS OF A LETHAL OPERATION DIRECTION AGAINST A U.S. CITIZEN WHO IS A SENIOR OPERATIONAL LEADER OF AL-QA'IDA

conditions it lists—that the person be a senior operational leader of al Qaeda or an associated force, that his capture be deemed infeasible, and that the United States follow the applicable law of war principles[12]—apply indiscriminately to terrorists who meet such criteria and therefore do not explain why one should set aside the special standing Americans command, the "extra" protections granted to them as citizens, above and beyond those of non-citizen terrorists.[13] In fact, in specifying U.S. citizens who are members of al Qaeda, the white paper waters down a standard set by the Warren Court, by which membership in an organization is not enough to justify criminal punishment—there must also be intent to carry out the unlawful aims of the prescribed organization.[14] There is disagreement about whether Americans overseas possess *all* constitutional rights, but there is very little disagreement as to whether they have at least some protections not granted to foreign nationals. In *Reid v. Covert*,[15] Justice Harlan rejected that Fourth and Fifth Amendment criminal protections "are never operative without the United States," but also disagreed "with the suggestion that every provision of the Constitution must always be deemed automatically applicable to American citizens in every part of the world."[16] In applying the guarantees of the Constitution one must take into account "particular circumstances, the practical necessities, and the possible alternatives."[17] For example, minor offenses committed overseas might not require a trial by jury due to the practical difficulties such a requirement presents. In 2007, the Court of

OF AN ASSOCIATED FORCE (2013), *available at* http://msnbcmedia.msn.com/i/msnbc/sections/news/020413_DOJ_White_Paper.pdf.

12. *Id.*

13. *See* David Cole, *Are Foreign Nationals Entitled to the Same Constitutional Rights As Citizens?*, 25 T. JEFFERSON L. REV. 367, 369, 382 (2003) (arguing that most distinctions between foreign nationals and citizens are not consistent with constitutional and international law); Gerald L. Neuman, *The Extraterritorial Constitution After Boumediene v. Bush*, (Harvard Pub. L. Working Paper No. 08-39, 2008).

14. Law Students Research Council v. Wadmond, 401 U.S. 154 (1971) (holding that "knowing membership in an organization advocating the overthrow of the Government by force or violence, on the part of one sharing the *specific intent to further the organization's illegal goals*, may be made criminally punishable" (emphasis added)); Scales v. United States, 367 U.S. 203 (1961).

15. 354 U.S. 1 (1957).

16. *Id.* at 74.

17. *Id.*

Appeals of the Second Circuit held that the standard of protection guaranteed by the Fourth Amendment may vary when applied to citizens overseas.[18] In contrast, the Supreme Court held in *United States v. Verdugo-Urquidez*[19] that "[t]he Fourth Amendment does not apply to the search and seizure by United States agents of property owned by a nonresident alien and located in a foreign country."[20] In 2003, the Supreme Court ruled that alien residents convicted of "aggravated felonies" can face mandatory detention—a double standard justified by the fact that "Congress regularly makes rules that would be unacceptable if applied to citizens."[21] In *Johnson v. Eisentrager*,[22] the Court stated that a resident alien "has been accorded a generous and ascending scale of rights as he increases his identity with our society," but that "the security and protection enjoyed while the nation of his allegiance remains in amity with the U.S. are greatly impaired when his nation takes up arms against us."[23]

Hence, the normative and legal question stands: Should American terrorists be treated differently from others? What distinct procedures are to be employed in determining their treatment? In what legal forum should they be tried?

B. THE NORMATIVE GROUNDS

Libertarianism and some forms of liberalism are normative systems that are centered on individuals and their rights. Communitarianism is a normative system centered on the common good and the responsibilities that emanate from this shared understanding that the members of the community are expected to uphold. Liberal (or responsive) communitarianism seeks to balance these two sets of normative concerns, and determine if individual rights or social responsibilities should take precedence when the two cannot be reconciled.[24] This article describes, from a liberal

18. *In re* Terrorist Bombings of U.S. Embassies in E. Afr., 552 F.3d 157, 167 (2d Cir. 2008).
19. 494 U.S. 259 (1990).
20. *Id.* at 259.
21. Demore v. Kim, 538 U.S. 510, 511 (2003).
22. 339 U.S. 763 (1950).
23. *Id.* at 770, 771.
24. *See* AMITAI ETZIONI, THE NEW GOLDEN RULE: COMMUNITY AND

communitarian perspective, the circumstances under which American terrorists can be legally subjected to targeted killings while outside the United States and the proper procedures for dealing with those who can be captured.[25]

Liberal communitarianism grants that Americans have extra rights but stresses that they also have responsibilities to the national community that foreigners do not have. Note that "responsibilities to the national community" does not refer merely to the civic obligations due to the state (e.g., observing the laws, paying taxes, serving on a jury, and serving in the armed forces if there is a draft). Communitarians view nations as communities invested in states, of which people are not merely citizens but also members. Economists may see here a matter of implicit contract and incentives. Thus, neighbors will watch over the property of those who live next door when they are away on travel, on the implicit assumption that the favor will be returned. This arrangement holds for scores of other matters, from watching out for children, to maintaining the front lawns to ensure each other's property values, to making donations to keep the community center open.

In contrast, sociologists will suggest that these communal obligations rest not so much on economic calculations of costs and benefits, but on a sense of internalized responsibility. In effect, both considerations interact; one may start with a sense of obligation but if not reciprocated, it will diminish, though a perfect symmetry or "a clearing of the books" is not expected.[26] Most revealing, community members, including those of imagined communities (e.g., "the nation"), have a sense of commitment to one another based on the sense that they have a shared identity, history, future, and fate. While it is true that some people are devoted to much smaller communities, such as their ethnic or confessional group, the sense of respect for the community and its welfare is particularly strong at the national level, as revealed by the fact that many citizens are willing to die for the

MORALITY IN A DEMOCRATIC SOCIETY (1998); *see also The Responsive Communitarian Platform*, THE COMMUNITARIAN NETWORK, http://communitariannetwork.org/about-communitarianism/responsive-communitarian-platform/ (last visited July 5, 2013).

25. *See infra* Part II.B.

26. *See* H. Lorne Carmichael & W. Bentley MacLeod, *Gift Giving and the Evolution of Cooperation*, 38 INT'L ECON. REV. 485, 502, n.3 (1997).

preservation of their country, especially when defending it against attacks by outsiders.

From this communitarian viewpoint, when an *American* terrorist attacks, threatens to attack, or joins a group whose goal is to terrorize the United States, that person commits an additional normative violation, beyond that committed by other terrorists. He raises arms against his own kind, he betrays the community which he is committed to uphold, he fails to live up to responsibilities he has assumed, and he undermines the community of which he is a member—a community that has protected and nurtured him and his loved ones. This is, on its face, a serious normative violation, and, to reiterate, one that only Americans can commit against their nation.

Moreover, such assaults sow distrust. If the members of a community find that they cannot trust their own kind, they are particularly likely to feel terrorized and be suspicious of one and all. It is enough to recall the poisonous social climate at the height of the McCarthy era, when people felt that there was "a communist under every bed"—even though there was only a tiny number of Americans who actually betrayed their country—to sense the kind of social malaise that would arise if a large number of Americans did indeed aid and abet the enemy.[27] Also, American terrorists are more likely than others to successfully carry out an attack, given that they hold American passports and are familiar with American ways, culture, and modes of communication. Thus, deterring them is of special value to U.S. security.

II. A LEGAL EXPRESSION

Which legal expression is most suitable to the communitarian normative precept just presented? This article first discusses the legal category and then the attending procedures and forums for prosecution.

A. THE LEGAL FOUNDATION

The actual text of the Constitution clearly and quite explicitly treats treason as an offense different from all others. Article III

27. *See* Amitai Etzioni, *Charge American Terrorists with Treason*, THE ATLANTIC, May 24, 2013, www.theatlantic.com/national/archive/2013/05/charge-american-terrorists-with-treason/276199.

Section 2 speaks of "all crimes," while Section 3 is entirely set aside to deal with treason.[28] Federal law runs along the same lines: "Whoever, owing allegiance to the United States, levies war against them or adheres to their enemies, giving them aid and comfort within the United States or elsewhere, is guilty of treason."[29] The fact that the text considers two types of betrayal—war or merely adhering to enemies—speaks directly to those who claim that the United States can use its military only against nations and not against non-state actors. For example, Wayne McCormack argues that, "[u]ntil the international community defines terrorist crimes as being violations of the 'law of war,'" the United States should try these individuals in civilian courts not in front of military commissions "because there is no coherent distinction between the alleged terrorist and the ordinary street criminal"—American or otherwise.[30] This notion is a rather bad case of legalism given that a group of terrorists armed with weapons of mass destruction poses a much greater threat to the United States than to many other nations. In effect, it is a long time since any nation reaped as much destruction and terror on the United States as nineteen attackers did on 9/11. In *Cedar & Washington Associates v. Port Authority of New York & New Jersey*, U.S. District Judge Alvin Hellerstein explicitly recognized that previous acts of terror were not "equal in organizational scope or destructive intent to al Qaeda."[31] However, presumably employing lethal force against non-state actors also requires a declaration by Congress, as happened three days after 9/11 with passage of the AUMF.[32] Those who hold AUMF to be too vague or otherwise in need of revision are effectively arguing for a new AUMF, and not against the legitimacy of engaging in armed conflict with non-state actors. Though several scholars hold that such a declaration must be limited to particular

28. *See* U.S. CONST. art. III, § 3 ("Treason against the United States, shall consist only in levying War against them, *or in adhering to their Enemies*, giving them Aid and Comfort.") (emphasis added).

29. 18 U.S.C. § 2381 (2012).

30. Wayne McCormack, *Military Detention and the Judiciary: Al Qaeda, the KKK, and Supra-State Law*, 5 SAN DIEGO INT'L L.J. 7, 71 (2004).

31. *In re* Sept. 11 Litig. Cedar & Wash. Assocs., 2013 WL 1137320, at * 10 (S.D.N.Y. Mar. 20, 2013).

32. *See generally* Donna Cassata, *Congress Rethinks 9/11 Law on Military Force, Use of Drones*, HUFFINGTON POST (May 16, 2013), www.huffingtonpost.com/2013/05/16/congress-911-lawflnfl3288164.html?view=print&comm_ref=false.

theaters of war, this concept is obsolete in a world in which terrorists consider borders to be only a minor inconvenience, and cyber space is rapidly emerging as a vulnerable, transnational, borderless arena.[33]

It is true that, throughout American history, very few individuals have been convicted of treason and, of those, several were pardoned.[34] However, treating American terrorists as individuals guilty of treason is far from unprecedented. For example, Herbert Hans Haupt, a naturalized citizen of German descent, was convicted of treason by a military tribunal and executed for his participation in a failed Nazi-backed sabotage plot.[35] Martin James Monti, a lieutenant who deserted the Army Air Forces during WWII, was convicted of treason and sentenced to twenty-five years for his work as a Nazi propagandist.[36] Tomoya Kawakita, a dual U.S.-Japanese citizen was convicted of treason for torturing American prisoners of war during World War II.[37] More recently, in 2006, Adam Gadahn became the first American indicted for treason since WWII.[38] Gadahn, who was raised in California, converted to Islam and moved to Pakistan where he "chose to join our enemy and to provide it with

33. *See* Vincent-Joël Proulx, *If the Hat Fits, Wear It, If the Turban Fits, Run for Your Life: Reflections on the Indefinite Detention and Targeted Killing of Suspected Terrorists*, 56 HASTINGS L.J. 801, 849 (2005) (noting that the war on terror is a truly global campaign because terrorism is a problem crossing numerous borders); Mary Ellen O'Connell, *When Is a War Not a War? The Myth of the Global War on Terror*, 12 ILSA J. INT'L & COMP. L. 535, 536 (2005); Paul R. Pillar, *The Limitless Global War*, NATIONAL INTEREST, June 19, 2012, http://nationalinterest.org/blog/paul-pillar/the-limitless-global-war-7094.

34. Richard Z. Steinhaus, *Treason, A Brief History with Some Modern Applications*, 22 BROOK. L. REV. 254, 258–63 (1956); Paul T. Crane, *Did the Court Kill the Treason Charge?: Reassessing* Cramer v. United States *and Its Significance*, 36 FLA. ST. U. L. REV. 635, 636–37 (2009); Kristen E. Eichensehr, *Treason in the Age of Terrorism: An Explanation and Evaluation of Treason's Return in Democratic States*, 42 VAND. J.TRANSNAT'L L. 1443, 1452–54 (2009).

35. *See German Espionage and Sabotage Against the U.S. in World War II: George John Dasch and the Nazi Saboteurs (FBI Handout)*, NAVAL HISTORICAL CENTER, March 1984, http://www.history.navy.mil/faqs/faq114-2.htm (last visited June 11, 2013).

36. K. Kocjancic, *Desertion of Allied Soldiers*, AXIS HIST. F. (Aug. 11, 2003, 7:38 PM), http://forum.axishistory.com/viewtopic.php?t=29163.

37. Kawakita v. United States, 343 U.S. 717, 719–20 (1952).

38. *See* Dan Eggen & Karen DeYoung, *U.S. Supporter of Al-Qaeda Is Indicted on Treason Charge*, WASH. POST, Oct. 12, 2006, http://www.washingtonpost.com/wp-dyn/content/article/2006/10/11/AR2006101101121.html.

aid and comfort by acting as a propagandist for al-Qaeda."[39]

Considering the suggestion that the United States could charge American terrorists with treason by drawing upon the highly relevant and exceptionally clear lines of the Constitution on this subject, one should recall that each generation finds texts within the Constitution that speak to its unique challenges and needs and to its own communitarian balance. In the 1920s, the ACLU championed and succeeded in applying the text of the First Amendment to define free speech as we now understand it.[40] In the 1960s, the Supreme Court fashioned a federal right to privacy.[41] In 2008, the Roberts' Court broke from 200 years of precedent by interpreting the Second Amendment as an individualized right to own guns—as opposed to a right limited only to well-regulated militias.[42] There is no reason to ignore the treason clause of the constitution or refrain from applying it to American terrorists in this day and age.

B. PROCEDURE AND FORUM

What procedures should be followed and in what forum should American terrorists be tried if they are charged with treason? Many civil libertarians hold strongly that all terrorists should be treated like other criminals—tried in civilian courts and granted all the procedural protections afforded to other criminals.[43] These libertarians seem not to be mindful of the fact that, for terrorists to be tried in this way, they must first be captured and hauled into court.

39. *Id.*

40. *Cf.* AMERICAN CIVIL LIBERTIES UNION, https://www.aclu.org/free-speech/freedom-expression (last visited Sept. 11, 2013) (noting that the ACLU was founded in response to the government's excessive curbing of free speech following World War I).

41. *See* Griswold v. Connecticut, 381 U.S. 479, 485–86 (1965).

42. *See* District of Columbia v. Heller, 554 U.S. 570 (2008); *see also* Robert Barnes, *Justices Reject D.C. Ban on Handgun Ownership: 5-4 Ruling Finds 1976 Law Incompatible with Second Amendment*, WASH. POST, June 27, 2008, at A1 ("The [C]ourt's landmark 5 to 4 decision split along ideological grounds and wiped away years of lower court decisions that had held that the intent of the amendment, ratified more than 200 years ago, was to tie the right of gun possession to militia service.").

43. *See, e.g.*, Anthony Romero, *Terrorists Are Criminals and Should Be Tried in Civilian Court*, U.S. NEWS, February 16, 2010, http://www.usnews.com/opinion/articles/2010/02/16/terrorists-are-criminals-and-should-be-tried-in-civilian-court.

They are, after all, most unlikely to respond to an invitation to present themselves—at which point they cannot be tried due to the American legal tradition's prohibition against trying a person *in absentia* who is not at least present at the beginning of the trial.[44] However, many terrorists, like those in North Waziristan, northern Yemen, and considerable parts of Africa, cannot be captured without undue risk to our troops. Hence, a requirement to capture them is effectively a suggestion—however unwitting—to grant immunity to most, if not all, of them. Thus, one needs to consider separately two categories of American terrorists: those who cannot be captured and those who have been successfully detained.

C. WHEN AMERICAN TERRORISTS CANNOT BE CAPTURED

For those who cannot be captured, the procedures outlined in the Constitution apply. It states: "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."[45] The term "witness" generally means a person who provides evidence "under oath or affirmation, in person or by affidavit or deposition," before any court or court officer or any tribunal or tribunal officer, "or in any proceeding in regard to any matter or thing in or respecting which an oath or affirmation is or may be required or authorized by law."[46] That is, *witness testimony need not take place in civilian court.*

Although the Justice Department White Paper lays out when the government can legally "use lethal force in a foreign country outside the area of active hostile activities against a U.S. citizen," it does not mention that the United States is already approximating the Constitution's process in dealing with those terrorists whose capture is effectively infeasible.[47] For an individual to be added to the "kill list," there must be two independent sources of intelligence that confirm that he is a terrorist.[48] This condition seems to satisfy the

44. FED. R. CRIM. P. 43.
45. U.S. CONST. art. III, § 3; *see also* 18 U.S.C. § 2381 (2012).
46. State v. Gilroy, 199 N.W.2d 63, 65 (Iowa 1972).
47. U.S. DEP'T OF JUSTICE, *supra* note 11, at 1.
48. *See* Jane Mayer, *The Predator War: What Are the Risks of the C.I.A.'s Covert Drone Program?*, NEW YORKER, Oct. 26, 2009, http://www.newyorker.com/reporting/2009/10/26/091026fa_fact_mayer#ixzz2MCx8Wqsc ("[A]ccording to the recent Senate Foreign Relations Committee report,

requirement of two witnesses. The question remains as to whether they testify to "the same overt Act."[49] If one source of intelligence establishes that a particular person was preparing bombs on Monday, and a second source finds the same person placing the explosives beside a road on Tuesday, is this the same act? Presuming the response is in the affirmative, the United States is meeting the Constitution's basic evidentiary conditions for establishing treason for all terrorists, including Americans.

In effect, the procedures the United States currently follows provide better treatment to terrorists that cannot be captured than to those accused of treason, by conducting a semi-trial for the former group. Allegedly, before a person is put on the kill list, presidential administration lawyers review the evidence against him to determine whether the target is legally appropriate based upon whether he constitutes a significant threat.[50] In at lease one instance, President Obama is reported to have personally reviewed the case, a review not granted to Americans otherwise subjected to the death penalty.[51] One could further strengthen this procedure by appointing one of the lawyers (with proper security clearance) to act as if he represents the prospective target, like a guardian, without further requiring all the procedural steps of a normal trial—which the Constitution does not require in judging those suspected of treason as it does for other crimes. The main purpose of providing such a "guardian" is to ensure the validity of the two (or more) witnesses and the reliability of the evidence they provide.

Kristen Eichensehr argues that slipping away from the protections of the criminal process "is nearly impossible in the treason context"

the U.S. military places no name on its targeting list until there are 'two verifiable human sources' and 'substantial additional evidence' that the person is an enemy.").

49. U.S. CONST. art. III, § 3.

50. Benjamin McKelvey, 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 (2011) (relating the CIA's former acting general counsel's and a former CIA officer's statements that the procedure includes a group of approximately ten CIA Counterrorism Center attorneys who prepare memos, which they give to the General Counsel for approval).

51. *See* Doyle McManus, *Who Reviews the U.S. 'Kill List'?*, L.A. TIMES, Feb. 5, 2012, http://articles.latimes.com/2012/feb/05/opinion/la-oe-mcmanus-column-drones-and-the-law-20120205 (referring to Defense Secretary Leon Panetta's commentary on President Obama making the final decision on the case of Anwar al-Awlaki, a U.S. citizen, who was killed by a U.S. drone in Yemen).

because the Constitution "provides specific procedural and evidentiary requirements for treason that establish a non-derogable floor of protections."[52] Furthermore, Randal John Meyer has suggested that Congress is limited by the Constitution to determining the punishment for treason and has "no power to redefine treason or to create new treasons," while the Judiciary similarly cannot "expand the definition of treason."[53] Indeed, when the government overreached, the Supreme Court overturned treason convictions that did not follow precise definitions and procedures laid out in the Constitution.[54] In *Cramer v. United States*,[55] the Supreme Court overturned the government's conviction of Anthony Cramer, who was charged with supporting Nazi saboteurs, writing that the requirement that "[e]very act, movement, deed, and word of the defendant charged to constitute treason must be supported by the testimony of two witnesses" had not been met, thereby setting a "high bar for what constitutes an overt act of aid and comfort."[56] This case shows that, far from being automatic or incontestable, treason hearings can be thorough and reliable.

Civil libertarians charge that the government's targeted killing program allows the executive to act as the accuser, judge, and executioner, and thus argue that a judicial authority should be involved. A New York Times editorial in 2010 called for setting up a court like the Foreign Intelligence Surveillance Court, to review evidence for additions to the terrorist kill list behind closed doors to get a judicial warrant in a timely and efficient manner.[57] In 2013, several U.S. Senators raised this possibility and John Brennan responded that the idea might be worthy of discussion.[58] In any case,

52. Kristen E. Eichensehr, *Treason in the Age of Terrorism: An Explanation and Evaluation of Treason's Return in Democratic States*, 42 VAND. J. TRANSNAT'L L. 1443, 1495 (2009) [hereinafter *Treason in the Age of Terrorism*].

53. Randall John Meyer, Note, *The Twin Perils of the* al-Aulaqi *Case: The Treason Clause and the Equal Protection Clause* 79 BROOK. L. REV. (forthcoming 2013), *available at* http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2246981.

54. *See Treason in the Age of Terrorism* at 1454 (observing the Supreme Court's decision to overturn *Cramer v. United States*).

55. 325 U.S. 1 (1945).

56. *Id.* at 34–35.

57. Editorial, *Lethal Force Under Law*, N.Y. TIMES, Oct. 10, 2010, at WK7, *available at* http://www.nytimes.com/2010/10/10/opinion/10sun1.html?_r=0.

58. *Transcript of Open Hearing on the Nomination of John O. Brennan to Be Director of the Central Intelligence Agency Before the U.S. Senate Select Comm.*

such a court might be established, although the Constitution does not require it. Moreover, retired U.S. District Judge James Robertson has objected to involving the judiciary in the preapproval of targeted killings, writing that such cases must "necessarily [be] considered in absentia and in secret . . . . If [an American judge considered such cases], his independence would be severely compromised."[59] As it is a matter of policy, as opposed to a truly 'justiciable' case, Judge Robertson argues that it is Congress' and the executive's job to decide who constitutes a legitimate target for a drone strike.[60] Such a court would not necessarily be charged with issuing a death warrant. Judges might simply validate intra-executive branch procedures and require the attorney general to certify that they have been followed.[61] Congress, one must assume, will continue to oversee all such actions by the administration.[62] Congress would do best not to second-guess individual cases, but to review the procedures and criteria used to ensure that the witnesses are reliable and that examination of the evidence is judicious.

It is particularly troubling when the United States defines speech

on Intelligence, 113th Cong. 123 (2013) (statement of John O. Brennan, Nominee for Director of the Central Intelligence Agency), *available at* http://intelligence.senate.gov/130207/transcript.pdf. However, civil libertarians often criticize Foreign Intelligence Surveillance Act for approving practically all of the many thousands of surveillance requests brought before it and for not being sufficiently transparent.

59. *See* James Robertson, *Judges Shouldn't Decide About Drone Strikes*, WASH. POST, Feb. 16, 2013, http://www.washingtonpost.com/opinions/judges-shouldnt-decide-about-drone-strikes/2013/02/15/8dcd1c46-778c-11e2-aa12-e6cf1d31106b_story.html (noting that targets of drone strikes do not appear before a judge, do not have notice of charges against them, do not have lawyers, do not have the opportunity to call witnesses, and have no due process rights). Prior to retiring in June 2010, Judge Robertson was a United States District Judge for the District of Columbia.

60. *See id.* (referring to John Jay's 1793 advisory opinion to George Washington clarifying that the judiciary branch exists to decide cases and controversies, not policy).

61. Meeting with Peter Raven-Hansen, Glen Earl Weston Research Professor of Law, George Washington University (Mar. 12, 2013).

62. *See* Ken Dilanian, *Congress Keeps Closer Watch on CIA Drone Strikes*, L.A. TIMES, June 25, 2012, http://www.latimes.com/news/nationworld/world/middleeast/la-na-drone-oversight-20120625,0,7967691,full.story (commenting on the monthly meeting with members of the House and Senate intelligence committees that gather to assess the videos of drone strikes and review the intelligence that was used to justify the strike).

as treason. During World War II, in both the United States and Great Britain, propagandists for Germany and Japan, including radio personalities, were charged with treason and had their convictions affirmed in court. Mildred Gillars was convicted of treason for recording a radio drama that was "broadcast by the German Radio Broadcasting Company to the United States and to its citizens and soldiers at home and abroad as an element of German propaganda and an instrument of psychological warfare."[63] Herbert John Burgman was also charged with treason for his radio broadcasts addressed to the U.S. armed forces, which allegedly sought "to impair the morale of those forces and to dissuade them from support of this country."[64] These precedents facilitated al Qaeda propagandist Gadhan's indictment half a century later as well as the 2011 targeted killing of U.S. citizen Anwar al-Awlaki, a chief propagandists for al Qaeda in the Arabian Peninsula.[65] However, these acts do not truly assault the community. They do not lead to the kind of mutual distrust and corrosion of the social fabric that violent acts by American against American engender. I tend to join those who hold that sticks and stones will break our bones but words we should be able to handle.

Eichensehr warns that, "[w]ithout a clear definition of 'aid and comfort' that encompasses those who work for an enemy to produce propaganda but excludes those who engage in political dissent by independently agreeing with, but not working with, the enemy, treason may be expanded without limit."[66] She argues that the government can avoid this slippery slope by instead charging propagandists under the "levying war" prong of the Treason Clause as this would "limit treason more clearly to those cases in which the defendant has acted in concert with the enemy in a program of warfare, and prevent the government from raising treason prosecutions against individuals who make independent statements

63. Gillars v. United States, 182 F.2d 962, 966 (D.C. Cir. 1950) (quoting the charge made by the U.S. government against Mildred Gillars).

64. United States v. Burgman, 188 F.2d 637, 639 (D.C. Cir. 1951).

65. *See Treason in the Age of Terrorism*, *supra* note 52, at 1455 (recounting the case of Adam Gadhan who was indicted in 2006 for appearing in al Qaeda propaganda videos).

66. Kristen Eichensehr, *Treason's Return*, 116 YALE L.J. POCKET PART 229, 231–32 (2007), *available at* http://thepocketpart.org/2007/01/16/eichensehr.html.

in support of ideas endorsed by the enemy."[67] One way or another, we should let Americans speak unless there is hard and specific evidence that their words effectively incite terror. Otherwise, American terrorists who cannot be captured should be subject to the kind of review that is already being carried out—and then killed when found they committed treason.

D. IF AN AMERICAN TERRORIST IS CAPTURED

There are many reasons that those American terrorists who are captured should not be brought to trial before civilian courts in the United States and that their cases should be disposed in another forum, call it a *security review board*.[68] Benjamin Wittes, Mark Gitenstein, Jack L. Goldsmith, Neal Katyal, Philip Bobbits, and I have previously spelled out these reasons.[69] Hence, this article only quickly reviews them. The United States and other free societies already have several distinct judicial authorities to deal with different kinds of people. The implication of the civilian libertarian position that all people ought to be judged in the same way does not take into account the fact that the United States has drug courts, immigration courts, family courts, debtor courts, juvenile courts, Social Security Administrative courts, and military commissions, among others. Although these courts provide the same basic constitutional protections, each of these judicial authorities adheres to different procedures and standards of evidence (e.g., in juvenile courts, records are sealed whereas anyone can obtain adult records through the Freedom of Information act; all criminal cases require "proof

67. *Id.* at 232.

68. The term "board" is preferable to "court" as it signals a break from the civilian justice system. However, the name matters little as long as it is a distinct authority with its own rules and procedures.

69. *See generally* PHILIP BOBBITT, TERROR AND CONSENT: THE WARS FOR THE TWENTY-FIRST CENTURY, 125 (2008); Benjamin Wittes & Mark Gitenstein, *A Legal Framework for Detaining Terrorists: Enact a Law to End the Clash Over Rights*, OPPORTUNITY 08: INDEPENDENT IDEAS FOR OUR NEXT PRESIDENT, 1, 5–6 (2008), http://www.brookings.edu/~/media/research/files/papers/2007/11/15%20terrorism%20wittes%20opp08/pb_terrorism_wittes.pdf (remarking that Combatant Status Review Tribunals have created a disruptive system of judicial review); Jack L. Goldsmith & Neal Katyal, *The Terrorists' Court*, N.Y. TIMES, July 11, 2007, http://www.nytimes.com/2007/07/11/opinion/11katyal.html?_r=0 (recommending Congress establish a national security court composed of judges with life tenure, which would reduce the burden on ordinary civilian courts).

beyond a reasonable doubt," while family court cases use a "clear and convincing evidence" standard). Furthermore, the charges that can be made vary by setting, a fact that has often determined whether terror suspects are tried in federal courts or military tribunals. Two of the most common charges made against terrorists—material support and conspiracy—cannot in most cases be prosecuted in military tribunals because they do not qualify as law-of-war violations if "suspects cannot be tied to a specific act of violence."[70] These are strong reasons to create a separate forum for dealing with those who commit treason.

Many of the reasons why Americans indicted for treason should not stand trial in civilian court also apply to foreign terrorists. Both classes are often captured in combat zones or ungoverned regions where it is difficult to collect evidence that would meet the standards of the ordinary criminal justice system. The nature of available evidence is likely to be classified and highly sensitive—or obtained in a way where legality is not fully consolidated and is therefore liable to be thrown out by a civilian judge. For example, a federal appeals court threw out Salim Hamdan's conviction for providing material support for terrorism, not because he was innocent, but because he committed his crime before the Military Commissions Act of 2006 was enacted.[71] Reading terror suspects their Miranda rights and allowing them to "lawyer up" may forestall the collection of intelligence needed to prevent a future attack. Allowing terrorists to face their accusers would expose the means and methods of counterterrorism authorities and jeopardize their safety and efforts.[72]

To reduce the possibility of a failed conviction—which would put

70. Peter Finn, *Somali's Case a Template for U.S. as It Seeks to Prosecute Terrorism Suspects in Federal Court*, WASH. POST, Mar. 30, 2013, http://www.washingtonpost.com/world/national-security/somalis-case-a-template-for-us-as-it-seeks-to-prosecute-terrorism-suspects-in-federal-court/2013/03/30/53b38fd0-988a-11e2-814b-063623d80a60_story.html.

71. *See* Hamdan v. United States, 696 F.3d 1238, 1253 (2012).

72. *See* BOBBITT, *supra* note 69, at 266 (explaining that because the prosecution of terrorists is "unlikely to succeed with the current rules of trial practice and evidence, the U.S. administration has taken the position that they can simply be held indefinitely, much like other prisoners of war who await the end of the conflict in which they participated. Yet a terrorist can also be interrogated like a spy or partisan or tried like a criminal before a military tribunal (which of course no ordinary criminal could be). This simply amounts to a refusal to follow existing law or create new law that is more responsive to our new situation").

the government in the difficult position of having to either set free someone strongly suspected harming of intending to harm the United States, or having to undermine the legitimacy or the American legal system by detaining the suspect despite his acquittal—prosecutors often rely on plea bargains, which guarantee the conviction but generally result in lighter sentences.[73] This is regrettable even when dealing with ordinary criminals but difficult to accept when one deals with terrorists, especially those who have committed treason in addition to their terrorist act (i.e., American terrorists).

Like all human beings, American terrorists convicted of treason are entitled to some basic rights. They should not be killed if they can be captured without undue risk to innocent lives, nor should they be tortured. Instead of suspending *habeas corpus*, they should be subject to a defined period of administrative detention,[74] which could be extended if necessary upon proper review. In Great Britain, for example, the 2006 Terrorism Act permitted a twenty-eight-day period (shortened to fourteen days in 2010) of pre-charge detention for those reasonably suspected of being terrorists.[75] The specific amount of time for detention is not important, as long as there is an initial period characterized by less judicial scrutiny, which allows for the disruption of possible additional attacks, debriefing of the terrorist, and deciphering of encrypted documents.

A *security review board* would be made up of federal judges with life tenure and "expertise in applying rules that protect classified information and national security concerns."[76] Suspects would retain the right to fair counsel and to appeal decisions to a second set of

73. *E.g.*, Lucian E. Dervan, *The Surprising Lessons from Plea Bargaining in the Shadow of Terror*, 27 GA. ST. U. L. REV. 239, 272 (2011) (referring to six defendants who faced a possible twenty-five year sentence for material support to a terrorist organization and conspiracy, but received sentences between seven and ten years after pleading guilty and charges for conspiracy were dropped).

74. *See* Ashley S. Deeks, *Administrative Detention in Armed Conflict*, 40 CASE W. RES. J. INT'L L. 403, 403 (2009) (explaining that the rules governing detention without trial impose a high standard for a state to initially detain a person as they require the state to immediately review the detention, permit detainees to appeal the decision, require periodic review of the detention, and obligate the state to release the detainee when the reason behind the detention ceases to exist).

75. Gavin Berman & Alexander Horne, *Pre-Charge Detention in Terrorism Cases*, UK PARLIAMENT, SN/HA/5634, Mar. 15, 2012, *available at* http://www.parliament.uk/briefing-papers/SN05634.

76. Wittes & Gitenstein, *supra* note 69, at 12.

select federal judges.[77] However, detainees would not be afforded all the protections to which ordinary criminals are entitled, such as facing their accusers, if those protections would compromise counterterrorism efforts.[78] Next, the standards for admissible evidence would be lower than those in criminal cases.[79] While evidence obtained through torture would be inadmissible, "probative material—even hearsay or physical evidence whose chain of custody or handling would not be adequate in a criminal trial—ought to be fair game."[80]

An American found to have committed an act of terrorism should not be privileged compared to other terrorists, but on the contrary, subjected to harsher punishment, as he has committed an additional crime. The U.S. Code clearly indicates that treason should be strongly punished: those convicted of treason "shall suffer death, or shall be imprisoned not less than five years and fined under this title but not less than $10,000; and shall be incapable of holding any office under the United States."[81] Additionally, the Federal Sentencing Guidelines "assign treason the highest possible base offense level," which "requires life imprisonment, regardless of the offender's criminal history; a death-qualified jury would, of course, be necessary to impose the death penalty."[82] Clear enough.

III. STRIPPING AMERICAN TERRORISTS' CITIZENSHIP

Several legal scholars and voices in the media who seem to share my concern that Americans suspected of having committed treason will be provided with undue legal protection suggest that such Americans should be stripped of their citizenship. For instance, David French argues that the current law, under which Americans "in the armed forces of a foreign state engaged in hostilities against the U.S." forfeit their citizenship, should be expanded to include those who join "any armed force (state or non-state) engaged in

77. *Id.* at 11–12.
78. *Id.* at 10.
79. *Id.* at 11.
80. BENJAMIN WITTES, LAW AND THE LONG WAR: THE FUTURE OF JUSTICE IN THE AGE OF TERROR, 19 (2008).
81. 18 U.S.C. § 2381.
82. *Treason in the Age of Terrorism*, *supra* note 52, at 1502.

armed conflict (as designated by Act of Congress) against our nation."[83] Charles Krauthammer agrees that, "[o]nce you take up arms against the United States, you become an enemy combatant, thereby forfeiting the privileges of citizenship and the protections of the Constitution, including due process."[84] In 2010, Senator Joe Lieberman proposed legislation that would revoke the citizenship of Americans who purposely provide material support to foreign terrorist organizations or engage in hostilities against the United States.[85] Obviously, if such Americans were to lose their citizenship they would be subject to the same treatment as foreign terrorists.

At first blush, this approach seems promising. Treason is one of the seven actions included in the Immigration and Nationality Act for which "a person who is a national of the United States whether by birth or naturalization, shall lose his nationality."[86] However, the act must be done voluntarily "with the intention of relinquishing United States nationality."[87] Furthermore, in *Vance v. Terrazas*,[88] the Supreme Court ruled that treasonous actions themselves do not establish intent; a "preponderance of evidence" is required to establish that the action was done with the intention of giving up citizenship.[89] Finally, the loss of nationality will occur only "if and when the national thereafter takes up a residence outside the United States and its outlying possessions."[90] Terrorists are most unlikely to accommodate the prosecution by showing such intent. Notwithstanding *Vance*, acts of terrorism should satisfy the intent requirement. To achieve this end, Congress would have to change the law and enumerate such acts that provide the requisite intent to give

83. David French, *Yes, the Military Can and Should Target American Members of Al-Qaeda*, NAT. REV. ONLINE, Feb. 6, 2013, http://www.nationalreview.com/corner/340008/yes-military-can-and-should-target-american-members-al-qaeda-david-french (referring to 8 U.S.C.A § 1481(a)(3) (1988)).

84. Charles Krauthammer, *In Defense of Obama's Drone War*, WASH. POST, Feb. 4, 2013, http://www.washingtonpost.com/opinions/charles-krauthammer-in-defense-of-obamas-drone-war/2013/02/14/3a69d76c-76e5-11e2-aa12-e6cf1d31106b_story.html (referring to the President's power to approve the drone attack that killed Anwar al-Awlaki, a U.S. citizen).

85. Terrorist Expatriation Act, S. 3327, 111th Cong. (2010).

86. 8 U.S.C.A § 1481(a) (1988).

87. *Id.*

88. 444 U.S. 252 (1980).

89. *Id.* at 270 (majority opinion).

90. 8 U.S.C. § 1483(a) (1996).

up citizenship. Additionally, the Supreme Court will have to rule that such a move is constitutional. Congress unsuccessfully attempted in this highly controversial course in 2010.[91] Thus, Congress instead should assign American terrorists to be judged by a security review board, following the procedures that the Constitution clearly lays out.

Treason is a term that rankles; it should not be hurled about readily. However, Americans who betray their community by raising arms against it have committed a grave offense. In doing so, they commit an additional crime to those that other terrorists commit, and they should be treated in the way the Constitution prescribes.

91. The Constitution Project's Liberty and Security Committee, *Statement Opposing the Terrorist Expatriation Act*, THE CONSTITUTION PROJECT (May 20, 2010), http://www.constitutionproject.org/manage/file/402.pdf; *Members of Congress Propose Bill to Strip Citizenship from American Terrorism Suspects*, ACLU (May 6, 2010), http://www.acluct.org/downloads/ACLUReaction Lieberman.pdf.