Exhibit 12

May 2011 White Paper

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DEPARTMENT OF JUSTICE WHITE PAPER

May 25, 2011

Legality of a Lethal Operation by the Central Intelligence Agency Against a U.S. Citizen [redacted] (b)(1) (b)(3)

This white paper sets forth the legal basis upon which the Central Intelligence Agency ("CIA") could use lethal force in Yemen against a United States citizen who senior officials reasonably determined was a senior leader of al-Qaida or an associated force of al-Qaida. [redacted] Furthermore, (b)(1) (b)(3) 18 U.S.C. § 1119(b), which criminalizes the murder abroad of a United States national by another U.S. national, does not prohibit such use of lethal force. The text and legislative history of the relevant statutes, precedents of the Office of Legal Counsel ("OLC"), and ordinary principles of statutory construction support the conclusion that section 1119 imposes no bar to operations against a senior leader of al-Qaida or an associated force who nevertheless is a U.S. citizen. Section 1119(b) bars only "unlawful" killings (cross-referencing 18 U.S.C. §§ 1111, 1112, 1113), and, in light of the circumstances outlined below, the killing would not be "unlawful" because it would fall within the traditional justification for conduct undertaken pursuant to "public authority." Here, the authority to use lethal force in national self-defense, as recognized by congressional enactments, would make this kind of operation lawful, and section 1119 would not be violated. [redacted] (b)(1) (b)(3)

Nor would such an operation violate either 18 U.S.C. § 956(a)—which makes it a crime to conspire within the jurisdiction of the United States "to commit at any place outside the United States an act that would constitute the offense of murder, kidnapping, or maiming if committed in the special maritime and territorial jurisdiction of the United States" if any conspirator acts within the United States to effect any object of the conspiracy—or the War Crimes Act, 18 U.S.C. § 2441. Finally, an operation, under the circumstances outlined below, would not transgress any possible constitutional limitations—a conclusion that is also relevant to the judgment that a CIA operation would be performed pursuant to public authority and thus would not violate either section 1119(b) or section 956(a).[1] [redacted] (b)(1) (b)(3)

[1] This white paper addresses exclusively the use of force abroad, in the circumstances described herein. It does not address legal issues that the use of force in different circumstances or in any nation other than Yemen might present: [redacted] (b)(1) (b)(3)

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I.

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Furthermore, according to the CIA, although there may be no occasion for surrender in light of the means by which such an operation would be carried out, the CIA would prefer to capture this target, and if a potential target offers to surrender, such surrender would be accepted, if feasible. This would include any targets in Yemen, although the CIA assesses that a capture in Yemen would not be feasible at this time. *See infra* at 20-21. The CIA has further represented that this sort of operation would not be undertaken in a perfidious or treacherous manner.

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Finally, any U.S. citizen targeted in such an operation would be an individual with an operational and senior leadership role in al-Qaida or one of its associated forces. Moreover, the individual would be one who had previously participated in operational planning for attempted attacks on the United States and who has expressed interest in conducting additional terrorist attacks in the United States.

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II.

Subsection 1119(b) of title 18 provides that "[a] person who, being a national of the United States, kills or attempts to kill a national of the United States while such national is outside the United States but within the jurisdiction of another country shall be punished as provided under sections 1111, 1112, and 1113." 18 U.S.C. § 1119(b).[4] In light of the nature of the operation described above, and the fact that its target would be a "national of the United States" who is outside the United States, it might be suggested that section 1119(b) would prohibit such an operation. Section 1119, however, bars only unlawful killings, and the United States' use of lethal force in national self-defense is not an unlawful killing. Section 1119 is best construed to incorporate the public authority justification, which can render lethal action carried out by a governmental official lawful in some circumstances, and this public authority justification would apply to such a CIA operation.

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A.

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

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

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1113 provides criminal penalties for "attempts to commit murder or manslaughter." *Id.* § 1113. It is therefore clear that section 1119(b) bars only "unlawful killings."[5] (U)

This limitation on section 1119(b)'s scope is significant, as the legislative history to the underlying offenses that the section incorporates makes clear. The provisions section 1119(b) incorporates derive from sections 273 and 274 of the Act of March 4, 1909, ch. 321, 35 Stat. 1088, 1143. The 1909 Act codified and amended the penal laws of the United States. Section 273 of the enactment defined murder as "the unlawful killing of a human being with malice aforethought," and section 274 defined manslaughter as "the unlawful killing of a human being without malice." 35 Stat. 1143.[6] In 1948, Congress codified the federal murder and manslaughter provisions at sections 1111 and 1112 of title 18 and retained the definitions of murder and manslaughter in nearly identical form, *see* Act of June 25, 1948, ch. 645, 62 Stat. 683, 756, including the references to "unlawful killing" that remain in the statutes today—references that track similar formulations in some state murder statutes.[7] (U)

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[5] Section 1119 itself also expressly imposes various procedural limitations on prosecution. Subsection 1119(c)(1) requires that any prosecution be authorized in writing by the Attorney General, the Deputy Attorney General, or an Assistant Attorney General, and precludes the approval of such an action "if prosecution has been previously undertaken by a foreign country for the same conduct." In addition, subsection 1119(c)(2) provides that "[n]o prosecution shall be approved under this section unless the Attorney General, in consultation with the Secretary of State, determines that the conduct took place in a country in which the person is no longer present, and the country lacks the ability to lawfully secure the person's return"—a determination that "is not subject to judicial review," *id.* (U)

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

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

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As this legislative history indicates, guidance as to the meaning of what constitutes an "unlawful killing" in sections 1111 and 1112—and thus for purposes of section 1119(b)—can be found in the historical understandings of murder and manslaughter. That history shows that states have long recognized justifications and excuses to statutes criminalizing "unlawful" killings.[8] One state court, for example, in construing that state's murder statute explained that "the word 'unlawful' is a term of art" that "connotes a homicide with the absence of factors of excuse or justification," *People v. Frye*, 10 Cal. Rptr. 2d 217, 221 (Cal. App. 1992). That court further explained that the factors of excuse or justification in question include those that have traditionally been recognized. *Id.* at 221 n.2. Other authorities support the same conclusion. *See, e.g., Mullaney v. Wilbur*, 421 U.S. 684, 685 (1975) (requirement of "unlawful" killing in Maine murder statute meant that killing was "neither justifiable nor excusable"); *cf. also* Rollin M. Perkins & Ronald N. Boyce, *Criminal Law* 56 (3d ed. 1982) ("Innocent homicide is of two kinds, (1) justifiable and (2) excusable."). Accordingly, section 1119 does not proscribe killings covered by a justification traditionally recognized, such as under the common law or state and federal murder statutes. *See White*, 51 F. Supp. 2d at 1013 ("Congress did not intend [section 1119] to criminalize justifiable or excusable killings."). (U)

B.

Before one such recognized justification—the justification of "public authority"—can be analyzed in the context of a potential CIA operation, it is necessary to explain why section 1119(b) incorporates that particular justification. (b)(1) (b)(3)

The public authority justification, generally understood, is well-accepted, and it is clear it may be available even in cases where the particular criminal statute at issue does not expressly refer to a public authority justification.[9] Prosecutions where such a "public authority"

Laws of England 195 (Oxford 1769) (same); *see also A Digest of Opinions of the Judge Advocates General of the Army* 1074 n.3 (1912) ("Murder, at common law, is the unlawful killing by a person of sound memory and discretion, of any reasonable creature in being and under the peace of the State, which malice aforethought either express or implied") (internal quotation marks omitted). (U)

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

[9] Where a federal criminal statute incorporates the public authority justification, and the government conduct at issue is within the scope of that justification, there is no need to examine whether the criminal prohibition has been repealed, impliedly or otherwise, by some other statute that might potentially authorize the governmental

justification is invoked are understandably rare, *see* American Law Institute, Model Penal Code and Commentaries § 3.03 Comment 1, at 24 (1985); *cf. Visa Fraud Investigation*, 8 Op. O.L.C. 284, 285 n.2, 286 (1984), and thus there is little case law in which courts have analyzed the scope of the justification with respect to the conduct of government officials.[10] Nonetheless, discussions in the leading treatises and in the Model Penal Code demonstrate its legitimacy. *See* 2 Wayne R. LaFave, *Substantive Criminal Law* § 10.2(b), at 135 (2d ed. 2003); Perkins & Boyce, *Criminal Law* at 1093 ("Deeds which otherwise would be criminal, such as taking or destroying property, taking hold of a person by force and against his will, placing him in confinement, or even taking his life, are not crimes if done with proper public authority."); *see also* Model Penal Code § 3.03(1)(a), (d), (e), at 22-23 (proposing codification of justification where conduct is "required or authorized by," inter alia, "the law defining the duties or functions of a public officer . . ."; "the law governing the armed services or the lawful conduct of war"; or "any other provision of law imposing a public duty"); National Comm'n on Reform of Federal Criminal Laws, A Proposed New Federal Criminal Code § 602(1) ("Conduct engaged in by a public servant in the course of his official duties is justified when it is required or authorized by law."). And OLC has invoked analogous rationales when it has analyzed whether Congress intended a particular criminal statute to prohibit specific conduct that otherwise falls within a government agency's authorities.[11] (U)

The public authority justification does not excuse all conduct of public officials from all criminal prohibitions. The legislature may design some criminal prohibitions to place bounds on the kinds of governmental conduct that can be authorized by the Executive. Or the legislature may enact a criminal prohibition in order to delimit the scope of the conduct that the legislature

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conduct, including by the authorizing statute that might supply the predicate for the assertion of the public authority justification itself. Rather, in such cases, the criminal prohibition simply does not apply to the particular governmental conduct at issue in the first instance because Congress intended that prohibition to be qualified by the public authority justification that it incorporates. Conversely, where another statute expressly authorizes the government to engage in the *specific* conduct in question, then there would be no need to invoke the more general public authority justification doctrine, because in such a case the legislature itself has, in effect, carved out a specific exception permitting the executive to do what the legislature has otherwise generally forbidden. Such a circumstance is not addressed in this white paper. (U)

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

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

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has otherwise authorized the Executive to undertake pursuant to another statute.[12] But the recognition that a federal criminal statute may incorporate the public authority justification reflects the fact that it would not make sense to attribute to Congress the intent with respect to each of its criminal statutes to prohibit all covered activities undertaken by public officials in the legitimate exercise of their otherwise lawful authorities, even if Congress has clearly intended to make those same actions a crime when committed by persons who are not acting pursuant to such public authority. In some instances, therefore, the better view of a criminal prohibition may well be that Congress meant to distinguish those persons who are acting pursuant to public authority, at least in some circumstances, from those who are not, even if the statute by terms does not make that distinction express. *Cf. Nardone v. United States*, 302 U.S. 379, 384 (1937) (federal criminal statutes should be construed to exclude authorized conduct of public officers where such a reading "would work obvious absurdity as, for example, the application of a speed law to a policeman pursuing a criminal or the driver of a fire engine responding to an alarm").[13] (U)

Here, in the case of a federal murder statute, there is no general bar to applying the public authority justification to criminal prohibition. For example, with respect to prohibitions on the unlawful use of deadly force, the Model Penal Code recommended that legislatures should make the public authority (or "public duty") justification available, though only where the use of such force is covered by a more particular justification (such as defense of others or the use of deadly force by law enforcement), where the use of such force "is otherwise expressly authorized by law," or where such force "occurs in the lawful conduct of war." Model Penal Code § 3.03(2)(b), at 22; *see also id.* Comment 3, at 26. Some states proceeded to adopt the Model Penal Code recommendation.[14] Other states, although not adopting that precise formulation, have enacted specific statutes dealing with the question of when public officials are justified in using deadly force, which often prescribe that an officer acting in the performance of his official duties must reasonably have believed that such force was "necessary."[15] Other states have more broadly provided that the public authority defense is available where the government officer engages in a "reasonable exercise" of his official functions.[16] There is, however, no federal

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

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

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

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

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

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statute that is analogous, and neither section 1119 nor any of the incorporated title 18 provisions setting forth the substantive elements of the section 1119(b) offense, provide any express guidance as to the existence or scope of this justification. (U)

Against this background, the touchstone for the analysis of whether section 1119 incorporates not only justifications generally, but also the public authority justification in particular, is the legislative intent underlying this criminal statute. Here, the statute should be read to exclude from its prohibitory scope killings that are encompassed by traditional justifications, which include the public authority justification. There are no indications that Congress had a contrary intention. Nothing in the text or legislative history of sections 1111-1113 of title 18 suggests that Congress intended to exclude the established public authority justification from those that Congress otherwise must be understood to have imported through the use of the modifier "unlawful" in those statutes (which, as explained above, establish the substantive scope of section 1119(b)).[17] Nor is there anything in the text or legislative history of section 1119 itself to suggest that Congress intended to abrogate or otherwise affect the availability under that statute of this traditional justification for killings. On the contrary, the relevant legislative materials indicate that in enacting section 1119 Congress was merely closing a gap in a field dealing with entirely different kinds of conduct than that at issue here. (U)

The origin of section 1119 was a bill entitled the "Murder of United States Nationals Act of 1991," which Senator Thurmond introduced during the 102d Congress in response to the murder of an American in South Korea who had been teaching at a private school there. *See* 137 Cong. Rec. 8675-77 (1991) (statement of Sen. Thurmond). Shortly after the murder, another American teacher at the school accused a former colleague (who was also a U.S. citizen) of having committed the murder, and also confessed to helping the former colleague cover up the crime. The teacher who confessed was convicted in a South Korean court of destroying evidence and aiding the escape of a criminal suspect, but the individual she accused of murder had returned to the United States before the confession. *Id.* at 8675. The United States did not have an extradition treaty with South Korea that would have facilitated prosecution of the alleged murderer and therefore, under then-existing law, "the Federal Government ha[d] no jurisdiction to prosecute a person residing in the United States who ha[d] murdered an American abroad except in limited circumstances, such as a terrorist murder or the murder of a Federal official." *Id.* (U)

To close the "loophole under Federal law which permits persons who murder Americans in certain foreign countries to go punished," *id.*, the Thurmond bill would have added a new section to title 18 providing that "[w]hoever kills or attempts to kill a national of the United States while such national is outside the United States but within the jurisdiction of another country shall be punished as provided under sections 1111, 1112, and 1113 of this title." S. 861, 102d Cong. (1991) (incorporated in S. 1241, 102d Cong. §§ 3201-03 (1991)). The proposal also

[17] The argument that the use of the term "unlawful" supports the conclusion that section 1119 incorporates the public authority justification does not suggest that the absence of such a term would require a contrary conclusion regarding the intended application of a criminal statute to otherwise authorized government conduct in other cases. Each statute must be considered on its own terms to determine the relevant congressional intent. *See supra* note 13. (U)

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contained a separate provision amending the procedures for extradition "to provide the executive branch with the necessary authority, in the absence of an extradition treaty, to surrender to foreign governments those who commit violent crimes against U.S. nationals." 137 Cong. Rec. 8676 (1991) (statement of Sen. Thurmond) (discussing S. 861, 102d Cong., § 3).[18] The Thurmond proposal was incorporated into an omnibus crime bill that both the House and Senate passed, but that bill did not become law. (U)

In the 103d Congress, a revised version of the Thurmond bill was included as part of the Violent Crime Control and Law Enforcement Act of 1994. H.R. 3355 § 60009, 103d Cong. (1994). The new legislation differed from the previous bill in two key respects. First, it prescribed criminal jurisdiction only where both the perpetrator and the victim were U.S. nationals, whereas the original Thurmond bill would have extended jurisdiction to all instances in which the victim was a U.S. national (based on so-called "passive personality" jurisdiction[19]). Second, the revised legislation did not include the separate provision from the earlier Thurmond legislation that would have amended the procedures for extradition. Congress enacted the revised legislation in 1994 as part of Public Law No. 103-322, and it was codified as section 1119 of title 18. *See* Pub. L. No. 103-322, § 60009, 108 Stat. 1796, 1972 (1994). (U)

Thus, section 1119 was designed to close a jurisdictional loophole—exposed by a murder that had been committed abroad by a private individual—to ensure the possibility of prosecuting U.S. nationals who murdered other U.S. nationals in certain foreign countries that lacked the ability to lawfully secure the perpetrator's appearance at trial. This loophole had nothing to do with the sort of CIA counterterrorism operation at issue here. Indeed, prior to the enactment of section 1119, the only federal statute expressly making it a crime to kill U.S. nationals abroad, at least outside the special and maritime jurisdiction of the United States, reflected what appears to have been a particular concern with protection of Americans from terrorist attacks. *See* 18 U.S.C. § 2332(a), (d) (criminalizing unlawful killings of U.S. nationals abroad where the Attorney General or his subordinate certifies that the "offense was intended to coerce, intimidate, or retaliate against a government or a civilian population").[20] It therefore would be anomalous to now read section 1119's closing of a limited jurisdictional gap as having been intended to jettison important applications of the established public authority justification, particularly in light of the statute's incorporation of substantive offenses codified in statutory

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

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

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

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provisions that from all indications were intended to incorporate recognized justifications and excuses. (U)

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

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III.

Given that section 1119 incorporates the public authority justification, the next question is whether a potential CIA operation would be encompassed by that justification and, in particular, whether that justification would apply even when the target is a United States citizen. The analysis leads to the conclusion that it would—a conclusion that depends in part on the further determination that this kind of operation would accord with any potential constitutional protections of a United States citizen in these circumstances (*see infra* part VI). In reaching this conclusion, this white paper does not address other circumstances involving different facts. The facts addressed here would be sufficient to establish the justification, whether or not any particular fact is necessary to the conclusion.[21]

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A.

The frame of reference here is that the United States is currently in the midst of an armed conflict, *see* Authorization for Use of Military Force ("AUMF"), Pub. L. No. 107-40, 115 Stat. 224, § 2(a) (2001), and the public authority justification would encompass an operation such as this one were it conducted by the military consistent with the laws of war. As one legal commentator has explained by example, "if a soldier intentionally kills an enemy combatant in time of war and within the rules of warfare, he is not guilty of murder," whereas, for example, if that soldier intentionally kills a prisoner of war—a violation of the laws of war—"then he commits murder." 2 LaFave, *Substantive Criminal Law* § 10.2(c), at 136; *see also State v. Gut*, 13 Minn. 341, 357 (1868) ("That it is legal to kill an alien enemy in the heat and exercise of war, is undeniable; but to kill such an enemy after he laid down his arms, and especially when he is confined in prison, is murder."); Perkins & Boyce, *Criminal Law* at 1093 ("Even in time of war an alien enemy may not be killed needlessly after he has been disarmed and securely

[21] In light of the conclusion that section 1119 and the statutes it cross-references incorporate this justification, and that the justification would cover an operation of the sort discussed here, this discussion does not address whether other grounds might exist for concluding that such an operation would be lawful. (TS//NF)

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imprisoned").[22] Moreover, without invoking the public authority justification by terms, OLC has relied on the same notion in an opinion addressing the intended scope of a federal criminal statute that concerned the use of possibly lethal force. *See United States Assistance to Countries that Shoot Down Civil Aircraft Involved in Drug Trafficking*, 18 Op. O.L.C. 148, 164 (1994) ("*Shoot Down Opinion*") (concluding that the Aircraft Sabotage Act of 1984, 18 U.S.C. § 32(b)(2), which prohibits the willful destruction of a civil aircraft and otherwise applies to U.S. government conduct, should not be construed to have "the surprising and almost certainly unintended effect of criminalizing actions by military personnel that are lawful under international law and the laws of armed conflict"). (b)(1) (b)(3)

As explained above, an operation of this sort would be targeted at a senior leader of al-Qaida or its associated forces who participated in operational planning for attempted attacks on the United States on behalf of such forces and who continues to plan such attacks. *See supra* at 2. Such an individual would have engaged in conduct bringing him within the scope of the AUMF. Any military operation against such a person, therefore, would be carried out against someone who is within the core of individuals against whom Congress has authorized the use of necessary and appropriate force. (~~TS//NF~~)

This sort of operation would also be consistent with the laws of war applicable to a non-international armed conflict[23] if carried out by military personnel. Any military member

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

[23] The rules of non-international armed conflict are relevant because the Supreme Court has held that the United States is engaged in a non-international armed conflict with al-Qaida. *Hamdan v. Rumsfeld* 548 U.S. 557, 628-31 (2006). Although an operation of the kind discussed here would occur in Yemen, a location that is far from the most active theater of combat between the United States and al-Qaida, that does not affect the conclusion. There appears to be no authority for the proposition that when one of the parties to an armed conflict plans and executes operations from a base in a new nation, an operation to engage the enemy in that location can never be part of the original armed conflict—and thus subject to the laws of war governing that conflict—unless and until the hostilities become sufficiently intensive and protracted within that new location. Nor is there any obvious reason why that more categorical, nation-specific rule should govern in a non-international armed conflict. Rather, the determination of whether a particular operation would be part of an ongoing armed conflict for purposes of international law requires consideration of the particular facts and circumstances present in each case.

Here, any potential operation would target a senior leader of al-Qaida or its associated forces. Moreover, such an operation would be conducted in Yemen, where a co-belligerent of al-Qaida, engaged in hostilities against the United States as part of the same comprehensive armed conflict and in league with the principal enemy, has a significant and organized presence, and from which it is conducting terrorist training in an organized manner and has executed and is planning to execute attacks against the United States. Finally, the target of such an operation would be someone continuously planning attacks from that Yemeni base of operations against the United States, as the conflict with al-Qaida continues. These facts in combination support the judgment that this sort of operation in Yemen would be conducted as part of the non-international armed conflict between the United States and al-Qaida. (~~TS//NF~~)

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responsible for such a strike would likely have an obligation to abort a strike if he or she concluded that civilian casualties would be disproportionate or that such a strike would in any other respect violate the laws of war. *See* Chairman of the Joint Chiefs of Staff, Instruction 5810.01D, *Implementation of the DoD Law of War Program* ¶ 4.a. at 1 (Apr. 30, 2010) ("It is DOD policy that . . . [m]embers of the DOD Components comply with the law of war during all armed conflicts, however such conflicts are characterized, and in all other military operations."). Moreover, the targeted nature of this sort of operation would help to ensure that it would comply with the principle of distinction. *See, e.g.*, United States Air Force, *Targeting*, Air Force Doctrine Document 2-1.9, at 88 (June 8, 2006) (explaining that the "four fundamental principles that are inherent to all targeting decisions" are military necessity, humanity (the avoidance of unnecessary suffering), proportionality, and distinction). Further, while such an operation would be conducted without warning, it would not violate the prohibitions on treachery and perfidy—which are addressed to conduct involving a breach of confidence by the assailant. *See, e.g.*, Hague Convention IV, Annex, art. 23(b), 36 Stat. at 2301-02 ("[I]t is especially forbidden . . . to kill or wound treacherously individuals belonging to the hostile nation or army"); *cf. also* Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts, art. 37(1) (prohibiting the killing, injuring or capture of an adversary in an international armed conflict by resort to acts "inviting the confidence of [the] adversary. . . with intent to betray that confidence," including feigning a desire to negotiate under truce or flag of surrender; feigning incapacitation; and feigning noncombatant status).[24]

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In light of all these circumstances, a military operation against the sort of individual described above would comply with international law, including the laws of war applicable to this armed conflict, and would fall within Congress's authorization to use "necessary and appropriate force" against al-Qaida. Consequently, the potential attack, if conducted under military authority in the manner described, should be understood to constitute the lawful conduct of war and thus to be encompassed by the public authority justification.

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B.

Given the assessment that an analogous operation carried out pursuant to the AUMF would fall within the scope of the public authority justification, there is no reason to reach a

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

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different conclusion for a CIA operation.[25] As discussed above, such an operation would consist of an attack against an operational leader of an enemy force, as part of the United States's ongoing non-international armed conflict with al-Qaida.

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Finally, the CIA—

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would conduct an operation of this sort in a manner that accords with the rules of international humanitarian law governing this armed conflict

See supra at 2, 4-5.[26]

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[25] The potential restrictions imposed by two other criminal laws—18 U.S.C. §§ 956(a) and 2441—are addressed in Parts IV and V of this white paper. Part VI explains why the Constitution would impose no bar to a potential CIA operation under these circumstances, based on the facts outlined above. (U)

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If the killing by a member of the armed forces would comply with the law of war and otherwise be lawful, actions of CIA officials facilitating that killing should also not be unlawful. *See, e.g.*, *Shoot Down Opinion* at 165 n.35 ("[O]ne cannot be prosecuted for aiding and abetting the commission of an act that is not itself a crime.") (citing *Shuttlesworth v. City of Birmingham*, 373 U.S. 262 (1963)).

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Nor does the fact that CIA personnel would be involved in this sort of lethal operation itself cause it to violate the laws of war. It is true that CIA personnel, by virtue of their not being part of the armed forces, would not enjoy the immunity from prosecution under the domestic law of the countries in which they act for their conduct in targeting and killing enemy forces in compliance with the laws of war—an immunity that the armed forces enjoy by virtue of their status. *See* Philip Alston, *Report of the Special Rapporteur on extrajudicial, summary or arbitrary executions* ¶ 71, at 22 (United Nations Human Rights Council, Fourteenth Session, Agenda Item 3, May 28, 2010); *see also* Yoram Dinstein, *The Conduct of Hostilities Under the Law of International Armed Conflict* 31 (2004) ("*Conduct of Hostilities*"). Nevertheless, lethal activities conducted in accord with the laws of war, and undertaken in the course of lawfully authorized hostilities, do not violate *the laws of war* by virtue of the fact that they are carried out in part by government actors who are not entitled to the combatant's privilege. The contrary view "arises . . . from a fundamental confusion between acts punishable under international law and acts with respect to which international law affords no protection." Richard R. Baxter, *So-Called "Unprivileged Belligerency": Spies, Guerillas, and Saboteurs*, 28 Brit. Y.B. Int'l L. 323, 342 (1951) ("the law of nations has not ventured to require of states that they . . . refrain from the use of secret agents or that these activities upon the part of their military forces or civilian population be punished"). *Accord* Yoram Dinstein, *The Distinction Between Unlawful Combatants and War Criminals*, in *International Law at a Time of Perplexity: Essays in Honour of Shabtai Rosenne* 103-16 (Y. Dinstein ed., 1989). Statements in the Supreme Court's decision in *Ex parte Quirin*, 317 U.S. 1 (1942), are sometimes cited for the contrary view. *See, e.g.*, *id.* at 36 n.12 (suggesting that passing through enemy lines in order to commit "any hostile act" while not in uniform "renders the offender liable to trial for violation of the laws of war"); *id.* at 31 (enemies who come secretly through the lines for purposes of waging war by destruction of life or property "without uniform" not only are "generally not to be entitled to the status of prisoners of war," but also "to be offenders against the law of war subject to trial and punishment by military tribunals"). Because the Court in *Quirin* focused on conduct taken behind enemy lines, it is not clear whether the Court in these passages intended to refer only to conduct that would constitute perfidy or treachery. To the extent the Court meant to suggest more broadly that any hostile acts performed by unprivileged belligerents are *for that reason* violations of the laws of war, the authorities the Court cited (the Lieber Code and Colonel Winthrop's military law treatise) do not provide clear support. *See* John C. Dehn, *The* Hamdan *Case and the Application of a Municipal Offense*, 7 J. Int'l Crim. J. 63, 73-

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Nothing in the text or legislative history of section 1119 indicates that Congress intended to criminalize such an operation. Section 1119 incorporates the traditional public authority justification, and did not impose any special limitation on the scope of that justification. As explained above, *supra* at 10-12, the legislative history of that criminal prohibition revealed Congress's intent to close a jurisdictional loophole that would have hindered prosecutions of murders carried out by private persons abroad. It offers no indication that Congress intended to prohibit the targeting of an enemy leader during an armed conflict in a manner that would accord with the laws of war when performed by a duly authorized government agency. Nor does it indicate that Congress, in closing the identified loophole, meant to place a limitation on the CIA that would not apply to the armed forces.

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Thus, just as Congress would not have intended section 1119 to bar a military attack on the sort of individual described above, neither would it have intended the provision to prohibit an attack on the same target, in the same authorized conflict and in similar compliance with the laws of war, carried out by the CIA in accord with

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Finally, there is no basis in prior OLC precedent for reaching a different conclusion. Outside the context of the use of deadly force, OLC has had occasion to address whether particular criminal statutes should be construed to criminalize otherwise authorized government activities, notwithstanding the absence of an express exception to that effect. OLC's opinions on

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79 (2009); *see also* Baxter, *So-Called "Unprivileged Belligerency,"* 28 Brit. Y.B. Int'l L. at 339-40; Michael N. Schmitt, *Humanitarian Law and Direct Participation in Hostilities by Private Contractors or Civilian Employees*, 5 Chi. J. Int'l L. 511, 521 n.45 (2005); W. Hays Parks, *Special Forces' Wear of Non-Standard Uniforms*, 4 Chic. J. Int'l L. 493, 510-11 n.31 (2003). DoD's current Manual for Military Commissions, however, does not endorse the view that the commission of an unprivileged belligerent act, without more, constitutes a violation of the international law of war. *See* Manual for Military Commissions, Part IV, § 5(13), Comment, at IV-11 (2010 ed., Apr. 27, 2010) (murder or infliction of serious bodily injury "committed while the accused did not meet the requirements of privileged belligerency" can be tried by a military commission "even if such conduct does not violate the international law of war").

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

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such questions have not directly invoked the public authority justification, but they have engaged in the same basic, context-specific inquiry concerning whether Congress intended the criminal statute at issue to prohibit government activities in circumstances where the same conduct would be unlawful if performed by a private person. OLC concluded in one such opinion that a statutory prohibition on granting visas to aliens in sham marriages, 8 U.S.C. § 1201(g)(3), would not prohibit granting such a visa as part of an undercover operation. *Visa Fraud Investigation*, 8 Op. O.L.C. at 284. OLC explained that courts have recognized that it may be lawful for law enforcement agents to disregard otherwise applicable laws "when taking action that is necessary to attain the permissible law enforcement objective, when the action is carried out in a reasonable fashion." *Id.* at 287. The issuance of an otherwise unlawful visa that was necessary for the undercover operation to proceed, done in circumstances—"for a limited purpose and under close supervision"—that were "reasonable," did not violate the federal statute. *Id.* at 288. Given the combination of circumstances concerning such an operation, it plainly would meet this standard. *See also infra* at 19-22 (explaining that a CIA operation under the proposed circumstances would comply with constitutional due process and the Fourth Amendment's "reasonableness" test for the use of deadly force).

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Accordingly, the combination of circumstances present here supports the judgment that a CIA operation of this sort would be encompassed by the public authority justification. Such an operation, therefore, would not result in an "unlawful" killing under section 1111 and thus would not violate section 1119.

IV.

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

Like section 1119(b), section 956(a) bars only unlawful killings, and the United States' use of lethal force in national self-defense is not an unlawful killing. Section 956(a) incorporates by reference the understanding of "murder" in section 1111 of title 18. For reasons explained earlier in this white paper, *see supra* at 5-7, section 956(a) thus incorporates the traditional public authority justification that section 1111 recognizes. A CIA operation, on the facts outlined above, would be covered by that justification. Nor does Congress's reference in section 956(a) to "the special maritime and territorial jurisdiction of the United States" reflect an intent to transform such a killing into a "murder" in these circumstances—notwithstanding that the analysis of the applicability of the public authority justification is limited for present purposes to operations conducted abroad. A contrary conclusion would require attributing to Congress the surprising intention of criminalizing through section 956(a) an otherwise lawful killing of an enemy leader that another statute specifically prohibiting the murder of U.S. nationals abroad does not prohibit.

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The legislative history of section 956(a) further confirms the conclusion that that statute should not be so construed. When the provision was first introduced in the Senate in 1995, its sponsors addressed and rejected the notion that the conspiracy prohibited by that section would apply to "duly authorized" actions undertaken on behalf of the federal government. Senator Biden introduced the provision at the behest of the President, as part of a larger package of anti-terrorism legislation. *See* 141 Cong. Rec. 4491 (1995) (statement of Sen. Biden). He explained that the provision was designed to "fill[] a void in the law," because section 956 at the time prohibited only U.S.-based conspiracies to commit certain property crimes abroad, and did not address crimes against persons. *Id.* at 4506. The amendment was designed to cover an offense "committed by terrorists" and was "intended to ensure that the government is able to punish those persons who use the United States as a base in which to plot such a crime to be carried out outside the jurisdiction of the United States." *Id.* Notably, the sponsors of the new legislation deliberately declined to place the new offense either within chapter 19 of title 18, which is devoted to "Conspiracy," or within chapter 51, which collects "Homicide" offenses (including those established in sections 1111, 1112, 1113 and 1119). Instead, as Senator Biden explained, "[s]ection 956 is contained in chapter 45 of title 18, United States Code, relating to interference with the foreign relations of the United States," and thus was intended to "cover[] those individuals who, without appropriate governmental authorization, engage in prohibited conduct that is harmful to the foreign relations of the United States." *Id.* at 4507. Because, as Senator Biden explained, the provision was designed, like other provisions of chapter 45, to prevent private interference with U.S. foreign relations, "[i]t is not intended to apply to duly authorized actions undertaken on behalf of the United States Government." *Id.*; *see also* 8 Op. O.L.C. 58 (1984) (concluding that section 5 of the Neutrality Act, 18 U.S.C. § 960, which is also in chapter 45 and which forbids the planning of, or participation in, military or naval expeditions to be carried on from the United States against a foreign state with which the United States is at peace, prohibits only persons acting in their private capacity from engaging in such conduct, and does not proscribe activities undertaken by government officials acting within the course and scope of their duties as United States officers). Senator Daschle expressed this same understanding when he introduced the identical provision in a different version of the anti-terrorism legislation a few months later. *See* 141 Cong. Rec. 11,960 (1995) (statement of Sen. Daschle). Congress enacted the new section 956(a) the following year, as part of the Antiterrorism and Effective Death Penalty Act, Pub. L. No. 104-132, tit. VII, § 704(a), 110 Stat. 1214, 1294-95 (1996). The legislative history appears to contain nothing to contradict the construction of section 956(a) described by Senators Biden and Daschle. (U)

Accordingly, section 956(a) would not prohibit an operation of the kind discussed here.

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The War Crimes Act, 18 U.S.C. § 2441, which makes it a federal crime for a member of the Armed Forces or a national of the United States to "commit[] a war crime." *Id.* § 2441(a). Subsection 2441(c) defines a "war crime" for purposes of the statute to mean any conduct (i) that is defined as a grave breach in any of the Geneva Conventions (or any Geneva protocol to which the U.S. is a party); (ii) that is prohibited by four specified articles of the Fourth Hague Convention of 1907, (iii) that is a "grave breach" of Common Article 3 of the Geneva

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Conventions (as defined elsewhere in section 2441) when committed "in the context of and in association with an armed conflict not of an international character"; or (iv) that is a willful killing or infliction of serious injury in violation of the 1996 Protocol on Prohibitions or Restrictions on the Use of Mines, Booby-Traps and Other Devices. Of these, the only subsection potentially applicable here is that dealing with Common Article 3 of the Geneva Conventions.[28] (U)

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

Whatever might be the outer bounds of this category of covered persons, it could not encompass an individual of the sort considered here. Common Article 3 does not alter the fundamental law-of-war principle concerning a belligerent party's right in an armed conflict to target individuals who are part of an enemy's armed forces. The language of Common Article 3 "makes clear that members of such armed forces [of both the state and non-state parties to the conflict] . . . are considered as 'taking no active part in the hostilities' only once they have disengaged from their fighting function ('have laid down their arms') or are placed *hors de combat*, mere suspension of combat is insufficient." International Committee of the Red Cross, *Interpretive Guidance on the Notion of Direct Participation in Hostilities Under International Humanitarian Law* 28 (2009); *cf. also id.* at 34 ("individuals whose continuous function involves the preparation, execution, or command of acts or operations amounting to direct participation in hostilities are assuming a continuous combat function," in which case they can be deemed to be members of a non-state armed group subject to continuous targeting); *accord Gherebi v. Obama*, 609 F. Supp. 2d 43, 65 (D.D.C. 2009) ("the fact that 'members of armed forces who have laid down their arms and those placed *hors de combat*' are not 'taking [an] active part in the hostilities' necessarily implies that 'members of armed forces' who have not surrendered or been incapacitated are 'taking [an] active part in the hostilities' simply by virtue of their membership in those armed forces"); *id.* at 67 ("Common Article 3 is not a suicide pact; it does not provide a free pass for the members of an enemy's armed forces to go to or fro as they please so long as, for example, shots are not fired, bombs are not exploded, and places are not hijacked'). An

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

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active, high-level leader of an enemy force who is continually involved in planning and recruiting for terrorist attacks, can on that basis fairly be said to be taking "an active part in hostilities." Accordingly, targeting him in the circumstances discussed here would not violate Common Article 3 and therefore would not violate the War Crimes Act.

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VI.

Although (as explained above) this sort of CIA operation would not violate sections 1119(b), 956(a) and 2441 of title 18 of the U.S. Code, the fact that such an operation may target a U.S. citizen could raise distinct questions under the Constitution. Nevertheless, on the facts outlined above, the Constitution would not preclude such a lethal action because of a target's U.S. citizenship.

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The Fifth Amendment's Due Process Clause, as well as the Fourth Amendment, likely protects a U.S. citizen in some respects even while he is abroad. *See Reid v. Covert*, 354 U.S. 1, 5-6 (1957) (plurality opinion); *United States v. Verdugo-Urquidez*, 494 U.S. 259, 269-70 (1990); *see also In re Terrorist Bombings of U.S. Embassies in East Africa*, 552 F.3d 157, 170 n.7 (2d Cir. 2008). The fact that a central figure in al-Qaida or its associated forces is a U.S. citizen, however, does not give that person constitutional immunity from attack. This conclusion finds support in Supreme Court case law addressing whether the military may constitutionally use certain types of military force against a U.S. citizen who is a part of enemy forces. *See Hamdi v. Rumsfeld*, 542 U.S. 507, 521-24 (2004) (plurality opinion); *Ex parte Quirin*, 317 U.S. 1, 37-38 (1942)).

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In *Hamdi*, a plurality of the Supreme Court used the *Mathews v. Eldridge* balancing test to analyze the Fifth Amendment due process rights of a U.S. citizen captured on the battlefield in Afghanistan and detained in the United States who wished to challenge the government's assertion that he was a part of enemy forces, explaining that "the process due in any given instance is determined by weighing 'the private interest that will be affected by the official action' against the Government's asserted interest, 'including the function involved' and the burdens the Government would face in providing greater process." 542 U.S. at 529 (plurality opinion) (quoting *Mathews v. Eldridge*, 424 U.S. 319, 335 (1976)). Under this balancing test, at least in circumstances where the highest officers in the Intelligence Community have reviewed the factual basis for a lethal operation, and where the CIA has reviewed, and found infeasible, an operation to capture a targeted individual instead of killing him and continues to monitor whether changed circumstances would permit such an alternative, the Constitution does not require the government to provide further process to the U.S. person before using lethal force against him. *See Hamdi*, 542 U.S. at 534 (plurality opinion) ("[t]he parties agree that initial captures on the battlefield need not receive the process we discuss here; that process is due only when the determination is made to continue to hold those who have been seized"). On the battlefield, the Government's interests and burdens preclude offering a process to judge whether a detainee is truly an enemy combatant.

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As explained above, such an operation would be carried out against an individual a decision-maker could reasonably decide poses a "continued" and "imminent"

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threat to the United States. Moreover, the CIA has represented that it would capture rather than target such an individual if feasible, but that such a capture operation in Yemen would be infeasible at this time.

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

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(b)(3)

Although in the "circumstances of war," as the *Hamdi* plurality observed, "the risk of erroneous deprivation of a citizen's liberty in the absence of sufficient process . . . is very real," 542 U.S. at 530, the plurality also recognized that "the realities of combat" render certain uses of force "necessary and appropriate," including against U.S. citizens who have become part of enemy forces—and that "due process analysis need not blink at those realities," *id.* at 531. Thus, at least where, as here, the target's activities pose a "continued and imminent threat of violence or death" to U.S. persons, the highest officers in the Intelligence Community have reviewed the factual basis for a lethal operation, and a capture operation would be infeasible—and where the CIA continues to monitor whether changed circumstances would permit such an alternative—the "realities of combat" and the weight of the government's interest in using an authorized means of lethal force against this enemy are such that the Constitution would not require the government to provide further process to the U.S. person before using such force. *Cf. Hamdi* 542 U.S. at 535 (noting that the Court "accord[s] the greatest respect and consideration to the judgments of military authorities in matters relating to the actual prosecution of war, and . . . the scope of that discretion necessarily is wide") (plurality opinion). (b)(1) (b)(3)

Similarly, even assuming that the Fourth Amendment provides some protection to a U.S. person abroad who is part of al-Qaida and that the sort of operation discussed here would result in a "seizure" within the meaning of that Amendment, such a lethal operation would not violate the Fourth Amendment. The Supreme Court has made clear that the constitutionality of a seizure is determined by "balanc[ing] the nature and quality of the intrusion on the individual's Fourth Amendment interests against the importance of the governmental interests alleged to justify the intrusion." *Tennessee v. Garner*, 471 U.S. 1, 8 (1985) (internal quotation marks omitted); *accord Scott v. Harris*, 550 U.S. 372, 383 (2007). Even in domestic law enforcement operations, the Court has noted that "[w]here the officer has probable cause to believe that the suspect poses a threat of serious physical harm, either to the officer or to others, it is not constitutionally unreasonable to prevent escape by using deadly force." *Garner*, 471 U.S. at 11. Thus, "if the suspect threatens the officer with a weapon or there is probable cause to believe that he has committed a crime involving the infliction or threatened infliction of serious physical harm,

(b)(1)
(b)(3)

(b)(1)
(b)(3)

deadly force may be used if necessary to prevent escape and if, where feasible, some warning has been given." *Id.* at 11-12.

(b)(1)
(b)(3)

The Fourth Amendment "reasonableness" test is situation-dependent. *Cf. Scott*, 550 U.S. at 382 (*Garner* "did not establish a magical on/off switch that triggers rigid preconditions whenever an officer's actions constitute 'deadly force'"). What would constitute a reasonable use of lethal force for purposes of domestic law enforcement operations will be very different from what would be reasonable in the situation discussed here. At least where high-level government officials have determined that a capture operation overseas is infeasible and that the targeted person is part of a dangerous enemy force and is engaged in activities that pose a continued and imminent threat to U.S. persons or interests

(b)(1)
(b)(3)

the use of lethal force would not violate the Fourth Amendment. Here, the intrusion on any Fourth Amendment interests would be outweighed by "the importance of the governmental interests [that] justify the intrusion," *Garner*, 471 U.S. at 8, based on the facts outlined above

(b)(1)
(b)(3)

(b)(1)
(b)(3)